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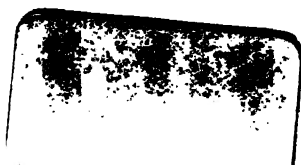
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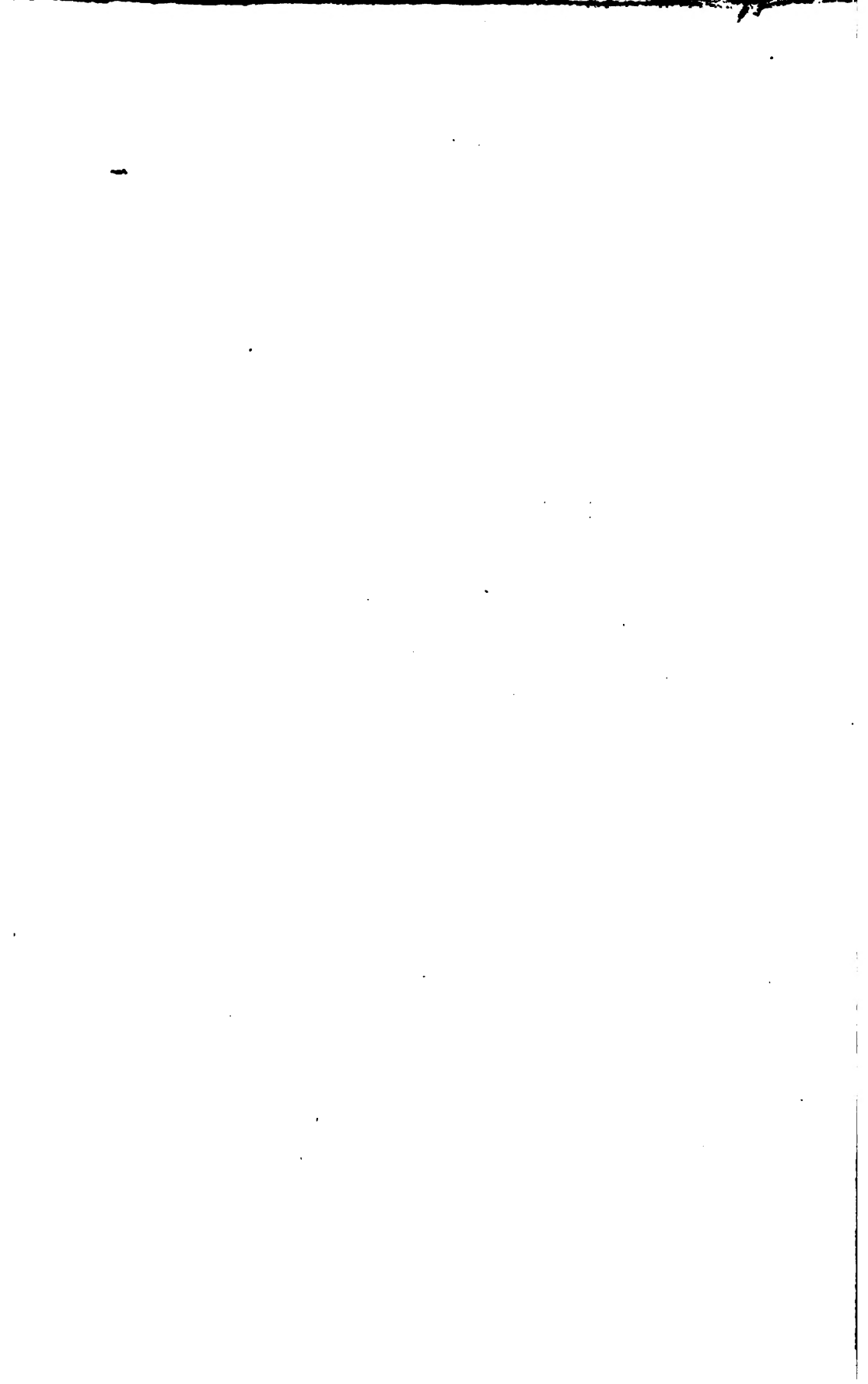
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BURDETT A. RICH, HENRY P. FARNHAM,
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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

OHIO SUPREME COURT.

STATE OF OHIO EX REL. GEORGE B.
MOYER, Plff. in Err.,
v.
FRANK L. BALDWIN.

(77 Ohio St. 532, 83 N. E. 907.)

Mandamus — restoration to office.

1. Mandamus is the proper remedy to restore a party to the possession of an office from which he has been illegally removed.

Municipal corporation — mayor — removal of officer.

2. Under the new Municipal Code, the mayor has authority to remove an officer or appointee in the police department upon inquiry into the cause of suspension, by the chief of police, of such officer or appointee;

but he is without original jurisdiction to inquire into charges against such an officer (other than the chief of police) or appointee, and, upon such an inquiry, he is without authority to remove an officer or appointee.

(February 18, 1908.)

ERROR to the Circuit Court for Mahoning County to review a judgment dismissing a petition for mandamus after its allowance by the Court of Common Pleas for the purpose of restoring petitioner to an office from which he alleged he had been illegally removed. Writ allowed.

The facts are stated in the opinion.

Messrs. M. A. Norris, E. H. Moore, and S. S. Conroy, for plaintiff in error:

Where a statute has prescribed a certain method for the removal of an officer, this

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method must, in all particulars, be strictly pursued.

People ex rel. Metevier v. Therrien, 80 Mich. 187, 45 N. W. 78; Com. ex rel. Lehman v. Sutherland, 3 Serg. & R. 145.

Mandamus is the only remedy.

3 Bl. Com. 110; Dew v. Sweet Springs Dist. Judges, 3 Hen. & M. 1, 3 Am. Dec. 639; 19 Am. & Eng. Enc. Law, p. 724; Tiedeman, Mun. Corp. § 630; State ex rel. Poe v. Raine, 47 Ohio St. 447, 25 N. E. 54; Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 77; State ex rel. Ingerson v. Berry, 14 Ohio St. 315; Ex parte Scott, 19 Ohio St. 531; State ex rel. Culbert v. Kinney, 63 Ohio St. 304, 58 N. E. 809; Moses, Mandamus, 150; High, Extr. Legal Rem. § 67; Metsker v. Neally,

41 Kan. 122, 13 Am. St. Rep. 269, 21 Pac. 206; State ex rel. Hitchcock v. Hewitt, 3 S. D. 187, 16 L.R.A. 413, 44 Am. St. Rep. 788, 52 N. W. 875; Runkel v. Winemiller, 4 Harr. & McH. 429, 1 Am. Dec. 411; Geter v. Tobacco Inspection Comrs. 1 Bay, 354, 1 Am. Dec. 621; State ex rel. Mead v. Dunn. Minor (Ala.) 46, 12 Am. Dec. 28; State ex rel. Gill v. Watertown, 9 Wis. 259; State ex rel. Lewis v. Board of Public Works, 51 N. J. L. 240, 17 Atl. 112; State ex rel. Mason v. Paterson. 35 N. J. L. 190; Walker, American Law, p. 593; State ex rel. Martin v. Thompson, 71 Ohio St. 76, 72 N. E. 296; State ex rel. Whiteman v. Chase, 5 Ohio St. 528; State ex rel. Trauger v. Nash, 66 Ohio St. 612, 64 N. E. 558; State ex rel. Knisely v. Jones, 66

I. Scope of note.

The subject of this note necessarily limited the search for authorities to cases passing upon the right of an officer who had been illegally removed from his office to be reinstated by means of the writ of mandamus. There will, therefore, not be found in the note cases in which a mandamus has been granted or refused for the purpose of inducting into office in the first instance one who has been duly elected or appointed.

There have also been omitted, in compiling this note, all cases in which writs of mandamus were sought to restore to their offices clergymen, attorneys, or officers of a private or quasi public corporation or association, such as railroad companies, etc., or professional and fraternal societies or trade guilds, even where property rights were involved; nor have there been included in this note cases in which mandamus was sought to reinstate pupils or students in schools or colleges. All of the foregoing classes of cases have been regarded as lying beyond the scope of this note, the purpose of it being expressly to confine the discussion which follows to cases concerning public officers and governmental servants.

This note does not embrace any cases of proceedings by mandamus to restore to their offices or positions public officers who have been removed therefrom where the illegality or propriety of their removals depended upon the construction and application of particular statutes involving their right to hold or be continued in office. The more common statutes of this class are those regulative of appointments to and removals from places in the civil service after competitive examinations and certifications by civil-service boards or commissions, and statutes which give preference in public employment to veteran soldiers or sailors of the Army and Navy of the United States and honorably discharged firemen who have served in local fire departments.

The reader will find an extended note upon this topic appended to State v. Dunn, 12 Am. Dec. 25.
19 L.R.A. (N.S.)

II. The right to a mandamus.

The writ of mandamus is not a writ of right.

Petitions for writs of mandamus are addressed to the judicial discretion of the court. Woodbury v. Piscataquis County, 40 Me. 304.

The granting of a writ of mandamus is discretionary. Hill v. Boston, 193 Mass. 569, 79 N. E. 825.

Although a return to mandamus is insufficient, yet, if it appears thereby that the relator ought not to be restored, he will not be restored. R. v. Raines, 3 Salk. 233.

A peremptory mandamus to reinstate a person in the office from which he has been removed will not be granted notwithstanding the return is defective in form, if the facts set up in the return are such as justify the court in refusing the writ as a matter of discretion. R. v. Bristol, 1 Dowl. & R. 389.

The writ of mandamus will never be granted if, when granted, it would be nugatory. State ex rel. Bland v. Rodman, 43 Mo. 256.

Nor if it would be useless. Fuller v. Brown, 10 Tex. Civ. App. 64, 30 S. W. 506.

Nor where it cannot accomplish the purpose for which it is sought. Woodbury v. Piscataquis County, supra.

Mandamus will not lie in any case where it would be fruitless by reason of events happening subsequently to the application for it. Re Croker, 175 N. Y. 158, 67 N. E. 307.

It is said to be a well-settled rule that, whenever a writ of mandamus would be unavailing, or, if granted, fruitless, it will be refused. State ex rel. Goodnow v. Police Comrs. 80 Mo. App. 206, affirmed in 184 Mo. 109, 71 S. W. 215.

Applications of the rule referred to are found in the refusal of the writ to restore an officer illegally removed, when he can be immediately legally restored.

The writ of mandamus will not be awarded to restore to his office an officer irregularly removed in any case where the right to remove exists and can be immediately exercised upon restoration, and the irregu-

Ohio St. 453, 90 Am. St. Rep. 592, 64 N. E. 424; *Flack v. Humphreys*, 24 Ohio St. 330; *State ex rel. Atty. Gen. v. Halliday*, 61 Ohio St. 352, 49 L.R.A. 427, 56 N. E. 118; *Reeves v. Griffin*, 4 Ohio S. & C. P. Dec. 461; *State ex rel. Hogan v. Sutton*, 6 Ohio Dec. Reprint, 786; *State ex rel. Atty. Gen. v. Hoglan*, 64 Ohio St. 532, 60 N. E. 627; *State ex rel. Klaue v. Barrett*, 22 Ohio C. C. 104; *State ex rel. McKenzie v. Hyman*, 22 Ohio C. C. 213.

Messrs. **M. C. McNab and Arrel, Wilson, & Harrington**, for defendant in error:

The right of appeal is an adequate remedy.

High, *Extr. Legal Rem.* 3d ed. 189.

A proceeding in equity might be prose-

cuted, setting up the fraud which is specifically relied upon in a defendant's motion.

Darst v. Phillips, 41 Ohio St. 514; *Coates v. Chillicothe Branch State Bank*, 23 Ohio St. 415; *Howenstine v. Sweet*, 13 Ohio C. C. 239.

Summers, J., delivered the opinion of the court:

The relator, George B. Moyer, was a detective in the police department of the city of Youngstown. Charges against him of misconduct in office were filed with the defendant, Frank L. Baldwin, the mayor of the city. The relator protested against the hearing of the charges by the mayor, on the ground that the mayor was without jurisdiction. His objections were overruled, and,

larly complained of avoided. *People v. Chicago*, 99 Ill. App. 489.

Mandamus to seat a person in an office will be refused, even on proof of his prima facie title thereto, if his title is such that, if seated, he must be ousted from his office upon a contest. *State ex rel. Clarke v. Board of Health*, 49 N. J. L. 349, 8 Atl. 509.

Where an officer has been illegally and improperly removed from his office, he will not be restored again by writ of mandamus if the authorities against whom the writ is asked have the power to remove him again by proceeding regularly and for just cause. *Stepney's Case*, 1 Bulstr. 174.

A mandamus will not be granted to restore a removed officer to his office where it would be useless on account of the right to remove again immediately upon restoration. *R. v. Axbridge*, 2 Cowp. 523; *R. v. Bristol*, *supra*.

A mandamus will be refused when it would be useless, as, for instance, when it is applied for to restore to his office one who has been illegally removed, although for good cause, so that immediately upon restoration he may be removed again by proceeding regularly. *R. v. Griffiths*, 5 Barn. & Ald. 731.

"We are not," said Best, J., in *R. v. Griffiths*, *supra*, "obliged to do so absurd a thing as to order a person to be restored to an office (however irregularly he has been removed from it) who ought to be removed again the moment that he is restored. The writ of mandamus was not intended to enable a party, by taking advantage of the want of form, to defeat justice."

If it appears that the removal or suspension of an officer was merely irregular when legal cause existed, restoration to office will not be compelled by mandamus. *Ex parte Wiley*, 54 Ala. 226.

The reason assigned for refusing a mandamus to restore to office one who had been irregularly removed therefrom when legal cause for his removal existed is that the writ would be useless when, on the instant of restoration, an order of removal or suspension could be legally made. *Ibid*.

19 L.R.A. (N.S.)

The writ of mandamus will not be allowed to restore to his office an officer removed therefrom because of irregular or want of proper formalities in the proceedings to remove him, for the reason that, after reinstatement, he may again be removed upon precisely the same grounds by regular and formal proceedings. *State ex rel. Clarke v. Board of Health*, 49 N. J. L. 349, 8 Atl. 509.

A mandamus will not be granted to restore a town clerk to his office where it is acknowledged that there was sufficient cause for his removal, merely because he had been removed without notice. *R. v. Axbridge*, *supra*.

Failure to give notice to an officer of his intended suspension or removal is an irregularity merely, if cause exists to remove him; and therefore it is not sufficient in itself to warrant an issue of a writ of mandamus to restore him to office. *Ex parte Wiley*, *supra*.

But, notwithstanding an officer against whom a dismissed subordinate in the municipal service seeks a mandamus to reinstate him in his position because of the unlawful dismissal without proper reason or hearing may, immediately after reinstating him, remove him again upon charges and a trial, mandamus will not be refused, because the only presumption that can be made is that the removing officer will give such employee a fair hearing and make an honest investigation of any charges against him. *Truitt v. Philadelphia*, 221 Pa. 331, 70 Atl. 757.

In the case of *Street v. Gallatin County, Breese (Ill.)* 25, the court granted a peremptory mandamus to compel the county commissioners' court to restore to his office a clerk because the cause of his removal had not been stated upon the records of the court as required by statute. This would seem to be a case in which commissioners might at once, upon obeying the writ, have removed the clerk again by simply stating upon their records the cause of removal, and therefore a case in which, under the general rule, a mandamus ought not to issue.

In *R. v. Ipswich Corp.* 2 Ld. Raym. 1283,

after a full hearing, the mayor found that certain of the charges were sustained, and removed him from office, and certified in writing his removal and the cause thereof to the board of public safety of the city. Thereupon the relator brought a proceeding in mandamus in the court of common pleas to require the defendant to restore him to his office. The defendant answered that the relator took no appeal from the decision of the mayor to the board of public safety, and that, subsequently to the action of the mayor, the council of the city repealed the ordinance creating the office which the relator had filled, and enacted another ordinance providing for the appointment of two detectives; and that the mayor had filled these offices by appointment, and that the

appointees had duly qualified and were then in office. The court of common pleas allowed a peremptory writ. The circuit court, on appeal, dismissed the petition.

The principal contention is whether mandamus is the proper remedy, and whether the mayor has authority originally to hear charges against an officer of the police department and to remove the officer in the event he finds that the charges have been sustained, or whether he may act only after the chief of police has suspended an officer and filed written charges with the mayor.

By § 6741, Rev. Stat., mandamus is defined as "a writ issued in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially en-

Sergeant Whitacre, having theretofore obtained a mandamus to restore him to the office of recorder of Ipswich, complained of the return by the corporation that the writ had been obeyed as insufficient because it appeared that, although he had been in fact reinstated pursuant to the writ, he had been immediately thereafter summoned to show cause why he should not be again removed for alleged misconduct, most of the acts specified being the same as stated in the former return, and that he had been displaced again in the second proceeding; but the court sustained the return, and held that the former writ had been well obeyed.

There is in *Lofft*, 148, a memorandum of an application for a mandamus to admit a burgess, when, upon the other side, it was offered to admit him without a mandamus, and that the court would not immediately grant a mandamus until it should appear by a refusal to admit him that a mandamus was necessary.

III. Immunity of the heads of the state.

That the writ of mandamus cannot be issued to coerce the sovereign power in a state is admitted. *People ex rel. La Chicotte v. Best*, 187 N. Y. 1, 116 Am. St. Rep. 586, 79 N. E. 890, 10 A. & E. Ann. Cas. 58.

It follows, therefore, that the writ will not ordinarily lie against the executive or the legislative department of the government.

Mandamus will not lie against the President of the United States, Secretary of War, and the adjutant general of the Army to restore to his rank and position in the Army register a military officer of the United States displaced therefrom by executive orders. *Ex parte Schaumburg*, 1 Hayw. & H. 249, Fed. Cas. No. 12,441.

The writ of mandamus will not lie in favor of a naval officer against the Secretary of the Navy to require the restoration of such officer to the relative rank formerly held by him in the Navy, and which has been changed by order of the head of the Navy Department. *United States ex rel. Hall v. Whitney*, 5 Mackey, 370, 19 L.R.A. (N.S.)

Mandamus will not lie to restore to his office a military officer relieved of duty by the governor of the state in his official capacity as commander in chief of the state troops. *State ex rel. Higdon v. Jelks*, 138 Ala. 115, 35 So. 60.

Mandamus will not lie to review the action of the governor of the state in his official capacity as commander in chief of the militia, in transferring a military officer, or in relieving him from active duty. *People ex rel. Lockwood v. Scrugham*, 25 Barb. 216.

A writ of mandamus to the commandant of the National Guard of the state of New York will be refused to restore a military officer relieved from duty, to his office, where the order relieving him has been approved, and an application for his reinstatement has been denied by the governor. *People ex rel. Smith v. Roe*, 51 App. Div. 494, 64 N. Y. Supp. 642.

An order relieving from duty a military officer, issued by his commanding officer and approved by the governor, neither deprives the officer of his office, nor subjects him to any pecuniary damage; therefore it cannot be reviewed by the civil courts. *Ibid.*

The judiciary has no power to interfere by a writ of mandamus with the action of the Executive Department of the government in the discharge of any public duty not purely ministerial. *State ex rel. Higdon v. Jelks* and *United States ex rel. Hall v. Whitney*, *supra*.

The governor of a state acting officially cannot be compelled by mandamus to perform a duty not strictly ministerial. *Householder v. Morrill*, 55 Kan. 317, 40 Pac. 664.

The courts of the state of New York have no power to issue a mandamus to the governor to compel him to perform any duty imposed upon him by virtue of his office, even a merely ministerial duty. *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791.

An appointment to an official position in the government, even if it is simply a clerical position, is not a mere ministerial act,

joins as a duty resulting from an office, trust, or station;" and it is contended that it is not the remedy, because nowhere does any statute specially enjoin upon the defendant, as a duty resulting from his office, the performance of the act of withdrawing his certificate of removal. The remedy by writ of mandamus did not originate with the legislature, but with the courts, and is said to have been in use as early as the thirteenth century. The Constitution of 1802 does not mention it, but power to issue the writ is specially given to the supreme court by the act of April 15, 1803, 1 Chase, Stat. p. 356, chap. 7, § 5. In *Re Turner*, 5 Ohio, 542, Judge Lane, speaking of the statute, says: "The occasions upon which the writ is to issue are not pointed out, and it is

necessary to recur to the common law to learn in what cases the writ is properly applicable." In *Universal Church v. Trustees of Section Twenty-nine*, 6 Ohio, 446, 27 Am. Dec. 267, the court declined to depart from the common-law rules and practice on the writ, and it was not until the act of 1835 (Swan's Gen. Stat. 1841, chap. 86, p. 689, §§ 140 et seq.) that the practice was regulated by statute. That statute is limited to matters of practice, and did not touch the jurisdiction; and it still was necessary to recur to the common law to learn in what cases the writ might issue. So the matter stood until after the adoption of the Constitution of 1851, and until the adoption of the Civil Code.

The Constitution of 1851, art. 4, § 2, con-

but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant, whether or not he is a proper person to discharge the duties of the position; therefore, it is one of those acts over which the courts have no general exercising power. *Keim v. United States*, 177 U. S. 290, 44 L. ed. 774, 20 Sup. Ct. Rep. 574.

Inasmuch as the governor of the state cannot be coerced by mandamus in any case, mandamus will not lie to restore to his office a public officer who has been removed therefrom by a governmental board of which the governor of the state is a member. *People ex rel. Broderick v. Morton*, supra.

Mandamus will not lie, directed to the Secretary of the Interior, to reinstate a clerk in his department, discharged for alleged incompetency. *Keim v. United States*, supra.

It has been repeatedly adjudged, said Brewer, J., writing for the court in *Keim v. United States*, supra, that the courts have no general supervising power over proceedings and actions of the various administrative departments of the government.

In *State ex rel. Higdon v. Jelks*, the court considered to some extent the question of judicial power to compel, by writ of mandamus, the discharge of a purely ministerial duty by the governor of the state, but deemed it unnecessary to decide the question for the reason that the action of which the relator complained was not ministerial.

Mandamus will not lie to compel the state senate to restore a senator to membership in any case after that body has adjourned without day. *French v. Senate*, 146 Cal. 604, 69 L.R.A. 556, 80 Pac. 1031, 2 A. & E. Ann. Cas. 756.

The court, in *French v. Senate*, supra, plainly entertained the opinion that it had not the power to restore to his office a legislator who had been expelled by the legislative body to which he had belonged; but it was not necessary to decide the question because in that particular case the legislature had adjourned *sine die*, and at its next session would be a new and different body from the one before the court.
19 L.R.A. (N.S.)

IV. When mandamus lies to reinstate ousted officer.

The writ of mandamus is an appropriate remedy to install in office one who has a clear legal title and indisputable right thereto. *Harwood v. Marshall*, 9 Md. 83.

One who has been wrongfully ousted from an office to which his title is clear, and who promptly applies for a mandamus to restore his office to him, is entitled to the writ if the office remains vacant. *Ex parte Wiley*, 54 Ala. 226; *Ex parte Lusk*, 82 Ala. 519, 2 So. 140; *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042; *Davenport v. Los Angeles*, 146 Cal. 508, 80 Pac. 684; *Gillett v. People*, 13 Colo. App. 553, 59 Pac. 72; *Fuller v. Academic School*, 6 Conn. 532; *Burr v. Norton*, 25 Conn. 103; *Thompson v. Troup*, 74 Conn. 121, 49 Atl. 907; *State ex rel. Donnelly v. Teasdale*, 21 Fla. 552; *Akerman v. School Comrs.* 118 Ga. 334, 45 S. E. 312; *Street v. Gallatin County*, Breese (Ill.) 25; *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237; *Chicago v. People*, 210 Ill. 84, 71 N. E. 816; *Metaker v. Neally*, 41 Kan. 122, 13 Am. St. Rep. 269, 21 Pac. 206; *Eastman v. Householder*, 54 Kan. 63, 37 Pac. 989; *State ex rel. McMahon v. New Orleans*, 107 La. 632, 32 So. 22; *State ex rel. Denis v. Shakespeare*, 43 La. Ann. 92, 8 So. 893; *Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646; *Field v. Malster*, 88 Md. 691, 41 Atl. 1087; *Howard v. Gage*, 6 Mass. 462; *Ransom v. Boston*, 193 Mass. 537, 79 N. E. 823; *Lattime v. Hunt*, 196 Mass. 261, 81 N. E. 1001; *Lawrence v. Hanley*, 84 Mich. 399, 47 N. W. 753; *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355; *Riley v. Kansas City*, 31 Mo. App. 439; *State ex rel. Goodnow v. Police Comrs.* 80 Mo. App. 206, affirmed in 184 Mo. 109, 71 S. W. 215; *State ex rel. Mason v. Paterson*, 35 N. J. L. 190; *People ex rel. La Chicotte v. Best*, 187 N. Y. 1, 116 Am. St. Rep. 586, 79 N. E. 890, 10 A. & E. Ann. Cas. 58; *People ex rel. Coveney v. Kearney*, 44 App. Div. 449, 61 N. Y. Supp. 41, affirmed in 161 N. Y. 648, 57 N. E. 1121; *People ex rel. O'Connor v. Brady*, 49 App. Div. 238, 63 N. Y. Supp. 145; *People ex rel. Percival v.*

fers original jurisdiction in mandamus on the supreme court, and subsequently on the circuit court; and such jurisdiction is conferred on the court of common pleas by statute. The jurisdiction in mandamus that is conferred by the Constitution is the common-law jurisdiction as it then was exercised in this state, and it is not in the power of the legislature either to add to or take from it. The provisions of the statutes must be regarded as merely regulating the practice. They remain substantially as they were in the Code of Civil Procedure of 1853 (Swan's Rev. Stat. 1854, chap. 87, §§ 569-580). That the provisions of the Code were intended merely to relate to the practice is evident from the report of the Code commissioners. On page 228 of their

report, under the chapter entitled "Proceedings upon mandamus," they say: "We found it necessary to prepare a chapter on this subject, because we have repealed the whole of the practice act in which the provisions in reference to the mandamus are to be found (Swan's Gen. Stat. 1841, chap. 86, pp. 689, 690, §§ 146-151). It will be noticed that we have amplified somewhat the sections in the old statute, but the proceeding under this chapter will be about the same as before." The statutory definition does not define the act as one enjoined by statute, but as one enjoined by law. The definition appears to have been compounded from the 14th section of the act of 1835 (Swan's Gen. Stat. 1841, chap. 86, § 150) and from Blackstone. Attention to Blackstone's defi-

Cram, 50 App. Div. 380, 64 N. Y. Supp. 158; People ex rel. Banta v. Scannell, 50 App. Div. 625, 63 N. Y. Supp. 985; People ex rel. Segee v. Hayes, 106 App. Div. 563, 94 N. Y. Supp. 754; Lyon v. Granville County, 120 N. C. 237, 26 S. E. 929; Com. ex rel. O'Brien v. Gibbons, 196 Pa. 97, 46 Atl. 313; Geter v. Tobacco Inspection Comrs. 1 Bay, 354, 1 Am. Dec. 621; Singleton v. Charleston Tobacco Inspection Comrs. 2 Bay, 105; State ex rel. Stephens v. Pilotage Comrs. 23 S. C. 175; State ex rel. McDonald v. Courtenay, 23 S. C. 180; Howard v. Burns, 14 S. D. 383, 85 N. W. 920; Gray v. Beadle County (S. D.) 110 N. W. 36; Hardin County Ct. v. Hardin, Peck (Tenn.) 291; Sevier v. Washington County Justices, Peck (Tenn.) 384; Ragdale v. State, 2 Swan, 416; Felts v. Memphis, 2 Head, 650; Morley v. Power, 5 Lea, 691; Butcher v. Charles, 95 Tenn. 532, 32 S. W. 631; Bradley v. McCrabb, Dallam (Tex.) 504, approved in Banton v. Wilson, 4 Tex. 400; Milliken v. Weatherford, 54 Tex. 388, 38 Am. Rep. 629; Nelson v. Edwards, 55 Tex. 389; Terrell v. Greene, 88 Tex. 539, 31 S. W. 631; Johnson v. Galveston, 11 Tex. Civ. App. 469, 33 S. W. 150; Pratt v. Police & Fire Comrs. 15 Utah, 1, 49 Pac. 747; Dew v. Sweet Springs Dist. Judges, 3 Hen. & M. 1, 3 Am. Dec. 639; Schmulbach v. Speidel, 50 W. Va. 553, 55 L.R.A. 922, 40 S. E. 424; Kline v. McKelvey, 57 W. Va. 29, 49 S. E. 896; State ex rel. Gill v. Watertown, 9 Wis. 254; State ex rel. Gill v. Milwaukee County, 21 Wis. 443; R. v. Wrexham, 5 Ad. & El. 581; Anonymous, 1 Barnard. K. B. 195; R. v. London. 2 Barnard. K. B. 398; R. v. Liverpool, 2 Burr. 723; R. v. Baker, 3 Burr. 1266; R. v. Wells, 4 Burr. 1999; R. v. Leicester, 4 Burr. 2087; Earle's Case, Carth. 173; Bagg's Case, 11 Coke, 93b; Parkinson's Case, Comb. 144; Williams and Cary, Comb. 264; Moulsworth's Case, Comb. 287; Clerk's Case, Cro. Jac. 506; R. v. Lyme Regis, 1 Dougl. K. B. 79; Middleton's Case, 3 Dyer, 332b; R. v. Christ Church 7 El. & Bl. 409; R. v. Gloucester, Holt, 450; R. v. Brecknock, 1 Keble, 33; Crips v. Maidstone, 1 Keble, 812; Williams's Case, 2 Keble, 558; R. and Boulton, 19 L.R.A. (N.S.)

3 Keble, 464; R. and Jay, 3 Keble, 714; Anonymous, 1 Lev. 148; R. v. Vicars, 11 Mod. 214; Kid v. Watkinson, 11 Mod. 221; R. v. Wall, 11 Mod. 261; R. v. Lane, 11 Mod. 270; R. v. Shaw, 12 Mod. 113; White's Case, 2 Ld. Raym. 1004; R. v. Lane, 2 Ld. Raym. 1304; R. v. Doncaster, 2 Ld. Raym. 1564; R. v. Oxon, 2 Salk. 428; R. v. Coventry, 2 Salk. 430; R. v. Taylor, 3 Salk. 231; R. v. Doncaster, Sayer, 37; R. v. Evans, 1 Shower, 282; R. v. Bristol, 1 Shower, 288; Basset v. Barnstable, Sid. pt. 1, p. 286; Schriiven v. Turner, 2 Strange, 832; London and Estwick, Style, 32, 42; The Protector, Style, 447; The Protector, Style, 477.

The great weight of authority, said the court in Eastman v. Householder 54 Kan. 63, 37 Pac. 989, is that the courts will refuse to lend their extraordinary aid by mandamus to compel the admission of the claimant to an office in the first instance where he has never been in the actual possession of the office or discharged its duties. Where, however, one has been in the actual and lawful possession and enjoyment of the office from which he has been wrongfully removed, a different case is presented.

While the current of authority according to Brickell, Chief Justice, writing for the court in Ex parte Wiley, 54 Ala. 226, does not recognize mandamus as an appropriate office for testing a disputed title to a public office or to compel admission of a claimant in the first instance, yet, if a rightful officer, in the actual enjoyment of the office, is wrongfully removed, mandamus is generally regarded as the proper remedy to compel his restoration.

Mandamus will issue both to admit a man to an office to which he has been lawfully chosen, and to restore him to one from which he has been unlawfully removed. Howard v. Gage, 6 Mass. 462.

Mandamus is the proper remedy where a person is dispossessed of the right to execute an office, perform a service, or exercise a franchise,—especially if it is in a matter of public concern or attended with profit. R. v. Baker, 3 Burr. 1266; Fuller v. Academic School, 6 Conn. 532.

dition, and to the cases, will discover that the act which the writ directs to be performed is one that the courts determine it is the duty of the respondent to do because it appertains to his office, trust, or station; and it is specially enjoined by law when it is so determined. The purpose in defining "mandamus" was not to limit the jurisdiction, but merely to describe the writ; and it is still necessary to recur to the cases to learn the occasions when it may issue.

In many of the states mandamus is treated as a civil action; but in this state, while it has been so declared in *State ex rel. Barker v. Philbrick*, 69 Ohio St. 283, 69 N. E. 439, still it is treated as preserving its prerogative character. That is, it is not used for the redress of private wrongs, but only

in matters relating to the public. Recurring to the cases, it will be found that, when purely a prerogative writ, it was chiefly used to enforce restitution to public officers, and to such an extent that it was then designated in the reports as the "writ of restitution." That the writ of mandamus is the appropriate remedy to restore an officer to his office, and that it will lie when there is no other adequate remedy, is laid down in the text-books without exception; and in the following cases the writ was allowed:

Chicago v. People, 210 Ill. 84, 71 N. E. 816. This was a proceeding in mandamus by a police patrolman to compel the city of Chicago and the general superintendent of police to place his name upon the roster of the police patrolmen, from which it had

When a public officer has been unlawfully ousted from his office, the proper means for him to regain it is by application for a writ of mandamus. *Ransom v. Boston*, 193 Mass. 337, 79 N. E. 823.

A writ of mandamus may be issued to restore to office a person ousted therefrom when he has a fair right thereto. *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355.

If an officer is wrongfully dismissed from his office without cause or a trial, he has a clear legal remedy by mandamus to compel reinstatement. *Riley v. Kansas City*, 31 Mo. App. 439.

Mandamus is the proper remedy to reinstate a removed officer into his office when he has a clear right thereto and has been wrongfully ousted and the title is not in dispute. *State ex rel. Goodnow v. Police Comrs.* 80 Mo. App. 206, affirmed in 184 Mo. 109, 71 S. W. 215.

When an applicant for a writ of mandamus is clearly an officer by legal appointment, excluded from his office without legal authority, he has a clear right to the writ to reinstate him. *State ex rel. Mason v. Paterson*, 35 N. J. L. 190.

An officer who seeks restoration to an unoccupied office, having a present clear legal right thereto, is entitled to a mandamus. *Lyons v. Granville County*, 120 N. C. 237, 26 S. E. 929.

The general rule is that mandamus is the proper remedy, whenever a public officer has been wrongfully turned out of his office, to restore him thereto. *Felts v. Memphis*, 2 Head, 650.

The writ of mandamus lies to compel the admission or restoration of an applicant to any office or franchise of a public nature, whether temporal or spiritual. *Dew v. Sweet Springs Dist. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639.

At common law and in jurisdictions where the common law prevails, except so far as modified by statute, mandamus lies to compel the restoration or admission of anyone entitled to any office or franchise of a public nature, whether the same is spiritual or temporal. *Bradley v. McCrabb, Dallam* 19 L.R.A. (N.S.)

(Tex.) 504, approved and followed in *Banton v. Wilson*, 4 Tex. 400.

The law is well established that mandamus is the proper writ to restore a party to an office from which he has been illegally ousted. *Nelson v. Edwards*, 55 Tex. 380.

It is well settled that mandamus is the proper writ to restore a person to an office from which he has been illegally ousted. *Johnson v. Galveston*, 11 Tex. Civ. App. 469, 33 S. W. 150.

Mandamus lies to reinstate in his office a person clearly entitled thereto, who has been improperly removed. *Schulbach v. Speidel*, 50 W. Va. 553, 55 L.R.A. 922, 40 S. E. 424.

Mandamus lies to compel the admission or the restoration to office of a person who has a clear legal title thereto. *Kline v. McKelvey*, 57 W. Va. 29, 49 S. E. 896.

Mandamus is the proper remedy to restore a person to the position or the office from which he has been illegally removed. *State ex rel. Gill v. Watertown*, 9 Wis. 254.

Writs of mandamus have been granted to restore to their offices many different officials who had been unlawfully ousted. They include:

Mayors: *State ex rel. Donnelly v. Teasdale*, 21 Fla. 652; *Milliken v. Weatherford*, 54 Tex. 388, 38 Am. Rep. 629; *Gillett v. People*, 13 Colo. App. 553, 59 Pac. 72.

Recorders: *R. v. Wells*, 4 Burr. 1999; *R. v. Ipswich Corp.* 2 Ld. Raym. 1283; *The Protector*, Style, 447.

Aldermen: *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677; *R. v. Leicester*, 4 Burr. 2087; *R. v. Brecknock*, 1 Keble, 33; *R. v. Jay*, 3 Keble, 714; *R. v. Taylor*, 3 Salk. 231; *R. v. Doncaster*, Sayer, 37; *Shriven's Case*, 2 Strange, 832.

Common councilmen: *Davenport v. Los Angeles*, 146 Cal. 508, 80 Pac. 684; *State ex rel. McMahon v. New Orleans*, 107 La. 632, 32 So. 22; *R. v. Liverpool*, 2 Burr. 723; *Earle's Case*, Carth. 173; *Williams's Case*, 2 Keble, 558.

Burgesses: *Bagg's Case*, 11 Coke, 93b; *R. v. Lyme Regis*, 1 Dougl. K. B. 79; *R. v. Gloucester*, Holt, 450; *R. v. Pomfret*, 10 Mod. 107; *R. v. Vicars*, 11 Mod. 214; *R. v.*

mittee, and that the clerk do not call his name among the list of members in any action, vote, or proceeding of the council, and that he be not allowed to take part in any debate on any question which may come before the board of aldermen." It was held that the council had power to expel, but not power to suspend, and that this resolution of council was equivalent to suspension; and a peremptory writ of mandamus was allowed to the common council to restore the relator to the exercise of his lawful rights as an alderman and member of that body from which he had been suspended by the resolution in question.

State ex rel. Mason v. Paterson, 35 N. J. L. 190. In this case it was held that an appointment for city treasurer by less than a

majority of the whole number of aldermen was unlawful and void, and that the treasurer who had been ousted by such illegal act might be restored to his office by a writ of peremptory mandamus. It was contended that quo warranto was the proper remedy and that mandamus was not the proper remedy, because the person who had been appointed to the office was in by color of right. But the court said: "This is not the case of attempting to oust from office by mandamus a person who is in by color of right. There is no right here. The pretended appointment is a mere nullity. There was no appointing board, and those who attempted to act had no authority. The applicant here is clearly still in office by legal appointment and the effort is to oust him without legal

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In the same opinion, Chief Judge Parker also cited *Re Gardner*, 68 N. Y. 467, as a case in which it was said, in the course of the opinion, that it was settled at a very early period of the judicial history of the state "that, when a person is already an officer by color of right, the court will not grant a mandamus to admit another person who claims to have been duly elected; and that the proper remedy is by an information in the nature of a quo warranto. . . . This doctrine has since been approved and upheld by repeated decisions, and has become settled law."

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When there is another incumbent in an office claimed by a public officer who applies for a reinstatement after having been removed, his remedy is not mandamus, but quo warranto. *People ex rel. Baldwin v. McAdoo*, 110 App. Div. 432, 96 N. Y. Supp. 362.

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He who seeks admission to an office occupied by another under color of right is not entitled to a mandamus, but must seek a remedy by an action in the nature of quo warranto. *Lyon v. Granville County*, 13 N. C. 237, 26 S. E. 929.

If an officer's place has been filled by a other after his exclusion, under circumstances indicating that the removal and the appointment or election of his successor were made in good faith, even if mistakenly made, mandamus will not lie to restore the former officer to his place, but he will be remitted to quo warranto. *R. v. Oxford*, 6 Ad. & El. 349.

As to the writ of mandamus, we have said Scott, J., in delivering the opinion of the court in *Ewing v. Turner*, supra, two settled rules as to public offices and the effects of the belongings thereto, the one that mandamus will not lie to try title to a public office and the other that it will lie to compel predecessor to deliver to his successor the books, papers, records, money, insignia, and paraphernalia thereof when the relator shows an absolute prima facie title. The court or lawyer of to-day would for a moment controvert these two well-settled rules of modern jurisprudence.

A person who has been actually excluded from an office which he claims, in which another person has been installed, who has since discharged the duties of the office under color of law, will be refused a mandamus to restore him to office, where his removal and the appointment of his rival depend on the construction of a statute so ambiguous in its language as to render its interpretation difficult. *People ex rel. Dolan Lane*, 55 N. Y. 217; *People ex rel. Wren Goetting*, 133 N. Y. 569, 30 N. E. 968,

should not prejudice the right of the relator to assert his claim for right of salary for the period intervening between his removal and restoration in any appropriate form of action, nor the right of the city of Chicago to interpose any lawful defense thereto.

Metasker v. Neally, 41 Kan. 122, 13 Am. St. Rep. 269, 21 Pac. 206. In this case the mayor of the city of Topeka suspended the city engineer and placed another in his place, and the city marshal forcibly deprived the engineer of his office room, books, papers, records, etc., and prevented him from exercising the duties of his office. A peremptory writ was allowed. In the opinion it is said that, "if the title to this office were in dispute, the action to determine it would probably be quo warranto; but it is admitted that

the plaintiff was the city engineer by regular appointment, and in the actual and lawful possession and enjoyment of the office. There is no question of a contested election or disputed right to this office, except as it arises from the suspension alone. The plaintiff, up to July 3d, was the city engineer by undisputed right. Was he legally or illegally suspended? That is the sole question to be decided in this action." It was held that mandamus was the proper remedy to restore him to his office, and that, if the suspension was unauthorized, there was no vacancy to fill.

State ex rel. Tyrrell v. Jersey City, 25 N. J. L. 536. In this case the common council resolved that "the president of council be directed not to appoint Tyrrell on any com-

by any court of the United States, of this state, or any other state, to imprisonment in the penitentiary, his office or place is vacated from the time of the sentence; and, if the judgment is reversed, he must be restored." This statute was held to require that the restoration be made immediately upon reversal, and hence that it may be compelled by mandamus.

F. When office is occupied under claim of right.

The writ of mandamus is the proper remedy to restore to his office a municipal officer unlawfully removed, provided the title to the office is not in dispute. *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237.

But, after an officer has been removed from his office, and a successor has been appointed who has entered upon the discharge of the duties, and is actually exercising the powers of such office under color of right and claim of title not demonstrably made in bad faith and wholly unfounded, the general rule is that mandamus will not lie to oust the incumbent and restore his predecessor until the right and title to the office has been settled by proceedings in the nature of quo warranto.

The appropriate use of the remedies quo warranto and mandamus in cases of amotion from public office, according to the court in *State, Leeds, Prosecutor, v. Atlantic City*, 52 N. J. L. 332, 8 L.R.A. 697, 19 Atl. 780, has been a fruitful source of discussion, and the result, so far as the American cases are concerned, is contrariety of judicial opinion and practice.

Mandamus will not lie to try the title to a public office. *Ewing v. Turner*, 2 Okla. 94, 35 Pac. 951.

It is well settled that mandamus will not lie to try a disputed title to an office, or to compel the admission of a claimant to office the title to which is in dispute, and of which he has never had the possession nor discharged the duties. *Pratt v. Police & Fire Comrs.* 15 Utah, 1, 49 Pac. 747.

The rule of law that mandamus will not lie to try the title to a public office is so 19 L.R.A. (N.S.)

well established in our jurisdiction, said *Scott, J.*, in delivering the opinion of the court in *Ewing v. Turner*, supra, as to admit of no controversy.

If an office is occupied by one under color of title, mandamus will not issue to admit a different claimant to such office. *State ex rel. Goodnow v. Police Comrs.* 80 Mo. App. 206, affirmed in 184 Mo. 109, 71 S. W. 215.

When a person is in actual possession of an office under an election or commission, and is exercising its duties under color of right, his title thereto cannot be tried or tested on mandamus. *Cripple Creek v. People*, 19 Colo. App. 399, 75 Pac. 602.

Mandamus is never issued to restore a removed officer to his office when the office has been filled, and is in possession of another person under color of right. *People ex rel. Lockwood v. Scrugham*, 20 Barb. 302; this case was reversed in 25 Barb. 216, but the reversal left the proposition stated unaffected.

It is so well settled that mandamus will not lie to try the title to an office, said *Scott, J.*, in delivering the opinion of the court in *Ewing v. Turner*, supra, that the subject needs no discussion here or elsewhere.

When an office is already filled by a person holding under color of right, mandamus will not issue to remove him and admit another claimant to such office. The remedy in such a case is quo warranto. *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355; *State ex rel. Bland v. Rodman*, 43 Mo. 256.

When a person is in office by color of right, mandamus will not lie to admit another person claiming to have been duly elected to such office. The proper remedy in such a case is by information in the nature of a quo warranto. *State ex rel. Mason v. Paterson*, 35 N. J. L. 190.

Mandamus will not lie when the title to an office is in dispute; but the proper method of trying it is by information in the nature of a quo warranto, which, since the enactment of the Code of Civil Procedure in the state of New York, is by direct action instituted by the attorney general. *People ex rel. McLaughlin v. Police Comrs.*

mittee, and that the clerk do not call his name among the list of members in any action, vote, or proceeding of the council, and that he be not allowed to take part in any debate on any question which may come before the board of aldermen." It was held that the council had power to expel, but not power to suspend, and that this resolution of council was equivalent to suspension; and a peremptory writ of mandamus was allowed to the common council to restore the relator to the exercise of his lawful rights as an alderman and member of that body from which he had been suspended by the resolution in question.

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authority. He has a right to this remedy by mandamus."

State, Leeds, Prosecutor, v. Atlantic City, 52 N. J. L. 332, 8 L.R.A. 697, 19 Atl. 780. In this case it is held that, "where a mandamus is applied for to compel a corporation to restore relator to an office to which he is prima facie entitled, the incumbent is not a necessary party to the allowance of a peremptory mandamus."

Com. ex rel. O'Brien v. Gibbons, 196 Pa. 97, 46 Atl. 313: "Where there is no contest as to a school director's original title to his seat under a valid election, but only as to the legality of his ouster for alleged wilful absence from meetings, the remedy of the director is mandamus to prevent his further unlawful exclusion. The remedy by

quo warranto against the person chosen to succeed him does not apply." In the opinion it is said: "There is no contest as to the relator's original title to his seat under a valid election, but only as to the legality of his ouster. If this was not valid, he never has been ousted at all, and mandamus is the proper remedy to prevent his further unlawful exclusion. We have nothing to do with the title of his alleged successor, who was apparently elected by the board to fill a vacancy that did not exist. This cannot affect the relator. He was admittedly elected to the office, has never been out of it in contemplation of law, and the mandamus simply compels the respondents to recognize his established right."

Pratt v. Police & Fire Comrs. 15 Utah, 1,

firming 29 N. Y. S. R. 286, 8 N. Y. Supp. 742.

Where a clerk of a parish has been removed from his office by the judge of the district court, and compelled to surrender the records and papers of his office to a successor appointed to said office, a mandamus will not lie to restore him when the successor is actually filling his place; but he will be relegated to his remedy in the nature of quo warranto. State v. Dunlap, 5 Mart. (La.) 271.

The Louisiana supreme court, in State v. Dunlap, supra, in refusing a mandamus to a clerk of a parish who alleged that he had been removed by the district judge and compelled by force to surrender the records and papers of his office to a successor appointed by said judge, who had been made a party to the proceeding, said: "The clerk cannot be considered as removed, for this court alone has power of removing him. The facts sworn to present only a case of disturbance. If it does really exist, the deponent has his remedy in the ordinary course of justice, by an action for damages, and the intruder may be ousted by a writ of quo warranto. It is true, in a case like the present, an officer is commonly reinstated by a writ of mandamus. But it cannot be believed that, if the present incumbent be declared by a proper judgment to have been illegally placed in an office which was not vacant, the court of the seventh district will prevent the defendant from acting. Were we to proceed in a summary mode, by the process of mandamus, we would take original cognizance, in an extraordinary manner, of a right to office, contested by two persons,—a right which may effectually, though less speedily, be asserted in the ordinary course of justice. The rule must be discharged."

The reason why mandamus will not issue to admit to an office a person claiming title thereto, when it is also claimed by another under color of right, is because the adverse claimant has no opportunity to be heard in defense of his right. State ex rel. Clarke v. Board of Health, 49 N. J. L. 349, 8 Atl. 509.

Where there is a serious question as to the 19 L.R.A. (N.S.)

title to an office from which the applicant for mandamus has been removed and of which another party is possessed, mandamus ought not to be granted because the incumbent of the office has no opportunity to be heard. People ex rel. Dolan v. Lane and People ex rel. Wren v. Goetting, supra.

In the opinion of the court, Parker, Ch. J., writing, in People ex rel. McLaughlin v. Police Comrs. 174 N. Y. 450, 95 Am. St. Rep. 596, 67 N. E. 78, reversing 79 App. Div. 82, 79 N. Y. Supp. 710, approval was given to the language of Gray, J., in People ex rel. Wren v. Goetting, supra, in which he said: "There is, however, this insuperable objection to the maintenance of this proceeding by the appellant: That mandamus is not the proper remedy in such a case. The office claimed is filled by another person, holding under color of right, and the question of the title to the office turns upon the construction of statutory provisions. It would be highly inappropriate to determine such a question in a mandamus proceeding. The appropriate remedy, and an adequate one, is by information in the nature of quo warranto, in which proceeding the incumbent of the office can be heard in his own behalf upon the disputed question. The rule must be regarded as well established by frequent decisions in the courts of this state that the writ of mandamus should be refused to aid the admission of a claimant into an office, already filled under color of law, and when the title to it presents a disputable question."

High, in his work on Extraordinary Remedies (§ 49), considers such a rule to be 'established by an overwhelming current of authority.'

Usually a title to a public office will not be settled in mandamus proceedings; but, when a person is in office *de jure* and *de facto*, and is interfered with by one plainly without title, mandamus is the proper remedy to settle the title. Lawrence v. Hanley, 84 Mich. 399, 47 N. W. 753.

Although in most cases quo warranto is the proper and appropriate remedy to test the right to hold an office, the exigencies of a particular case, and the public necessity, may often require a more speedy determina-

49 Pac. 747. In this case the chief of police of the city of Salt Lake had been removed from office by the board of police and fire commissioners, and another person had been appointed in his place, and had taken possession and was discharging the duties of the office. It was held that the board had no authority to dismiss him without charges and without a hearing; and that, "where a person has been in the actual and lawful possession of an office, received and enjoyed the emoluments thereof, is entitled to the office *de jure*, and is unlawfully removed, mandamus is the appropriate remedy to restore the *de jure* officer to his office, and it is not necessary to resort to quo warranto, even though the office be in the possession of another."

Schmubach v. Speidel, 50 W. Va. 553, 55 L.R.A. 922, 40 S. E. 424: "Mandamus lies to correct an improper amotion from office. and to restore to the full enjoyment of his franchise a person who has been improperly deprived thereof; and, when one has been wrongfully deprived of his office by the illegal appointment of another, the writ lies to compel his restoration though the person appointed in his stead be in possession *de facto*."

State ex rel. Gill v. Watertown, 9 Wis. 254. In this case a peremptory writ of mandamus was allowed to restore the relator to the office of superintendent of schools from which he had been improperly removed. Held, "mandamus is the proper remedy to restore a party to the possession of an of-

tion of the controversy; and, when such is the case, resort may be had to mandamus. Ibid.

Where the relator's title to an office from which he had been excluded was in dispute, but was established by the judgment of a court of competent jurisdiction after a contest in the nature of quo warranto, mandamus lies to admit him to the office notwithstanding it is filled *de facto* by the rival claimant who was defeated in the antecedent proceedings. State, Leeds, Prosecutor, v. Atlantic City, 52 N. J. L. 332, 8 L.R.A. 697, 19 Atl. 780.

In Harwood v. Marshall, 9 Md. 83, the court held that a writ of mandamus might issue to put an officer in possession of an office to which he had been duly elected or appointed, notwithstanding he had not filled it before, and it was in possession of another person claiming title to it; and this ruling was made upon the ground that quo warranto, or an information in that nature, did not afford an adequate and complete legal remedy, because it would merely determine the title without necessarily giving possession of the office.

Mandamus is the proper remedy to admit to an office a person having a clear legal right thereto when there is no disputed question of fact and his title depends altogether upon pertinent, statutory, and constitutional provisions of law, notwithstanding another person has actual possession of the office, since the latter has neither color of right thereto, nor is he an officer *de facto*. People ex rel. Howard v. Erie County, 42 App. Div. 510, 59 N. Y. Supp. 476, affirming 26 Misc. 233, 56 N. Y. Supp. 318.

When a person has had actual and lawful possession of an office, and has a clear legal title to it, and has been unlawfully removed from it, mandamus is an appropriate remedy to restore him to his office; and it is not necessary to resort to quo warranto, even though the office is in possession of another person. Pratt v. Police & Fire Comrs. 15 Utah, 1, 49 Pac. 747.

When a municipal officer having a clear legal title to his office is illegally ousted, and another unlawfully appointed to serve

in his place, a writ of mandamus to reinstate him is a proper and appropriate remedy, notwithstanding the office is in actual possession of his illegally appointed successor. Schmubach v. Speidel, 50 W. Va. 553, 55 L.R.A. 922, 40 S. E. 424.

It has often been judicially declared, said the court in Kline v. McKelvey, 57 W. Va. 29, 49 S. E. 896, that mandamus is a proper remedy for the trial of a title to office, and will lie where there is no other appropriate remedy, because it is more speedy and therefore a more adequate remedy; but it has often, on the contrary, been more generally declared that mandamus is not the proper remedy for the trial of a title to office. For the purposes of this case, it suffices to say that the writ of mandamus is the proper remedy for the admission or restoration to office of one who holds a clear legal prima facie right to it. Upon this proposition all the authorities agree; no case decided by this court seems to stop short of it.

As it did not appear in the case of State ex rel. Gill v. Watertown, 9 Wis. 254, that any other person had been appointed to fill the office to which the relator sought to be restored by mandamus, the question whether he would be bound to proceed by quo warranto in the first instance the court did not deem it necessary to determine.

In the case of People ex rel. McLaughlin v. Police Comrs. supra, reference was made by Parker, Ch. J., in delivering the opinion of the court, to *dicta* in several cases suggesting an exception to the general rule that mandamus will not lie where someone is actually in possession of the office under color of right, namely, except where there is no serious question as to the title to the office; and it was said that such exceptions, if once created, would destroy the rule itself, and render uncertain that which is now certain. In every one of those cases, said the chief judge, the court held that mandamus would not lie. That was the point of each decision, and nothing else would decide it. The fact that, in addition to so deciding, the court in several cases in the course of its argument made use of the expression that a writ of mandamus would not issue where there

from which he has been illegally removed." In the opinion it is said: "But it is objected in the return that the council cannot restore the relator because they have not the power of appointment, but that this power belongs to the school commissioners. But clearly it is not an appointment that the relator seeks, or is entitled to, if he has been illegally removed. If it was to be an appointment by the appointing power, it is very certain that this court could not control its discretion or compel it to appoint any particular person. But this proceeding is based on an entirely different theory. Its claim is that the relator does not need any appointment, but that his title is and has been complete and perfect to the office all the time, and he asks that the council which

has, without authority, removed him from that to which he is entitled, shall retrace its illegal steps, vacate its proceedings, and remove the obstacles which it has unlawfully placed in his way. He does not ask them to appoint him, but, by vacating their unauthorized proceedings against him, to restore him to that to which he is already appointed. Their return that the power of appointment belongs to the school commissioners is no answer to this demand. The demurrer is sustained, and the premptory writ awarded."

But it is contended that the relator has a remedy by injunction, and that a remedy in equity is a remedy in the ordinary course of the law within the inhibition of § 6744, Rev. Stat., that "the writ must not be issued in

was a serious question in regard to the title, is not entitled to affect the decision where it is not necessary to the decision, and the expression is clearly *obiter*.

At an early period it was established, according to the court in *State, Leeds, Prosecutor, v. Atlantic City*, supra, by the court of King's bench, that quo warranto, and not mandamus, is the proper remedy when an office is full *de facto*; and it is likewise to be gathered from the English cases that an office is deemed full *de facto* whenever a person elected has been admitted to it, whether the election was or was not of such a character that it could be supported at law. But, while it is true that the illegality of the election by virtue of which an incumbent has gained entrance to an office does not prevent the office from being full of him *de facto*, it is also to be noted that from the earliest periods it has been held requisite that the illegality in question must be consistent with honesty of purpose. Elections based upon mistakes of fact or misconceptions of law may impart a color of right which will bar the allowance of a mandamus, but palpable disregard of law renders the action by which an office is seized merely colorable, and in a clear case will be brushed aside as affording no obstruction to the exercise of a plain legal duty. The distinction thus early indicated has become incorporated in the modern English rule upon this subject, which is stated by Mr. Shortt (*Mandamus*, 122).

In this country, the courts of New York are said, in *State, Leeds, Prosecutor, v. Atlantic City*, supra, to have adopted the English rule without substantial change, and that a similar course has been followed in Connecticut; but that other state courts, on the contrary, notably those of Massachusetts, have relaxed the rigidity of the English rule, and, to a certain extent, permit the right to an office actually filled to be tried upon an alternative mandamus. In this state, continued the court, so far as any expression of judicial sentiment is to be found, it is favorable to retain the distinction upon which the English rule is founded; that is, that quo warranto, and not mandamus, is

the remedy in all cases in which an office is full *de facto*, excepting only those cases in which the office has been filled by proceedings palpably without legal warrant. That that rule, in its rigidity, is applicable only to cases in which a relator clearly out of office *de facto* is seeking to oust an incumbent who is clearly in. In such cases the reason for the rule makes the fullness of the office *de facto* the test as to whether quo warranto is or is not the only remedy.

There is, however, a class of cases in which this reason for the rule is wanting. It is those cases in which the facts before the court, or within its judicial knowledge, show that the relator was in office *de jure et de facto*, and that the defendant, while claiming to be in *de facto*, can make no claim to be in *de jure*. Here the relator is not called upon to test the title to the office, for that is not in dispute. The office is not *de facto* full against him, unless by his conduct he elects to consider himself out. In contemplation of law, his title to the office *de jure* draws to it the possession *de facto*, as in cases where simultaneous acts of occupancy are exercised by contestants over a legal title. In such cases there is nothing to be tried by quo warranto. The law being settled, and the facts undisputed, the duty of the court is clear.

The rule that, upon the application for a mandamus, of a person out of possession of an office filled by another, the writ will be refused and such person will be left to his remedy by quo warranto, does not apply to clerks or employees in public office who have been unlawfully removed from their position by their superiors. *People ex rel. Drake v. Sutton*, 88 Hun, 173, 34 N. Y. Supp. 487.

Mandamus is the proper remedy to reinstate in his office a clerk of a county court improperly removed therefrom, although his successor has been appointed. *Hardin County Ct. v. Hardin, Peck (Tenn.)* 291.

Mandamus lies to restore to his office a clerk of a district court having a clear legal title thereto and unlawfully ousted therefrom, notwithstanding another person has been appointed to, and is filling, the office

a case where there is a plain and adequate remedy in the ordinary course of the law." *Freon v. Carriage Co.* 42 Ohio St. 30, 51 Am. Rep. 794; *State ex rel. Bross v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L.R.A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033. The allowance of the writ always was in the discretion of the court, and its discretion sometimes was controlled by the existence of a remedy in equity; but, respecting the jurisdiction of the court, such a remedy never was a remedy at law. However, § 2, art. 14. of the Constitution, provides for the abolition of the distinct forms of action at law, and for the administration of justice by a uniform mode of proceeding, without refer-

ence to any distinction between law and equity; and, if there is a remedy under the Code, it is in the ordinary course of the law. But there is no such remedy in equity. In the opinion in *Re Sawyer*, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482, 487, Mr. Justice Gray reviews the authorities, and says: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers,

under color of right. *Bradley v. McCrabb, Dallam (Tex.)* 504.

The writ of mandamus is the proper remedy to restore an illegally ousted clerk of a district court to his office, although another person has been appointed in his place. *Dew v. Sweet Springs Dist. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639.

When an employee in a municipal or county office, as distinguished from a public officer,—that is, from the incumbent of an office created by the people or the legislature,—is removed from his position, he may test his right to be reinstated in an application for a mandamus, notwithstanding another person has been appointed in his place and is performing the duties and receiving the salary attached thereto. *People ex rel. O'Toole v. Hamilton*, 98 App. Div. 59, 90 N. Y. Supp. 547, affirming 44 Misc. 577, 90 N. Y. Supp. 97; *People ex rel. Corkhill v. McAdoo*, 98 App. Div. 312, 90 N. Y. Supp. 689.

A municipal employee, as distinguished from a municipal officer, is entitled to the remedy by mandamus to reinstate him in an office from which he has been unlawfully removed, notwithstanding the office is held by another person. But a municipal officer,—that is, one charged with the performance of original, independent, or governmental duties as contradistinguished from a mere employment,—if wrongfully removed from his office, must resort for reinstatement, when another person is an occupant thereof claiming under color of right, to quo warranto; and is not entitled to mandamus. *People ex rel. Hoeffe v. Cahill*, 188 N. Y. 489, 81 N. E. 453, reversing 116 App. Div. 885, 102 N. Y. Supp. 325.

It is no defense to the application of a police officer who has been wrongfully removed, for a mandamus to reinstate him, that another person has been appointed to and is filling the relator's place. *People ex rel. Beaty v. Board of Police*, 9 Abb. Pr. 257.

Mandamus is properly refused to reinstate a city employee when another is holding his position under color of right, and when the illegality of his removal is not clear, but 19 L.R.A. (N.S.)

depends upon questions of statutory construction which are doubtful. *Re Hardy*, 17 Misc. 667, 41 N. Y. Supp. 469; *People ex rel. Brymer v. Scannel*, 22 Misc. 298, 49 N. Y. Supp. 1096.

VI. Basic requirements.

a. Clear legal right to office.

The writ of mandamus will not issue unless there is a clear and specific legal right to be enforced by it. *Swartz v. Large*, 47 Kan. 304, 27 Pac. 993.

To entitle a removed officer to restoration to his office by writ of mandamus upon the ground that he has been illegally removed therefrom, he is bound to show that, prior to his removal, he was lawfully an incumbent of such office by a clear legal title. *Stott v. Chicago*, 205 Ill. 281, 68 N. E. 736, affirming 98 Ill. App. 105; *Moon v. Champaign*, 214 Ill. 40, 73 N. E. 408; *Kenneally v. Chicago*, 220 Ill. 485, 77 N. E. 155.

That he was eligible, and had a constitutional right to exercise the powers and discharge the duties of the office. *Jefferson County Justices v. Clarke*, 1 T. B. Mon. 82; *Spencer County Justices v. Harcourt*, 4 B. Mon. 499.

He is bound to show at least a prima facie title to the office he claims. *State ex rel. McDermott v. Kenny*, 45 N. J. L. 251; *State ex rel. Clarke v. Board of Health*, 49 N. J. L. 349, 8 Atl. 509.

He must show affirmatively a clear legal right to immediate possession of the office. *People ex rel. Dolan v. Lane*, 55 N. Y. 217; *People ex rel. Wren v. Goetting*, 133 N. Y. 569, 30 N. E. 968, affirming 29 N. Y. S. R. 286, 8 N. Y. Supp. 742.

If he was summarily removed without notice or opportunity to be heard, it must appear that his removal was in violation of some statute law having application to his office at the time of his removal. *People ex rel. Terry v. Keller*, 158 N. Y. 187, 52 N. E. 1107.

To entitle a removed officer to reinstatement by mandamus in the office from which he had been removed, on the ground that his

is to invade the domain of the courts of common law, or of the executive and administrative department of the government."

In *Reemelin v. Mosby*, 47 Ohio St. 570, 26 N. E. 717, it is held: "The remedy by injunction may be employed by the incumbent of a public office to protect his possession against the interference of an adverse claimant whose title is in dispute, until the latter shall establish his title at law; but it is not the appropriate remedy to try the title to a public office, or determine questions concerning the authority to make appointments thereto."

In *Harding v. Eichinger*, 57 Ohio St. 371, 49 N. E. 306, Eichinger averred that he was elected a member of the board of education of the city of Mansfield, and that he duly

qualified, but that, on the night the members met to organize, Harding intruded into the office and usurped his (Eichinger's) place, and excluded and forcibly prevented him from performing the duties of the office. The court of common pleas granted an injunction, against Harding, and, on appeal, the circuit court did the same. Held, "injunction will not lie at the suit of a claimant to a public office who is out of possession, against an adverse claimant who is in possession."

Moyer is out of possession, and he has no adequate remedy at law. A suit for his salary is not an adequate remedy, because that does not restore him to the office, and the public is interested in having official duties performed by those whose duty it is to

removal was without charges and a hearing, he must be within the protection of some statute law forbidding such a removal. *People ex rel. Cochrane v. Tracy*, 35 App. Div. 265, 54 N. Y. Supp. 1070.

It must clearly appear that he was illegally removed, and that he has an indisputable right to reoccupy the office. *Kimball v. Olmsted*, 20 Wash. 629, 56 Pac. 377.

It is not sufficient, in an application for a writ of mandamus to restore an illegally removed officer to his office, simply to set forth the legal conclusion that the removal was unauthorized and without justification; but it is necessary to aver the exact facts in regard to the removal. *Chicago v. People*, 210 Ill. 84, 71 N. E. 816.

To entitle a removed officer to a mandamus to restore him to office, the illegality of his removal must be clearly and indisputably established. *People ex rel. Warschauer v. Dalton*, 159 N. Y. 235, 53 N. E. 1113, affirming 34 App. Div. 302, 54 N. Y. Supp. 216.

To entitle an employee to reinstatement in an office from which he has been unlawfully removed, he is bound to show affirmatively the invasion or denial of some of his substantial rights in the proceedings which ended in his removal. *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161, affirmed in 179 N. Y. 525, 71 N. E. 1137.

A mandamus is not the proper remedy to procure the reinstatement of one alleged to have been illegally removed from his office, when the legality of the removal is a disputed question depending upon the construction of pertinent statutes. *Kimball v. Olmsted*, supra.

Mandamus to reinstate a court attendant is properly denied when he cannot show a clear legal right to the office. *Re Torney*, 11 Misc. 291, 32 N. Y. Supp. 277, affirming 7 Misc. 260, 27 N. Y. Supp. 913.

An officer who was summarily removed from his position cannot be restored thereby by mandamus when it is made to appear that he was appointed to the office in the first instance in violation of law, and held it unlawfully at the time of his removal. *L.R.A. (N.S.)*

removal. *People ex rel. Lee v. Gleason*, 32 App. Div. 357, 53 N. Y. Supp. 7.

One who seeks restoration by writ of mandamus to an office from which he alleges he has been illegally removed must show affirmatively the legal existence of the office itself when it is one not known to the common law. *Moon v. Champaign and Kennealy v. Chicago*, supra.

A subordinate officer who was removed from his position in violation of the New York civil service act (Laws 1898, chap. 186) is bound affirmatively to show in his application for the writ of mandamus, to entitle him to such writ, that the position from which he was removed was, at the time of his removal, in the competitive class. *People ex rel. Warschauer v. Dalton*, supra.

To entitle a veteran of the Civil War, who was discharged from public employment without notice and hearing, to a mandamus to restore him to office, he must affirmatively show that the removing officer had notice that he was a veteran and refused to accord him a hearing notwithstanding. *People ex rel. O'Brien v. Cruger*, 12 App. Div. 536, 42 N. Y. Supp. 398.

One who claims the benefit of a statute giving him the preference in public employment, and forbidding his removal without cause and hearing, as an honorably discharged veteran of the Civil War, is not entitled to a mandamus to restore him to a position from which he has been removed, without previously bringing home to the knowledge of the removing officer the fact that he is a veteran, and claiming his privileges as such, with a demand that he be reinstated for that reason. *People ex rel. McDonald v. Clausen*, 50 App. Div. 286, 63 N. Y. Supp. 993; *People ex rel. Bean v. Clausen*, 50 App. Div. 324, 63 N. Y. Supp. 1064.

A veteran entitled by statute to preference in public employment and forbidden by law to be removed therefrom without charges, notice, and the opportunity to be heard, if removed arbitrarily in violation of such law, must show, before mandamus will issue to reinstate him, that the officer who removed him had notice of his rights, and refused his demand to be reinstated. *Re*

perform them, and, if they are ousted without authority, it is in the public interest and conducive to peace and good government that they shall be speedily restored by a mandamus. The only other remedy suggested is that of appeal to the board of public safety. But, if the mayor was without jurisdiction to hear the charges, his action was void, and the relator was not required to pursue that course.

This brings us to the question on the merits of the case, and that is, whether the mayor has authority originally to hear charges against an officer in the police department, and to remove the officer in the event he finds that the charges have been sustained, or whether he may act only after the chief of police has suspended the officer and filed written charges with the mayor.

Stutzbach, 62 App. Div. 219, 70 N. Y. Supp. 901, affirmed in 168 N. Y. 416, 61 N. E. 697; People ex rel. Goetchious v. Follett, 24 Misc. 510, 53 N. Y. Supp. 956.

If a municipal employee who applies for a mandamus to restore him to his position grounds his application upon a statute which forbids the arbitrary removal without charges of persons in a class to which he belongs, he is bound to show affirmatively that he is one of the persons protected by the statute. People ex rel. Fogarty v. Cassidy, 118 App. Div. 693, 103 N. Y. Supp. 671.

The fact that the relator's name was carried upon the pay rolls and certified by the civil service commissioners after the adoption of the civil service statute is not sufficient proof, upon application for a mandamus to restore him to the office from which he has been removed, of the prior legal existence of such office. Kenneally v. Chicago, supra.

b. Undisputed facts.

The object to be accomplished by a writ of mandamus is not to determine controversies; but simply to enforce a clear, specific, legal right, when such right depends only upon questions of law. People ex rel. Hoyt v. Ballston Spa, 19 Misc. 671, 44 N. Y. Supp. 471.

If the facts entitle a relator to reinstatement in an office of public employment from which he has been removed, mandamus is a legitimate and proper remedy. State ex rel. Stephens v. Pilotage Comrs. 23 S. C. 175; State ex rel. McDonald v. Courtenay, 23 S. C. 180.

The writ of mandamus to admit or restore an officer to his office issues only where, upon the return, facts are admitted, and only the question of law is involved. Howard v. Gage, 6 Mass. 462.

Mandamus will not issue to restore a removed officer to his office where the material question of facts is in dispute. Re Kenny, 52 App. Div. 385, 65 N. Y. Supp. 204, affirming 27 Misc. 680, 59 N. Y. Supp. 555. 19 L.R.A. (N.S.)

Section 147 of the new Municipal Code (90 Ohio Laws, p. 69), Rev. Stat. §§ 1536-683 provides that all power and duties connected with and incident to the appointment, regulation, and government of the police and fire departments of the city shall be vested in the mayor and the board of public safety as thereafter provided, and that the mayor shall be the chief conservator of the peace within the limits of the corporation. Section 148, Rev. Stat. § 1536-684, provides that the chief of police shall be the executive head of the department, under the direction of the mayor; provided, that the chief shall have exclusive control of the stationing and transfer of all patrolmen and other officers and employees in the department, under such rules and regulations as may be prescribed by the board of public safety.

When, upon an application for a mandamus to reinstate a person removed from his position in the municipal service, an issue of fact is made upon material questions, peremptory mandamus cannot issue. People ex rel. Shay, 39 N. Y. S. R. 856, 15 N. Y. Supp. 488.

When, upon an application for a mandamus to restore a removed officer to his office material facts upon which the relator's right depends are denied, a peremptory writ must be refused. People ex rel. Hoyt v. Ballston Spa, supra.

Mandamus to restore one unlawfully excluded from his office should be refused where there is a dispute as to material facts upon which his right to reinstatement or the unlawfulness of his removal depends. Adam v. Duffield, 4 Brewst. (Pa.) 9.

If a sufficient return is made to a mandamus, a writ of restoration will not be awarded, even though the return is false, but the party aggrieved will be remitted to his action. Bagg's Case, 11 Coke, 93b; Efield v. Hills, 3 Keble, 859.

A dispute over matters merely immaterial does not require the refusal of a writ of mandamus to reinstate in his office an officer who has been wrongfully removed. Stutzbach v. Coler, 62 App. Div. 219, 70 N. Y. Supp. 901.

Upon an application for a mandamus to reinstate a person wrongfully removed from his office as a policeman, the material facts are not put in issue by denials and affirmations made upon information and belief. Re Elder, 118 App. Div. 25, 103 N. Y. Supp. 617, affirmed in 189 N. Y. 509, 81 N. E. 116.

To justify the refusal of a peremptory writ of mandamus to restore an officer to his office from which he has been removed, the return must be an honest dispute as to the material facts involved. Sullivan v. Gilroy, 55 Hu. 285, 8 N. Y. Supp. 401.

c. Lack of other adequate remedy.

It is a rule of general application that where there is another specific legal remedy for the complaining party, a writ of mandamus will not issue.

Section 152, Rev. Stat. § 1536-688, is as follows: "The chief of the police and the chief of the fire department shall have exclusive right to suspend any of the deputies, officers, or employees in his respective department and under his management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause. If any such employee be suspended as herein provided, the said chief of police, or the chief of the fire department, as the case may be, shall forthwith, in writing, certify such fact, together with the cause of such suspension, to the mayor, who shall, within five days from the receipt of the same, proceed to inquire into the cause of such suspension and render his judgment

thereon, and his judgment in the matter shall be final, except as otherwise provided in this act. The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given by the proper authority, or for any other reasonable and just cause. In the event that either the said chief of police or chief of the fire department shall be suspended as herein provided, it shall be the duty of the mayor to forthwith certify such fact, together with the cause of such suspension, to the board of public safety, which shall within five days from and after the date of the receipt of such notice proceed to hear said charges and

mus will not lie. *Cripple Creek v. People*, 19 Colo. App. 399, 75 Pac. 603.

Mandamus will not lie to invest a claimant to an office with title and possession thereto when he has another adequate and appropriate remedy by information in the nature of a quo warranto. *Bonner v. State*, 7 Ga. 480.

Mandamus cannot be awarded when there is another specific and adequate legal remedy. *Swartz v. Large*, 47 Kan. 304, 27 Pac. 993.

Mandamus will not lie if there is another specific and adequate legal remedy available to him who applies for the writ. *Harwood v. Marshall*, 9 Md. 83.

Mandamus will not issue to restore a person to an office from which he has been unlawfully removed, where he has another appropriate, adequate remedy, although less speedy. *People ex rel. Lazarus v. Sheehan*, 128 App. Div. 743, 113 N. Y. Supp. 230.

Mandamus will not lie to reinstate a removed officer in his office when he has an ample and effectual remedy by proceedings in the nature of quo warranto against his successor, the actual incumbent. *Ellison v. Raleigh*, 89 N. C. 125.

A writ of mandamus will not issue to restore an officer to his office after his removal, in a case where there exists an adequate remedy at law which the applicant has not invoked or exhausted. *State ex rel. Aucoin v. Police Comrs.* 113 La. 424, 37 So. 16; *State ex rel. Journee v. Police Comrs.* 119 La. 515, 44 So. 283.

Mandamus will not lie to restore to his position a subordinate employee of a public board when he has a complete, plain, and adequate remedy at law. *Board of Education v. State*, 100 Wis. 455, 76 N. W. 351.

But the writ of mandamus issues to restore to office an officer illegally removed therefrom by his superiors, whenever he has no other appropriate and adequate remedy at law to obtain his restoration. *Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646.

If a party has no other remedy which is complete and adequate to restore him to the office from which he has been illegally re-

moved, mandamus will lie, although he may have a remedy not so well adapted to the end sought. *Dew v. Sweet Springs Dist. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639.

Mandamus to restore to his office an unlawfully removed officer issues both in those cases in which the applicant has no other legal remedy, and where any other modes of redress are tedious or inadequate to afford relief. *Bradley v. McCrabb, Dallam (Tex.)* 504.

Mandamus to restore to office an officer who has been illegally removed therefrom, and who has a clear and legal right thereto, will not be refused because he has other legal remedies, if such remedies are not plain, adequate, and complete. *Ransom v. Boston*, 193 Mass. 537, 79 N. E. 823.

In *White's Case*, 2 Ld. Raym. 959, upon an application for a mandamus to restore a clerk of a chartered company, Chief Justice Holt remarked that in such cases a mandamus had been granted, but that he was of the opinion that no mandamus ought to be granted where the officer may have an assize; afterwards, however, in 2 Ld. Raym. 1004, the mandamus was granted on the ground that it was the same case as that of the town clerk.

The bringing and prosecution of an action at law inadequate to afford the desired relief to an applicant for a mandamus to restore him to his office does not bar the remedy. *Hill v. Boston*, 193 Mass. 569, 79 N. E. 825.

The fact that an officer illegally removed from his office has brought an action for the salary attached thereto for the period which has elapsed since his removal is no bar to his application for a writ of mandamus to restore him to office. *Ransom v. Boston*, supra.

Mandamus is still the proper remedy to reinstate in his office a clerk of a county court who has been improperly removed, notwithstanding he also has the remedy by writ of error to review in the circuit court an order or judgment for removal. *Hardin County Ct. v. Hardin, Peck (Tenn.)* 291; also *Sevier v. Washington County Justices, Peck*

render its judgment thereon, which shall be final."

Section 186, Rev. Stat. § 1536-722, is as follows: "Any person in the department of public safety in any city, who shall be removed from his position of employment or appointment by the mayor, shall have the right to appeal from the decision of such officer, to the board of public safety within ten days from and after the date of his removal, and said board of public safety shall hear said appeal within ten days from and after the filing of the same with it, and its judgment in the matter shall be final."

Section 167, Rev. Stat. § 1536-703, is as follows: "No officer or employee in the department of public safety shall be removed or discharged except for cause; and the

cause of removal of any person shall be forthwith stated in writing by the mayor to the board, and shall be filed by the said board in its office, and shall be open to public inspection."

Prior to the adoption of the new Municipal Code, the mayor had power to suspend policemen or any officer appointed by him; but the power of removal was vested in the city council. Rev. Stat. § 1749. Under the new Code the powers of council are legislative only, and this section, giving the mayor power of suspension and the council power of removal, was repealed. However, § 1747 Rev. Stat. (now § 1536-638), provided: "He shall supervise the conduct of all the officers of the corporation, inquire into and examine the grounds of all reasonable complaint

(Tenn.) 334; Ragsdale v. State, 2 Swan, 416

d. Diligence.

If an officer who has been ousted without warrant of law and for no sufficient cause from an office which he had a legal right to hold, and is entitled, upon undisputed facts and law, to reoccupy, neglects to apply promptly for a mandamus to restore him to such office, and delays without sufficient excuse or explanation to seek the remedy, the writ will be refused because of laches. Chicago v. People, 210 Ill. 84, 71 N. E. 816; Eastman v. Householder, 54 Kan. 63, 37 Pac. 989; State ex rel. McCabe v. Police Board, 107 La. 162, 31 So. 662; Streeter v. Worcester, 177 Mass. 29, 58 N. E. 277; Hill v. Boston, 193 Mass. 509, 79 N. E. 825; People ex rel. Vanderhoof v. Palmer, 3 App. Div. 389, 38 N. Y. Supp. 651.

No precise definition can be formulated as to what is sufficient to constitute laches in applying for a writ of mandamus; but every case must depend upon its own particular circumstances. Hill v. Boston, *supra*.

The laches of the relator in not applying for a writ of mandamus to restore him to an office from which he has been illegally removed will bar the writ,—especially when he has slept upon his rights for a length of time equal to the statute of limitations in analogous cases. Jones v. Police Comrs. 141 Cal. 96, 74 Pac. 696; Dodge v. Police Comrs. 1 Cal. App. 608, 82 Pac. 699; Harby v. Board of Education, 2 Cal. App. 418, 83 Pac. 1081; Hill v. Boston, *supra*.

Inexcusable delay for several years, in a removed officer, to apply for mandamus to reinstate him in his office, requires a refusal. People ex rel. Steinson v. Board of Education, 158 N. Y. 125, 52 N. E. 722, affirming 20 App. Div. 452, 46 N. Y. Supp. 782.

An application for a mandamus to reinstate a discharged municipal employee must be refused on the ground of laches when there is a delay of more than three years in making the application for it. 19 L.R.A. (N.S.)

People ex rel. Harper v. Adams, 46 N. Y. S. R. 150, 18 N. Y. Supp. 896.

A delay of three years by a veteran soldier applying for a mandamus to compel his restoration to a place in the municipal department from which he was removed arbitrarily without a hearing is such laches as to preclude the granting of the writ. People ex rel. Throckmorton v. McCartney, 28 App. Div. 138, 50 N. Y. Supp. 919.

A delay of two and one half years in applying for a writ of mandamus to restore to his office an officer who has been wrongfully removed therefrom constitutes such laches as warrants a refusal of the writ. Re Galney, 84 Hun, 503, 32 N. Y. Supp. 303; Murphy, 61 App. Div. 145, 70 N. Y. Supp. 405.

Advice of counsel which appears to have been unsound or inapplicable is not sufficient excuse for a delay of more than two years in applying for a writ of mandamus to reinstate a removed officer; and in such case a writ will be refused on the ground of laches. McDowell v. Dalton, 33 Misc. 368 N. Y. Supp. 419.

Neglect for two years to apply for a mandamus to reinstate a removed officer is such laches, when unexplained and unexcused, as to preclude the granting of the writ. People ex rel. Shea v. Bryant, 28 App. D. 480, 51 N. Y. Supp. 119.

The unexcused and unexplained delay of a year and five months in making application for a writ of mandamus to restore to active duty a fireman unlawfully retired to on a pension constitutes such laches as requires a denial of the writ. People ex rel. Miller v. Sturgis, 82 App. Div. 580, 81 N. Y. Supp. 816.

A delay of sixteen months without adequate excuse or explanation, by one who has been removed from a position in the city service of New York, is such laches as requires that his application for a mandamus to reinstate him be denied. People ex rel. Connolly v. Board of Education, 1 App. Div. 1, 99 N. Y. Supp. 737, affirming in 187 N. Y. 535, 80 N. E. 1116.

An unexplained and unexcused delay of eleven months, by an employee of the public

against any of them, and cause all their violations or neglect of duty to be promptly punished or reported to the proper authority for correction;" and that section is expressly continued in force, and it is said that this section confers the power of removal upon the mayor. That it did not give him such power prior to the adoption of the new Code is expressly decided in *State v. Heinmiller*, 38 Ohio St. 101, and *State ex rel. Atty. Gen. v. Bryson*, 44 Ohio St. 469, 8 N. E. 470; and the incorporation of it into, or the express continuance of it in force by, the new Municipal Code, does not add to its scope; but, on the contrary, the legal presumption is that it was intended to be limited to the interpretation that had been given it. The evident purpose of the legislature respect-

ing the police and fire departments, as indicated by the provisions relating to them in the new Municipal Code, was to adopt a civil-service or merit system. The chief of police is made the executive head of the department under the direction of the mayor. He is given the exclusive right to suspend any of the deputies, officers, or employees under his management or control, and, in case of suspension, he is required to certify such fact, together with the cause of such suspension, to the mayor, who then finally determines the matter, excepting that an appeal may be taken to the board of public safety in case the judgment of the mayor is one of removal. The mayor is given the exclusive right to suspend the chief of the police department, and, in the event he sus-

service, to apply for a writ of mandamus to reinstate him after removal, is such laches as to require a refusal of the writ. *People ex rel. Rehm v. Willcox*, 60 Misc. 329, 112 N. Y. Supp. 341.

Where there has been a delay of ten months in applying for a writ to reinstate an officer alleged to have been unlawfully removed, he is chargeable with laches, and is bound to explain and excuse the delay before the writ will be granted. *People ex rel. Vanderhoof v. Palmer*, 3 App. Div. 389, 38 N. Y. Supp. 651, affirming 15 Misc. 434, 36 N. Y. Supp. 833; *People ex rel. Mehegan v. Scannell*, 28 Misc. 401, 59 N. Y. Supp. 950; *People ex rel. Dellett v. Board of Health*, 56 Misc. 26, 106 N. Y. Supp. 923.

A delay of nine months without adequate explanation or excuse is such laches on the part of a removed officer in applying for a writ of mandamus to restore him to his office as requires that the writ be denied. *People ex rel. O'Connor v. Brady*, 49 App. Div. 238, 63 N. Y. Supp. 145.

Unreasonable and inexcusable delay for eight months in applying for a mandamus is such laches as justifies a refusal of the writ to reinstate an officer unlawfully removed from his office. *People ex rel. Miller v. General Sessions Justices*, 78 Hun, 334, 29 N. Y. Supp. 157.

Laches may not be imputed from a delay of six months, to an officer applying for reinstatement in an office from which he has been removed by colorable and pretended abolition of the office, when explained by the statement that, until he discovered to the contrary immediately before applying for the writ, he believed, and had no reason to doubt, that the office had been abolished in good faith. *Re McDonald*, 34 App. Div. 512, 54 N. Y. Supp. 525.

While there is no statutory limit within which an application for a writ of mandamus to restore an illegally removed officer to his position must be made, the analogous limitation of four months which applies to a writ of certiorari makes a delay for that length of time such laches as, if unexplained and unexcused, will justify a refusal of the writ. *People ex rel. McDonald v. Lantry*, 19 L.R.A. (N.S.)

48 App. Div. 131, 62 N. Y. Supp. 630; *People ex rel. Finn v. Greene*, 87 App. Div. 346, 84 N. Y. Supp. 565.

Unexplained and unexcused delay for four months in applying for a writ of mandamus to restore a removed officer to his position warrants a denial of the writ of mandamus when it appears that another person has been appointed in the place of the relator. *People ex rel. Young v. Collis*, 6 App. Div. 467, 39 N. Y. Supp. 698.

The mere lapse of time since the right accrued is important, but not absolutely decisive, upon the question of laches in applying for a writ of mandamus. *Hill v. Boston*, 193 Mass. 569, 79 N. E. 825.

When the right of a removed officer to reinstatement by mandamus is dependent upon a statute the application and construction of which are in dispute and in litigation in the courts, laches cannot be imputed to such removed officer on account of his delay in applying for a mandamus pending adjudication of the disputed question. *People ex rel. McDonald v. Lantry*, supra.

The apparent laches of a person applying for a mandamus to reinstate him in an office from which he has been removed, due to delay in applying for it, is excused when the legality of his removal depends upon the application of a statute which has been in dispute in the courts, with conflicting decisions, and the application is made immediately following the final decision by the court of last resort. *People ex rel. Tierney v. Scannell*, 27 Misc. 662, 59 N. Y. Supp. 679.

A public employee wrongfully removed from office, who seasonably applies for a writ of mandamus to secure reinstatement, and withdraws the application because of conflicting judicial decisions respecting the proper remedy, is not chargeable with laches upon renewing his application promptly after final decision by the court of last resort settling the conflict. *People ex rel. Shuter v. Butler*, 54 Misc. 18, 103 N. Y. Supp. 583.

The pursuit and diligent prosecution of proper legal remedies, although inadequate, by an unlawfully removed officer, will excuse his delay in applying for a writ of manda-

pende the chief, it is his duty to certify such fact, together with the cause of suspension, to the board of public safety, and it is given final jurisdiction. And it is made the duty of the mayor to prefer charges with council against any director of public safety for incompetency, neglect of duty, malfeasance in office, habitual drunkenness, or gross immorality, and it is made the duty of council to inquire into the charges, in the manner provided for the removal of other officers of the municipality. Evidently, it was thought that it would be conducive to the discipline or efficiency of the department, respecting the members of the police force, if the exclusive power of suspension should be vested in the chief of police, and, if the mayor should not have original jurisdiction to remove members of

the force, but only in the event of charge being certified to him by the chief. If the chief fails in his duty the exclusive power of suspending him is vested in the mayor and he may suspend him and certify the fact to the board; so that the board of public safety does not deal directly with the members of the force or with the chief of the police, but exercises its control through the mayor, and the mayor does not deal directly or immediately with the members of the force, but with the chief of police and the chief is given immediate control of the men. This method seems to have been evolved from experience. But the wisdom of it, or effectiveness of it, is not a matter for our consideration. We have only to determine what the legislature, in its wisdom has prescribed.

mus to restore him to office. *Hill v. Boston*, supra.

An officer who has been removed from his office summarily without charges or hearing, when the statute requires both, is not guilty of laches when, twice within four months of his removal, he serves upon the removing officer a demand for a hearing, and gives notice of his right and privilege; and therefore will not be refused a mandamus notwithstanding, prior to his removal, he had been suspended from office without pay for nearly two years. *People ex rel. O'Connor v. Brady*, supra.

One who was removed from his position in the municipal civil service in violation of his rights, and who neglected to make application for a mandamus to restore him, for several months and until after the death of the officer who made the removal and the appointment of his successor, although he may satisfactorily explain and excuse his delay so as not to be imputed with laches, is not entitled to his writ without showing that he gave notice to the new officer of his removal, asserted his rights, and demanded his reinstatement. *People ex rel. Taylor v. Welde*, 61 App. Div. 580, 70 N. Y. Supp. 869.

It does not excuse a delay of several years by an officer unlawfully removed from his office, in applying for a mandamus to reinstate him, that the intervening time has been employed by him in seeking other remedies to recover compensation. *People ex rel. Steinson v. Board of Education*, 158 N. Y. 125, 52 N. E. 722, affirming 20 App. Div. 452, 46 N. Y. Supp. 782.

That the plaintiff applying for a writ of mandamus to reinstate him in the office from which he had been removed was without means to employ counsel, and had been advised by his unprofessional acquaintances that he was without a legal remedy, is no legal excuse for a delay of ten months in applying for the writ. *People ex rel. Dellett v. Board of Health*, supra.

Inasmuch as an application for a writ of mandamus to reinstate in office a person wrongfully removed will be refused unless

brought within the period of four months an amendment to the writ curing defect therein will not be allowed after a lapse of eighteen months from the removal. *People ex rel. Collins v. Ahearn*, 120 App. Div. 104 N. Y. Supp. 860.

VII. The power of motion.

a. In cases of unrestrained discretion

A writ of mandamus is never granted to compel the discharge of a duty involving the exercise of judgment or discretion. *People ex rel. Hoyt v. Ballston Spa*, 19 Misc. 61, 44 N. Y. Supp. 471.

It is a well-recognized principle of law that the writ of mandamus will not lie to revise the judgment of an inferior court or to compel the action of a public officer to whom the discretion is given by law to decide the question involved. *Johnson v. Galveston*, 11 Tex. Civ. App. 469, 33 S. 150.

The general rule is, where a duty to be performed is judicial, or involves the exercise of a discretion of a tribunal or officer that the courts will not undertake by mandamus to control or review the action of such tribunal or officer. *Riggins v. Richardson* (Tex. Civ. App.) 79 S. W. 84.

(A writ of error was obtained in this case, before it could be argued in the supreme court, the term of office expired, and that reason it was dismissed, in 97 Tex. 530 S. W. 524.)

The rule undoubtedly is, said the court in *Morley v. Power*, 5 Lea, 691, that in matters requiring the exercise of final judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie either to control the exercise of that discretion, or to terminate upon the decision which shall finally be given.

A mandamus will not lie to restore to office one who has been removed therefrom by superiors vested with an absolute discretion to dismiss him. *Hermitage's Case* Comb. 210.

The fact that, subsequently to the commencement of this action, the city council repealed the ordinance creating the office that was filled by the relator, and that it enacted another ordinance providing for a police force, and that an appointment has been made to the office created by the new ordinance, is not important, for the reason that the office that was filled by the relator was not abolished. The new ordinance by which the old ordinance was repealed did not make any change respecting the office held by the relator. And in such case the new ordinance should be construed merely as continuing in force the provisions of the repealed ordinance that were incorporated into the new ordinance. *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. Rep. 7;

Wright v. Oakley, 5 Met. 400. The restoration of relator to his office and the ousting of the person who was appointed to succeed him does not present a case of determining title to an office, because, his removal having been absolutely void, the pretended appointment is a mere nullity. *State ex rel. Mason v. Paterson*, 35 N. J. L. 190.

The mayor being without jurisdiction, there is no controversy as to the relevant and controlling facts, and, proceeding to render the judgment that the circuit court should have rendered, it is ordered that a peremptory writ of mandamus as prayed for issue against the respondent as mayor. Peremptory writ allowed.

Price, Spear, and Davis, JJ., concur.

Mandamus will not lie against a public board to require it to reinstate a discharged employee removable at pleasure. *Portman v. State Fish Comrs.* 50 Mich. 258, 12 N. W. 106.

One who occupies a place of public employment in contradistinction to a public office, and holds it at the will and discretion of the executive of the state or other public functionary, is not entitled to a mandamus to restore him thereto in case of his summary removal. *State ex rel. Gruber v. Champlin*, 2 Bail. L. 220.

When a public board has a right and the power to remove at will and discretion its employees, mandamus will not lie to reinstate in their former employments persons removed by such board, notwithstanding the removal was without charges, notice, or hearing. *Trainor v. Board of Auditors*, 89 Mich. 162, 15 L.R.A. 195, 50 N. W. 809.

When a municipality has the power, by its charter, to appoint and remove at will municipal officers, mandamus will not lie to restore a municipal officer to his office, notwithstanding his removal without any cause. *R. v. Cambridge*, 2 Shower, 69.

When the tenure of appointments to office under a charter of incorporation is during the pleasure of the municipal authorities, mandamus will not lie to restore an officer to his office who has been removed without any cause being assigned. *Ex parte Langen*, 8 N. B. 135.

Power of the court to inquire into the legality of the removal of an officer who applies for a writ of mandamus to reinstate him does not exist when the statute authorizing his removal makes the body which removed him the sole judge of the sufficiency of the cause of removal. *Lunt v. Davison*, 104 Mass. 498.

Mandamus will not lie to restore to his office an officer who has been removed therefrom by his superiors, where such superiors are invested by statute with a discretionary power to remove their subordinates whenever, in the exercise of their judgment, there is cause for such removal. *State ex rel. O'Neill v. Register*, 59 Md. 283. 19 L.R.A. (N.S.)

Although in the foregoing case the court broadly asserted the stated proposition, afterwards, in *Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646, it qualified the statement as follows: "We agree that the writ of mandamus does not lie to control the discretion of any tribunal, however limited its jurisdiction may be. Hence, when the act complained of rests in the exercise of a discretion, the remedy fails. But this discretion is not unlimited, for, if it be exercised with manifest injustice, the court will command its due exercise. . . . It must be a sound discretion and according to law."

When a statute makes a governmental body the final judge of the qualification of its members and their election to membership, mandamus will not lie to compel it to restore one whom it has excluded without hearing on the merits. *People ex rel. Cooley v. Fitzgerald*, 41 Mich. 2, 2 N. W. 179.

The common council of the city of Philadelphia being vested with power to judge of the qualifications of its own members, its action in unseating one of its members when taken at any regular meeting after notice and hearing, will not be interfered with by the courts by a writ of mandamus to reinstate the unseated member. *Com. ex rel. Duffield v. Loughlin*, 20 Phila. Leg. Int. 100.

Mandamus will not lie to restore a recorder to his office where he is removable at the pleasure of the corporation, and another person has been appointed in his stead. *R. v. Canterbury*, 11 Mod. 403.

A mandamus will not be granted to restore a sergeant-at-mace to his office in a corporation which has the power to remove him at pleasure. *R. v. Dartmouth*, 3 Salk. 229.

Clerks of the district courts of the United States hold their offices at the will of the courts, and, if removed therefrom by the district judge, are not entitled to mandamus to obtain reinstatement. *Ex parte Hennen*, 13 Pet. 230, 10 L. ed. 138.

A clerk to a justice in petty sessions, appointed by order of such sessions, has no legal hold upon his office; and the court

will not interfere if he is dismissed summarily, and without cause assigned. *Ex parte Sandys*, 4 Barn. & Ad. 863.

Mandamus does not lie to restore the clerk and treasurer of the guardians of the poor of St. Nicholas, Rochester. *R. v. St. Nicholas*, 4 Maule & S. 324.

A mandamus will not lie to restore a town clerk removed without cause from his office, when he held it merely during the pleasure of the corporation. *R. v. Stratford upon Avon*, 1 Lev. 291; *Stratford on Avon*, 2 Keble, 641, s. c. sub nom. *R. v. Deighton*, 2 Keble, 656.

Mandamus does not lie to restore a clerk to his office in the office of the "*custos brevium*," because it was said in *Whitechurch v. Pagot*, Style, 208, that the master of the office is unanswerable for all his clerks and has power over them, and they are not officers, but mere servants, and therefore there is no remedy to be had in law against him, but that in conscience he ought to restore him; and therefore an order to show cause why the applicant should not be restored was granted. The case, however, was never decided because of a compromise by the parties.

Mandamus will not lie to restore to his office a policeman who has been removed therefrom by his superiors in the exercise of a discretion vested in them by law. *Gleisman v. West New York*, 74 N. J. L. 74, 64 Atl. 1084.

When the members of a board of police commissioners are empowered by statute to remove any policeman for cause, and are made the sole judges of what is sufficient cause for such removal, their action in removing a policeman cannot be controlled by the courts; and a writ of mandamus will not lie to restore a policeman to his office. *State ex rel. Pinkerman v. Rusling*, 64 Conn. 517, 30 Atl. 758.

A court of competent jurisdiction, upon an application for mandamus to restore to his office one who has been removed therefrom by a governmental body vested with the power to appoint and remove subordinate officers, is bound to inquire whether incompetency, wilful neglect of duty, or misdemeanor in office really existed in case of a removal before the expiration of a term of office, because it is only for some such cause that the power of removal can be exercised. *Miles v. Stevenson*, supra.

The decision in *State ex rel. O'Neill v. Register*, supra, was carefully distinguished in *Miles v. Stevenson*, supra, by the following language: "What we have said is not to be understood as applying to a class of cases where there is no limit fixed to the term of the office, and the appointee holds merely at the will of the appointing power; nor to another class, where the power of removal is vested by statute in the discretion of any person or body of persons; nor where it depends on the exercise of personal judgment as to whether the cause for removal be sufficiently good."

When the statute makes a tribunal the final and exclusive arbiter in the matter of 19 L.R.A. (N.S.)

removals from office of certain officers, mandamus will not lie to restore such officers to their offices after having been removed by the proper authority. *Lunt v. Davison*, 104 Mass. 498.

The discretion of an officer, official body, or tribunal, which cannot be interfered with by mandamus to effect restoration to office of one removed therefrom by the action of such an officer, body, or tribunal, does not exist when the act done is ministerial upon a given state of facts, although the removing power must judge, according to its best discretion, whether the act of removal should be performed, and whether the facts exist that warrant removal; since, were it otherwise, it is obvious mandamus would never lie in any case. *Morley v. Power*, 5 Lea, 691; *Terrell v. Greene*, 88 Tex. 539, 31 S. W. 631.

The power given by a statute to a board of aldermen to remove a mayor when, in the judgment of its members, there is sufficient cause for his removal, does not confer upon such board unlimited discretion to remove a mayor, but one which can be exercised only when a recognized offense against the law has been committed; and therefore does not bar the remedy by mandamus to reinstate a mayor who has been arbitrarily removed. *Milliken v. Weatherford*, 54 Tex. 388, 38 Am. Rep. 629.

The uncontrolled discretion of inferior officers or bodies includes only their discretion upon the subject-matter which by law they may determine; but does not include their decision as to the extent of their own authority. *State ex rel. Gill v. Watertown*, 9 Wis. 254.

The case of *State ex rel. Gill v. Watertown*, supra, was cited, and its opinion adopted, upon the point relating to the discretion of the removing power, in *Terrell v. Greene*, supra.

When the power to remove for due cause is given, the words "due cause" operate as a limitation on the power. *State ex rel. Gill v. Watertown*, supra.

Although a corporation has the power to remove at will its town clerk, nevertheless, upon an application for a mandamus to restore a town clerk to his office, if the corporation returns a removal upon the ground of a misdemeanor, and does not rely upon its power to remove arbitrarily, a mandamus will issue if the return grounds of the removal are insufficient. *R. v. Oxon*, 2 Salk. 428.

A return, to be sufficient to require a denial of a mandamus to restore to his office a common councilman upon the ground that the corporation, by an ancient custom, might remove *ad libitum*, must set forth that the removal was positively an exercise of that power, and not leave it to be inferred from mere recital in the return. *R. v. Coventry*, 2 Salk. 430.

b. Under statutory restriction.

A municipal corporation cannot disfranchise a burgess unless it has authority so

to do, either by the express words of the charter, or by prescription. *Bagg's Case*, 11 Coke, 93b.

A return to a mandamus to restore an alderman to an office from which he has been removed by the common council is not good when it does not show a power to remove, vested in the common council. Such a power is incidental to the corporation, but cannot be exercised by a part of the corporation unless it is vested in such part by charter or prescription. *R. v. Doncaster*, Saver, 37.

Mandamus lies to restore to his office a city councilman who has been excluded therefrom by reason of illegal and void proceedings for his recall by the electors, under a special statute enacted in that behalf. *Davenport v. Los Angeles*, 140 Cal. 508, 80 Pac. 684, Beatty, Chief Justice, dissenting.

A writ of mandamus issues to a county commissioner's court to compel it to restore to his office a clerk whom it has removed without complying with the statute authorizing such a removal. *Street v. Gallatin County*, Breesee (Ill.) 25.

Mandamus will issue to restore to his office a clerk of the peace discharged by the session, under the statute 1 Wm. & Mary, chap. 21, without a charge having been made in writing and exhibited against him. *R. v. Evans*, 1 Shower, 282.

Mandamus is the proper remedy to restore to his office one illegally removed from a municipal office of trust and profit, who held it by virtue of a system established by law to maintain a proper civil service. *Thompson v. Troup*, 74 Conn. 121, 49 Atl. 907.

The writ of mandamus lies to restore to his office a subordinate officer removed by his superior unlawfully, whenever the statutory power of removal vested in such superior limits the exercise of the power to specified causes. *Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646.

Inasmuch as the statute of the state of New York (Laws 1892, chap. 571) forbids the removal of veteran volunteer firemen from their positions in the public service held under appointment for indefinite times, except for cause after hearing, such persons, if removed arbitrarily, are entitled to reinstatement by mandamus. *People ex rel. Drake v. Sutton*, 88 Hun, 173, 34 N. Y. Supp. 487.

The statute of New York giving preference of appointment and employment to honorably discharged Union soldiers and sailors upon all public works of the state, provided they possess the necessary capacity to discharge the duties of the position involved (Laws 1887, chap. 464), imposes upon public officers a duty and confers upon veterans a right which may be enforced by mandamus. *Sullivan v. Gilroy*, 55 Hun, 285, 8 N. Y. Supp. 401.

A statute having been adopted in the state of New York (Laws 1896, chap. 821) to the effect that a veteran improperly removed from a state or municipal position shall have a remedy by mandamus for right-

ing the wrong, under this statute a veteran officer or employee of a municipal department, who has been wrongfully removed, is entitled to mandamus, not relegated to an action in the nature of quo warranto to restore him to his place. *People ex rel. Tate v. Dalton*, 158 N. Y. 204, 52 N. E. 1119, affirming 34 App. Div. 6, 53 N. Y. Supp. 1060.

An ordinary laborer employed in the department of public works is within the scope and protection of the statute giving preference in public employment to honorably discharged Union sailors and soldiers, and, if removed from his position in violation of such statute without cause, is entitled to a mandamus to restore him to his place. *Sullivan v. Gilroy*, supra.

A Civil War veteran employed by the city as a laborer, eligible under the civil-service rules for appointment and employment, and competent to perform his duties, wrongfully discharged and refused employment when there is work for his class to be done, may compel his reinstatement by writ of mandamus. *Ransom v. Boston*, 193 Mass. 537, 79 N. E. 823.

When a special statute forbids the removal from his office, except for good cause shown and after a hearing, a veteran of the Civil War, and commands that he be continued therein during good behavior, mandamus will issue to restore to his position an officer discharged in violation of such statute. *State ex rel. Lewis v. Board of Public Works*, 51 N. J. L. 240, 17 Atl. 112.

An honorably discharged soldier of the Civil War, who has been removed from his position in the fire department of the city of New York in violation of the statute giving veterans the preference, is entitled to a mandamus to reinstate him, notwithstanding the place has been filled by the appointment of another incumbent. *People ex rel. Mesick v. Scannell*, 63 App. Div. 243, 71 N. Y. Supp. 383.

A municipal employee who has been arbitrarily and summarily removed because of his political affiliations, and merely to make place for another person, in violation of a statute, is entitled to a writ of mandamus to restore him to his position. *People ex rel. Boyd v. Hertle*, 28 Misc. 37, 60 N. Y. Supp. 23.

Mandamus lies to reinstate in his office an employee in the civil service of a city of the first class, protected by a statute, where, in violation of such statute, he has been summarily and arbitrarily removed without proper reason and an opportunity to be heard. *Truitt v. Philadelphia (Pa.)* 70 Atl. 757.

A chief of police entitled by statute to retain his position during good behavior, subject to the power of the board of police commissioners to remove him at any time for good cause or when the good of the service should be subserved by his removal, cannot be removed arbitrarily without notice and charges or an opportunity to be heard in his defense; and, if so removed, is entitled to a mandamus to restore him to his

office. *Pratt v. Police & Fire Comrs.* 15 Utah, 1, 49 Pac. 747.

A writ of mandamus lies to the head of the police department of a city, commanding him to restore to his office a clerk removed by him in violation of the provision of a statute regulating the civil service of cities, which controls the tenure of office of the clerk thus removed. *Kipley v. Luthardt*, 178 Ill. 525, 53 N. E. 74.

When a city charter and the rules adopted under it forbid the removal of a person employed in clerical work in any department of the city, except for sufficient cause duly shown, mandamus lies to restore a clerk to his position from which he has been removed without any assigned cause and without notice. *Thompson v. Troup*, 74 Conn. 121, 49 Atl. 907.

A writ of mandamus lies to reinstate in his office a medical officer of a city fire department who has been removed by the fire commissioner without charges and opportunity to be heard, in violation of a statute forbidding such removal. *People ex rel. Banta v. Scannell*, 50 App. Div. 625, 63 N. Y. Supp. 985.

One holding a clerical and subordinate position in the municipal service without original, independent, or governmental duties, and who has been removed therefrom without any hearing, in violation of a statute requiring it, is entitled to mandamus to reinstate him, in the absence of evidence that his position was excepted from the operation of the statute, and notwithstanding another person is filling his position under color of right, where such other person has been permitted to intervene and been made a party to the mandamus proceeding. *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, 81 N. E. 453, reversing 116 App. Div. 885, 102 N. Y. Supp. 325.

The writ of mandamus lies to restore to his office a municipal officer who has been removed therefrom without compliance with the statute requiring that in every case of removal true grounds thereof shall be forthwith entered upon the records of the department of the board, and the statement of the reasons filed in the department. *People ex rel. Percival v. Cram*, 50 App. Div. 380, 64 N. Y. Supp. 158, affirming 29 Misc. 359, 61 N. Y. Supp. 858.

But, when a statute gives a public officer power to remove his subordinates upon stating in writing the cause and giving them opportunity to be heard, without further limit upon the power of removal, mandamus will not lie to restore to his position a person removed by such officer if the requirements of the statute have been met. *Porter v. Howland*, 24 Misc. 434, 53 N. Y. Supp. 683.

When the head of a municipal department is vested by statute with power to dismiss for cause any officer of such department, mandamus will not lie to restore to his former position an officer who has been removed therefrom for a stated adequate cause. *State ex rel. Hill v. Fire Comrs.* 26 Ohio St. 24.
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In *R. v. Chester*, 1 Wils. 206, a mandamus was refused to restore a prebendary or canon of the church of Chester to his place and office after he had been removed by the bishop, notwithstanding he was entitled by the foundation statute to be thrice admonished before being deprived of his place. The refusal went upon the ground that the bishop, being the visitor with plenary power in the matter, was not subject to the control of the court, and, the removal having been effected for good cause, mandamus to restore would be useless.

In *R. v. Wrexham*, 5 Ad. & El. 581, a mandamus was granted to restore a discharged clerk to his office who had been removed by the road commissioners in an action where the commissioners had the power by statute to remove their clerks, but could take official action only pursuant to previous notice, which had not been given.

Mandamus lies to restore to his office the collector of poor rates in a parish, who has been dismissed from his office by affirmative vote of but 16 members of a vestry consisting of 80 persons, at a meeting attended by only 35, of whom 11 voted in the negative and the rest of those present remained mute. *R. v. Christchurch*, 7 El. & Bl. 409, affirmed in exchequer chamber 7 El. & Bl. 420.

VIII. Removals for cause.

a. After trial upon charges.

Mandamus will not lie to restore to his office an officer who has been ousted therefrom by the judgment of a court of competent jurisdiction in proceedings in the nature of quo warranto. *Swartz v. Large*, 47 Kan. 306, 27 Pac. 993.

When an officer having possession of an office, whose title thereto has been successfully contested and adjudged void by another claimant in regular legal proceedings instituted for the purpose, is ousted from his position by his successful rival, he cannot be restored thereto by writ of mandamus upon the ground that he had appealed from the judgment against him. *Allen v. Robinson*, 17 Minn. 113, Gil. 90.

A peremptory mandamus for the restoration of an officer will not be granted so long as a judgment for his removal, given by a jurisdiction able to remove him, remains in force. *R. v. Baines*, 2 Ld. Raym. 1265.

After a municipal council has tried a contested election of one of its members, and seated the contestant after ousting the incumbent, mandamus will not lie to restore the latter to office. *Cripple Creek v. People*, 19 Colo. App. 399, 75 Pac. 603.

Mandamus is not an appropriate remedy for reviewing the action of an officer in removing a subordinate. Its function is to command action, and it cannot be used for the correction of errors. *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161, affirmed in 179 N. Y. 525, 71 N. E. 1137.

The judicial action of civil-service commissions in taking a public employee out of

the competitive class in which he was protected from arbitrary discharge by his superior, and transferring the place to a non-competitive class, so as to make him subject to removal at the will of his chief, cannot be attacked upon mandamus to restore him to his place after he has been summarily removed without cause. *People ex rel. O'Toole v. Hamilton*, 98 App. Div. 59, 90 N. Y. Supp. 547.

If a removed officer has been accorded all his substantive rights in the proceedings for his removal, and the wrong alleged as cause for such removal has been substantiated, a mandamus to reinstate him will be refused. *State ex rel. Tanner v. Police Board*, 51 La. Ann. 941, 25 So. 935.

When an officer has been removed from his office after a hearing and an investigation by a body possessing authority to remove him, he has not a remedy by mandamus. *Hartwig v. Manistee*, 134 Mich. 615, 98 N. W. 1067.

Mandamus will not lie to reinstate in his office a member of the police force of a municipal corporation who has been dismissed therefrom upon conviction, after due trial by a proper tribunal, of a violation of the rules of the police department. *State ex rel. Klaue v. Barrett*, 22 Ohio C. C. 104; *State ex rel. McKenzie v. Hyman*, 22 Ohio C. C. 213.

If a pilot has been removed from his position by the commissioners of pilotage of his port for dereliction of duty or violation of rules affording an adequate cause for his removal, if established as a fact, he cannot be restored thereto by mandamus where the commissioners have in good faith and upon evidence found the fact against him. *State ex rel. Stephens v. Pilotage Comrs.* 23 S. C. 175; *State ex rel. McDonald v. Courtenay*, 23 S. C. 180.

Mandamus will not lie to restore to the office of Burgess of a municipal corporation one who has been removed for cause after having been heard in his defense, when the power of removal is vested in the corporation. *R. v. Wilton*, 5 Mod. 257.

The remedy of an officer who has been removed from his office after notice and a hearing upon the trial of charges found substantiated is certiorari to review the proceedings, and not mandamus. *People ex rel. Grace v. Police Comrs.* 43 How. Pr. 385, affirming 12 Abb. Pr. (N.S.) 181; *People ex rel. Segree v. Hayes*, 106 App. Div. 563, 94 N. Y. Supp. 754; *People ex rel. Hanrahan v. McAdoo*, 110 App. Div. 894, 96 N. Y. Supp. 1069; *Elder v. Bingham*, 118 App. Div. 25, 103 N. Y. Supp. 617.

Mandamus will not lie to restore an alderman to his office, where he has been removed for proper cause and after hearing, notwithstanding the municipal charter confers in express terms no power upon the corporation which has removed him, provided the exercise of such power is not forbidden, and ever was one of the ancient privileges exercised by the corporation before the 19 L.R.A. (N.S.)

granting of the charter. *Haddock's Case*, T. Raym. 435.

Suspension of a pilot by the Massachusetts pilot commissioners from his office as pilot, followed by his removal by the trustees of the Boston Marine Society after notice and opportunity to be heard, cannot be reviewed by the courts upon mandamus. *Lunt v. Davison*, 104 Mass. 498.

A mandamus to restore an officer of the city of New Orleans to his position after he had been removed upon charges followed by notice and hearing will not be awarded unless the proceedings show that the removal was a nullity, unsupported by any evidence whatever. *State ex rel. Tanner v. Police Board*, 51 La. Ann. 941, 25 So. 935.

But, when proceedings to remove a statutory officer take the form of a nominal trial upon charges, but are subversive of the rights of accused in that the charges are not specific, the witnesses in support of them are not examined on oath, and the accused is given no opportunity to be heard in his defense, mandamus will lie to restore the accused to his office in case of his removal. *Geter v. Tobacco Inspection Comrs.* 1 Bay, 354, 1 Am. Dec. 621; *Singleton v. Charleston Tobacco Inspection Comrs.* 2 Bay, 105.

A mandamus will not lie to restore a Burgess to his office who has been removed for misbehavior after he has had opportunity to be and has been heard, simply upon the ground that he was not summoned, because the end of the summons is only that he may be heard. *R. v. Wilton*, 2 Salk. 428, s. c. sub nom. *R. v. Chalke*, 1 Ld. Raym. 225.

b. Adequate causes.

1. Failure to qualify.

Mandamus will not lie to restore an alderman who has been removed from his office for failure to subscribe the statutory oath, although the return does not show that it had been tendered to him for subscription. *R. v. Thacker, T. Jones*, 121.

A mandamus will not lie to restore a Burgess who has been removed for not taking the oath and declaration required by the act of corporations. 13 Car. II.; *R. v. Phillingham*, 1 Keble, 777.

The statute of 1 Wm. & Mary, sess. 2, chap. 8, § 6, which enacted that, if any person then having any office should neglect to take the oath therein prescribed before the 1st of August then next ensuing, the said office should be void, works a forfeiture *ex proprio vigore*; and therefore an alderman of the city of London excluded from his office because he had neglected to take the statutory oaths within the time limited is not entitled to a mandamus to restore him to office. *Smith's Case*, 4 Mod. 53.

An alderman who has been excluded from his office when duly elected because he failed to qualify by taking the oath and subscribing the declaration cannot be restored by mandamus, for the election, *ipso facto*, becomes void. *R. v. Sanchar*, 2 Shower, 66.

2. Desertion.

Restoration to an office voluntarily abandoned cannot be had by mandamus. *Eastman v. Householder*, 54 Kan. 63, 37 Pac. 989.

An alderman who has been removed from his office for nonresidence, absenteeism, is not entitled to a mandamus to restore him, where an act of absence is definitely established. *R. v. Shrewsbury*, 2 Barnard, K. B. 394.

A burgess who has been removed from his office because he has ceased to be an inhabitant himself cannot be restored by mandamus. *R. v. Truebody*, 11 Mod. 75.

When a municipal charter requires that an alderman be both a citizen and an inhabitant of the municipality, a mandamus will not lie to restore to his office an alderman returned as having been removed therefrom because he had become a resident and an inhabitant elsewhere. *Exeter v. Glide*, 4 Mod. 33; *R. v. Shrewsbury*, 7 Mod. 201.

An alderman cannot be removed from his office upon the ground that he has become a nonresident of his borough simply because he has taken his family and gone elsewhere to reside temporarily for a few months. If removed for such reason, he is entitled to mandamus to restore him. *R. v. Leicester*, 4 Burr. 2087.

Mere residence in contiguous territory, of an alderman of a municipal corporation, is not a good cause for removing him from his office on the ground of desertion, or absenteeism, or nonresidence, when it appears that he actually attended to the duties of his office, and that other corporate officers frequently resided a few miles beyond the corporate limits. *R. v. Doncaster*, Sayer, 37.

A single absence of a public officer from his duty is not such a desertion as entitles a corporation to remove him. *R. v. Wells*, 4 Burr. 1999.

Where a school director's original title to his seat under a valid election is not contested, and the only question is as to the illegality of his ouster for alleged wilful absence from meetings of the board, his remedy to reseal him and prevent his further exclusion is mandamus. *Com. ex rel. O'Brien v. Gibbons*, 196 Pa. 97, 46 Atl. 313. And this is so even though a successor has been appointed and admitted to the seat by the other directors.

Mandamus lies to restore to the office of sword bearer a person illegally removed therefrom for absence and nonattendance. *R. v. Bristol*, 1 Shower, 288.

3. Resignation.

Mandamus will not lie to restore an officer who has been removed from his office pursuant to his own request. *R. v. Tidderley*, Sid. pt. 1, p. 14.

A police officer who has resigned under duress, and whose resignation has been accepted by the head office department, and who afterwards withdraws his resignation and demands reinstatement, which is refused, is not entitled to a mandamus to re-

store him to office. *People ex rel. Goodwin v. MacLean*, 62 Hun, 42, 16 N. Y. Supp. 401.

When, by statute, a police department of a city has been superseded and reorganized, and the policemen in actual service continue, as policemen under the new régime, and such statute forbids the removal of policemen except upon charges and hearing, mandamus lies to reinstate a member of the old police force in his place in the new department where he has been summarily removed without charges or hearing, provided his conduct prior to his exclusion did not legally amount to a voluntary resignation. *People ex rel. Gorman v. Board of Police*, 35 Barb. 527; *People ex rel. Titus v. Board of Police*, 35 Barb. 535; *People ex rel. Dunn v. Board of Police*, 35 Barb. 544; *People ex rel. Hanrahan v. Board of Police*, 35 Barb. 651.

A mandamus lies to restore to his office a burgess who has been removed therefrom for writing a libel, and who is alleged to have consented to be turned out, because the corporation has no power to try a case of libel, and a parol consent is too indefinite and uncertain. *R. v. Lane*, 11 Mod. 270, 2 Ld. Raym. 1304.

In *R. v. Lane*, supra, a mandamus was directed to the mayor, aldermen, and common council of Gloucester to restore Lane to the place of capital burgess, and it was returned that Lane had written a libelous letter to an aldermen, and, upon being charged therewith, he consented to be turned out; objections were made to this return as not good in that it should have been returned that Lane had resigned his office, and that his resignation had been accepted. Mr. Justice Powell held that a resignation might be made by parol, but that the return should have been more certain; and, according to this report, a peremptory mandamus was granted *per curiam*. The case is also reported somewhat differently in *Fortescue*, 275.

In the case of *Verrior v. Sandwich*, Sid. pt. 1, p. 305, the court, without, however, so deciding, was of the opinion that a return that the town clerk who sought restoration to his office by mandamus had been elected mayor was good, and that the acceptance of the office of mayor was in effect a resignation of that of town clerk.

4. Causes involving moral turpitude.

A return to a mandamus to restore one to the office of capital citizen of a municipality who was removed after hearing upon a charge of bribery is sufficient to prevent the issue of the writ, notwithstanding the charge is of an offense indictable at common law, upon which no conviction has been had, because it is also an offense against the duty of the office over which the corporation has jurisdiction. *R. v. Carlisle*, *Fortescue*, 200.

In *R. v. Chalk*, Comb. 396, Chief Justice Holt remarked, upon an application for a mandamus to restore a burgess to his office who had been removed upon the charge of

falsifying the court records, that, if a man be guilty of perjury, forgery, etc., he is not to be removed before conviction; but the raising of the corporation book is not an offense at common law, but one against the duty of the place. Although he did not then deny the application, but adjourned the case for further consideration.

Whether a burgess who has committed an offense indictable at law and a breach of his official oath and duty can be disfranchised before conviction of the indictable offense, Lord Hardwicke, in *R. v. Derby*, Cas. t. Hardw. 153, did not deem it necessary to decide; but he was of the opinion that the burgess, in such a case, might be disfranchised for acts which amounted to a breach of his oath and duty, and therefore held that a return to a mandamus to restore a burgess removed under such circumstances was good.

In *R. v. Taylor*, 3 Salk. 231, a mandamus was granted to restore to his place an alderman of the city of Gloucester, who had been removed by the common council upon the ground that he was a common drunkard, because the court was of the opinion that the return was insufficient, not because the charge did not warrant removal, for the court thought it did, but because it did not appear that the common council, at the time of the removal, had been convened for official business. Afterwards, it is reported, the question was, whether the corporation might proceed *de novo* to remove the restored officer for drunkenness, and the court held that it might.

5. Unfitness, unfaithfulness, and incompetency.

If the applicant for a writ of mandamus to restore him to office appears to be under a disability to hold the office, the writ must be denied. *R. v. Bristol*, 1 Shower, 288.

Mandamus will not lie to restore to his office an officer who has been removed therefrom, when it clearly appears that he has become disqualified from holding such office. *Bunting v. Willis*, 27 Gratt. 144, 21 Am. Rep. 338.

When an applicant for a writ of mandamus to reinstate him in an office from which he has been summarily removed is unfit for the position, the writ of mandamus will not issue regardless of the question of the legality of his removal. *McQueen v. Detroit*, 116 Mich. 90, 74 N. W. 387.

Mandamus will not lie to restore to office a veteran soldier of the Union Army entitled to preference, when the return showed that he had been removed for negligence and incompetency in the discharge of his duty. *People ex rel. Connor v. Brookfield*, 2 App. Div. 299, 37 N. Y. Supp. 718.

A mandamus will not be granted to restore an officer to his office when illegally removed, when it appears upon his own showing that there was good ground for displacing him if the proceedings had been regular. *R. v. London*, 2 T. R. 177.

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6. Original ineligibility.

As to whether the removal of an officer upon the ground that he was ineligible when he took office requires the denial of a mandamus to restore him, the courts are not agreed.

Mandamus will not lie to restore a Burgess of a corporation to his office when he has been excluded therefrom upon the ground that he was disqualified by statute when elected. *R. v. Aldborough*, 10 Mod. 100.

If it appears, upon the application for a writ of mandamus to restore to office one alleged to have been illegally removed, that the applicant was ineligible, the writ cannot be granted. *People ex rel. Lane v. Lindblom*, 215 Ill. 58, 74 N. E. 73.

To entitle a removed officer to a writ of mandamus to restore him to office, he is bound affirmatively to show that he was eligible and had a constitutional right to exercise the duties of the office. *Spencer County Ct. Justices v. Harcourt*, 4 Mon. 499; *Jefferson County Ct. Justices v. Clark*, 1 T. B. Mon. 82.

Although an officer may have been unlawfully removed from the office which he was *de facto* holding, mandamus will not issue to reinstate him if he had no constitutional or legal right to hold the office in the first place. *Spencer County Ct. Justices v. Harcourt*, supra.

It is no answer to an application to restore to his office a city alderman who has been removed by the city council, and has petitioned for a mandamus to reinstate him, that he was ineligible or disqualified from holding such office; since that is a question which the council has no power or jurisdiction to decide. *Doran v. DeLong*, 48 Mich. 552, 12 N. W. 848.

A municipal board of aldermen has not the power, by summary resolution, to deprive one of its members of his seat on the ground that he was ineligible when elected. *Ellison v. Raleigh*, 89 N. C. 125.

Mandamus lies to restore to his office a state's attorney whose office has been summarily declared vacant by the board of county commissioners of his county on the ground that he was ineligible, when he had been in fact discharging the duties of the office for more than a year without question; since his right to hold the office in such case can properly be determined only by quo warranto in a court of competent jurisdiction. *Howard v. Burns*, 14 S. D. 383, 85 N. W. 920.

It is not a sufficient answer to an application for a mandamus to reinstate in his position an unlawfully removed public-school teacher that the question of the legality of his original appointment is in litigation in a pending suit in equity. *Morley v. Power*, 5 Lea, 691.

It is not a good return to a mandamus for restoring an officer to his office after he has been removed therefrom, to say that he was incapable of being elected in the first place. The proper way of trying that question is by an information in the nature of quo warranto. *R. v. Doncaster, Sayer*, 37.

It is no answer to an application by an illegally removed officer for a mandamus to restore him, that the person or body against whom the writ is to run had not the power to appoint him to such office in the first instance. *State ex rel. Gill v. Watertown*, 9 Wis. 254.

c. Abolition of the office.

Mandamus will not lie to reinstate a removed officer in his office where the office itself has in good faith been abolished, notwithstanding the writ would have been granted in case of the continued existence of the office. *People ex rel. Corrigan v. Brooklyn*, 149 N. Y. 215, 43 N. E. 554, reversing 91 Hun, 308, 36 N. Y. Supp. 172.

Mandamus will be refused to restore to his office a municipal officer who has been removed therefrom, when the return to the application for the writ avers that the position has been abolished, and nothing appears to impeach the good faith of the respondent in abolishing the office. *People ex rel. Linnekin v. Ennis*, 18 App. Div. 412, 46 N. Y. Supp. 444.

If an office is actually abolished in good faith, one who has occupied it previous to such abolition is not entitled to a mandamus to restore him thereto. *Re Kelly*, 42 App. Div. 283, 59 N. Y. Supp. 30.

The statute prohibiting the removal of persons from the public service unless for a cause shown and after a hearing has no application where the position occupied has in good faith and for sufficient economic reasons been abolished; and therefore mandamus will not lie to restore to his position an officer removed from a place that has been abolished in good faith. *People ex rel. Sweeney v. York*, 43 App. Div. 444, 60 N. Y. Supp. 208.

Mandamus will not issue to restore to his office an officer who has been ousted therefrom in consequence of the abolition in good faith, for reasons of economy, of such office. *People ex rel. Croft v. Keating*, 94 App. Div. 123, 63 N. Y. Supp. 71.

The abolition of an office, made in good faith, *ipso facto* lawfully removes the incumbent thereof from his office, and he is not entitled to a writ of mandamus to restore him thereto. *People ex rel. Levenson v. Wells*, 78 App. Div. 373, 79 N. Y. Supp. 728.

Mandamus will not lie to reinstate a public employee in his employment when the position he occupied has been abolished in good faith. *Re Porter*, 24 Misc. 434, 53 N. Y. Supp. 683.

When a position to which a removed officer seeks reinstatement by mandamus has been abolished in good faith in the public interest, mandamus will be refused to restore him. *People ex rel. O'Donnell v. Bermel*, 51 Misc. 75, 100 N. Y. Supp. 728.

When an office is abolished in good faith by the power which created it, an incumbent at the time of its abolition, ousted because thereof, is not entitled to a mandamus to re-

instate him. *Silvey v. Boyle*, 20 Utah, 205, 57 Pac. 880.

A municipal employee discharged solely on the ground of economy in public service, in good faith, is not entitled to mandamus to restore him to his position. *People ex rel. Patten v. Waring*, 62 N. Y. Supp. 966.

In case an office or a position of employment has been abolished, and, in consequence, the incumbent thereof has been removed, mandamus will not lie to admit him to the new office created in its place, with different, if similar, duties attached to it. *Re Donovan*, 89 App. Div. 50, 85 N. Y. Supp. 406.

After the abolition of an office in the civil service has been made in good faith, the creation of a different position, requiring similar duties, left unfilled, does not entitle the person ousted from the original position to a writ of mandamus requiring his appointment to the new place, without preliminary proof that it is necessary to have the service of somebody in the new position. *Re Morrison*, 75 App. Div. 480, 78 N. Y. Supp. 385, affirmed in 173 N. Y. 646, 66 N. E. 1112.

Under a statute requiring the transfer upon the same compensation, of a veteran of the Civil War to another position in the department in which he has been employed when, for reasons of economy, his position has been abolished, a writ of mandamus will not lie to compel the reinstatement of a veteran, unless a vacancy exists elsewhere in such department. *Re Breckenridge*, 160 N. Y. 103, 54 N. E. 670.

While abolition, made in good faith, of an office, is sufficient to prevent the issue of a writ of mandamus to reinstate an officer removed because of such abolition, yet, the alleged abolition of the office is a mere pretense and a colorable method for the appointment of someone else, mandamus properly issued to restore the removed officer. *People ex rel. Hart v. LaGrange*, App. Div. 311, 40 N. Y. Supp. 1026.

If an office has been abolished in bad faith, and merely as a pretext to get rid of its incumbent and appoint another in his stead to the same duties under a different name, mandamus will lie to restore him. *Re Jones*, 80 App. Div. 167, 80 N. Y. Supp. 420.

The abolition in bad faith of a municipal office, resorted to as a mere pretense to effect an arbitrary removal of the incumbent and to confer his office upon another, is no answer to an application for restoration of the functions and emoluments of such office. *Silvey v. Boyle*, 20 Utah, 205, 57 Pac. 88.

If an officer is excluded from office in bad faith, and a mere pretended or colorable election of a successor is made, so that it can be said that the removal and appointment of a successor are void, mandamus will lie to restore the former officer. *R. v. Oxford*, Ad. & El. 349.

The rule requiring a veteran who has been unlawfully removed from the municipal civil service in violation of his privileges and rights, to bring to the notice

the removing officer, and to demand reinstatement on the ground, that he is a veteran, before applying for a writ of mandamus to reinstate him, does not apply where the office was abolished in bad faith for the sole purpose of making a place for another. *People ex rel. Bean v. Clausen*, 50 App. Div. 324, 63 N. Y. Supp. 1064.

But it has been held in one case that notwithstanding it is made to appear upon the trial of an alternative writ of mandamus to restore an officer of the city fire department who has been removed without cause, that the removal was unlawful and accomplished by means of a pretended abolition of the office and the colorable appointment of two other persons to discharge the same duties under another name, and not made in the interest of public economy, but, on the contrary, at an increased public cost, a mandamus will not lie to reinstate a removed officer; his only remedy is quo warranto against his successor. *People ex rel. Lazarus v. Sheehan*, 128 App. Div. 143, 113 N. Y. Supp. 230.

d. Insufficient causes.

A mandamus lies to restore freemen to their franchise of which they have been deprived, contrary to ancient custom, without just cause. *The Protector, Style*, 477.

A writ of mandamus issues to direct a municipal corporation to receive and restore to his functions an expelled officer who has been removed without sufficient cause. *State ex rel. Denis v. Shakspeare*, 43 La. Ann. 92, 8 So. 893.

Mandamus lies to restore to his office an officer holding for a fixed and definite term, who has been arbitrarily removed from his office without cause, when there is no statute justifying such removal. *Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646; *Field v. Malster*, 88 Md. 691, 41 Atl. 1087.

When a member of a municipal board of aldermen has been summarily unseated without warrant of law by the action of the board, and no successor has been seated in his place, but the office remains vacant, mandamus is the proper remedy to reinstate him in his office. *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677.

Mandamus lies to restore a member of the common council who has been expelled from his office without a special cause. *R. v. Liverpool*, 2 Burr. 723.

Mandamus lies to restore a common councilman to his office when he has been removed therefrom without sufficient cause. *Earle's Case*, Carth. 173.

Mandamus lies to restore a recorder to his office when he has been removed for an insufficient cause. *R. v. Wells*, 4 Burr. 1999.

Mandamus lies to restore an alderman to his office from which he has been removed without adequate cause. *R. v. Brecknock*, 1 Keble. 33.

A return to a mandamus to restore a jurate, that the corporation had power to elect jurates for their lives if they thought

it expedient, and that they had elected the applicant, and afterwards deemed it expedient to displace him, which they did, is insufficient. *Anonymous*, 1 Lev. 148; *Crips v. Maidstone*, 1 Keble. 812.

In *Kid v. Watkinson*, 11 Mod. 221, and *R. v. Wall*, 11 Mod. 261, a mandamus was granted to restore to his office a parish clerk who had been removed without cause by the priest, on the ground that he was elected by the parishioners, and not simply employed by the parson.

Upon application for a writ of mandamus to restore to his office an officer alleged to have been illegally removed, the court has the power, and it is its duty, to look into the whole case, including the testimony, to ascertain whether or not injustice has been done. *State ex rel. Donnelly v. Teasdale*, 21 Fla. 652.

When a statute organizing a municipal board of education continues schools theretofore in existence, and the teachers in such schools in service until removed in the manner provided by law, a teacher who is discharged by the incoming board because of an insufficient number of pupils in attendance at the school in which she teaches is entitled to a writ of mandamus to reinstate her. *People ex rel. Stanley v. Van Siclen*, 43 Hun, 537.

It is a rule of common law, in accordance with the plainest principles of justice, it was said in *Morley v. Power*, 5 Lea, 691, that, to warrant the removal of an official under a limited power, specific charges should be made; and, after notice, all witnesses in the matter should be sworn. This case was approved and followed on this point in *Butcher v. Charles*, 95 Tenn. 532, 32 S. W. 631.

A power given to remove a public officer for misconduct can be exercised only in cases of misconduct connected with the discharge of the duties of the office, and does not justify the removal from office for an offense against law or matters in no wise connected with official dealing. *Johnson v. Galveston*, 11 Tex. Civ. App. 469, 33 S. W. 150.

Mandamus lies to restore to his seat as a member of the board of supervisors a person duly elected thereto and having a clear legal right to the office at the time of his election, who has been unseated for the alleged reason that, by statute, a change has been made in the boundaries of the district represented by members of the board, which has had the effect to throw him out of residence in the district which he represents. *State ex rel. Gill v. Milwaukee County*, 21 Wis. 443.

A return of no record of election is insufficient to prevent the issuance of mandamus to restore a removed officer to his office. *Basset v. Barnestable*, Sid. pt. 1, p. 286.

A return to a mandamus to restore a burgess to his office, which merely states in conclusion that he was not duly elected, admitted, and sworn, is bad, and will not prevent the issue of the writ. *R. v. Lyme Regis*, 1 Dougl. K. B. 79.

In *R. v. Liverpool*, 2 Burr. 723, Lord Mansfield and his colleagues, upon an application for a mandamus to restore a member of the common council to his office who had been removed because he had become a bankrupt, held that the reason given was insufficient to disfranchise him, notwithstanding the common council had a trust and power over the revenues of the corporation.

The conduct of a public officer, wholly unconnected with his duties, however reprehensible it may be, if not amounting to a public offense, does not justify removal from office. *R. v. Wells*, 4 Burr. 1999; *Bagg's Case*, 11 Coke, 93b.

In *Clerk's Case*, Cro. Jac. 506, mandamus issued to restore to his office a churchwarden and burgess who had been expelled for having maliciously and causelessly presented one of the burgesses for being absent from the perambulation, and, upon being rebuked by the mayor, had spoken contemptuously, which the court held to be no cause for expulsion.

Mandamus lies to restore a burgess to his office from which he has been removed for an alleged offense unconnected with the duties of his office, but triable at common law, where he has not been convicted. *R. v. Gloucester*, Holt, 450; same ruling was made in *London and Estwick*, Style, 32, 42.

In *R. and Boulton*, 3 Keble, 464, mandamus was granted to restore Sir William Boulton to the place of governor of Bridewell upon an insufficient return by the city of London that the mayor and colleagues had removed him for not accounting for £1,000. The counsel of Sir William objected to the sufficiency of the return, first, that the city had no power to turn out any governor, either by grant or prescription; second, that the receipt of divers sums of money making in the aggregate £1,000 was too general a charge.

In *R. and Jay*, 3 Keble, 714, it was quaintly said that Offly excepted to a mandamus for Aye for alderman, returned that the defendant said Bailiff Flower is a knave, and ought to be posted for a knave all over the country; that no words are sufficient to disfranchise, and prayed restitution. Twisden, J., said oath cannot be imposed by by-law; also it is not said wherein he was a knave, but as to another, that is returned to have resigned, there can be no restitution, and the case was adjourned; afterwards he was restored.

Mandamus lies to restore to his office of burgess one who has been disfranchised for no other cause than preventing a corporation from collecting tolls claimed to be due by prescriptive right. *R. v. Vicars*, 11 Mod. 214.

In *R. v. Shaw*, 12 Mod. 113, a mandamus was granted to restore to his office one of the burgesses of Wilton because the offense for which he had been removed was not well alleged in the return.

To warrant the removal from his office of a public officer for misconduct, the charge must relate to some misfeasance or mal-

feasance in the action of his office, except after conviction of a common-law offense. *R. v. Baines*, 2 Ld. Raym. 1265.

A chamberlain of a corporation cannot be removed from his office as capital burgess for misconduct in the office of chamberlain; and, if this is done, a mandamus lies to restore him. *R. v. Doncaster*, 2 Ld. Raym. 1564.

In *Middleton's Case*, 3 Dyer, 332b, a mandamus was granted to restore a citizen of London who had been disfranchised for refusing to abide the award of two of the aldermen in the court of common pleas.

A member of a board of county commissioners who has been unlawfully unseated upon a mistaken ground is entitled to mandamus to restore him to his seat. *Gra v. Beadle County* (S. D.) 110 N. W. 36.

In the case of *R. v. Pomfret*, 10 Mod. 10, mandamus was granted to restore to his office a burgess who had been expelled therefrom because of inconsistency and repugnancy in the return to the application for the writ in alleging, first, that he had been expelled as an absentee after due election and qualification; and, second, that he was not qualified when elected. Apparently either reason would have been sufficient, standing alone, to prevent the writ, but the two were deemed to nullify each other.

If the return had simply alleged a *facto* election and want of eligibility, it would have been sufficient to prevent the mandamus. *R. v. Buckingham*, 10 Mod. 17.

IX. Arbitrary removals without cause

A removal of a burgess from his freehold by a corporation without a hearing is bad. *Bagg's Case*, 11 Coke, 93b.

Mandamus lies to restore a recorder to his place when he has been removed therefrom upon charges which he has had opportunity to hear and defend. *The Protector*, Style, 447.

Mandamus lies to compel the restoration of a public officer to his office, where he has been summarily removed therefrom without authority of law, and has a clear legal right thereto. *Geter v. Tobacco Inspection Comrs.* 1 Bay, 354, 1 Am. Dec. 621; *Sington v. Charleston Tobacco Inspection Comrs.* 2 Bay, 106.

A writ of mandamus will issue to restore to his office a member of a city council who has been expelled by his fellow members unlawfully and without sufficient cause, notice, and hearing. *State ex rel. McMal v. New Orleans*, 107 La. 632, 32 So. 22.

Mandamus is the proper remedy to restore to his office the superintendent of a state insane asylum arbitrarily and wrongfully removed without cause, before the expiration of his term of office, by the state board of trustees. *Eastman v. Householder*, 54 Kan. 63, 37 Pac. 989.

Unless he is protected by some statutory forbidding his summary removal, mandamus will not lie to reinstate a municipal employee in a position from which he has been arbitrarily discharged. *People ex rel. Mc*

ales v. Ahearn, 111 App. Div. 741, 98 N. Y. Supp. 492.

When, in violation of a statute, a duly appointed subordinate municipal officer has been wrongfully removed without hearing or charges, and his position has not been filled, he is entitled to a writ of mandamus to compel his reinstatement. *People ex rel. Coveney v. Kearney*, 44 App. Div. 440, 61 N. Y. Supp. 41, affirmed in 161 N. Y. 648, 57 N. E. 1121, on opinion below.

When, by the terms of a municipal charter, power is vested in a board of fire commissioners to appoint firemen, provided the annual expenses of the fire department shall not exceed a certain sum, a fireman who has been appointed to his office by such board, and subsequently arbitrarily removed by its successor in office, is entitled to a mandamus to restore him thereto, unless it affirmatively appears that the limit upon the expenses of the department was unlawfully exceeded at the time of his appointment. *People ex rel. Gleason v. Scannell*, 172 N. Y. 316, 65 N. E. 165, affirming 69 App. Div. 400, 75 N. Y. Supp. 122.

A person holding a subordinate position in a department of the New York city government, who has been discharged in violation of law without charges or a hearing, has a remedy for his reinstatement in the writ of mandamus. *People ex rel. Segee v. Hayes*, 106 App. Div. 563, 94 N. Y. Supp. 754.

The mere fact that a municipal employee was not appointed for a definite term, or that the statute under which he was appointed has not fixed a definite term, does not authorize his summary removal at the discretion of the head of his department without notice or charges. *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, 81 N. E. 453, reversing 116 App. Div. 885, 102 N. Y. Supp. 325.

X. Depositions without removal.

a. Suspensions.

It appears to be the view of the English judges, when an officer has been merely suspended from duty, but not removed from office, that mandamus does not lie to restore him to the active exercise and discharge of his official powers and duties. But the American courts hold otherwise.

When an officer is prevented from discharging his official duties, but not removed from his office, mandamus is not necessary or proper to restore him to office, for the reason he has never been displaced. *R. v. Oxford*, 6 Ad. & El. 349.

A mandamus will not lie to restore a common councilman to his privilege of precedence, he not having been removed from his office. *R. v. Tyther*, 2 Keble, 250.

In *R. v. Guilford*, 1 Lev. 162, an application for a mandamus to restore an approved man who had been suspended by the mayor and aldermen after hearing, it was debated among the members of the court whether a mandamus would lie to restore when there

had been a mere suspension without a removal. Chief Justice Hyde and Justice Kelynge were of the opinion that a mandamus does not lie for the suspending, for the freehold still remains; Twysden, J., was of the contrary opinion, holding that the suspension was a temporary amotion, and may never be terminated; but, as Justice Wyndham was absent, no conclusion was reached. 1 Keble, 868.

The suspension or removal from office warrants the granting of a writ of mandamus to restore the suspended officer to his office. *Ex parte Wiley*, 54 Ala. 226.

Mandamus lies in any case to restore a suspended officer to his office where it would be the proper remedy to restore him if removed. And it is the proper remedy to restore him to office when he has been illegally suspended while in actual possession of it under an undisputed right. *Metsker v. Neally*, 41 Kan. 122, 13 Am. St. Rep. 269, 21 Pac. 206.

Mandamus lies to reinstate in his office an officer who has been suspended without authority of law. *State ex rel. Tyrrell v. Jersey City*, 25 N. J. L. 536; *Re Croker*, 175 N. Y. 158, 67 N. E. 307.

The general rule is that a person having an uncontested title to a public office, or an undisputed right to exercise the function of the public office, if illegally ousted or suspended from the performance of his duties, may be restored to his rights or office by a writ of mandamus. *Terrell v. Greene*, 88 Tex. 539, 31 S. W. 631.

"It has not been seriously questioned," said the court in *State ex rel. Tyrrell v. Jersey City*, *supra*, in its opinion granting a writ of mandamus to restore a suspended alderman to the exercise of all his legal and official rights, "that a mandamus is the appropriate remedy in a case like this. The books are full of authorities in support of it."

Although mandamus will not be awarded to try a disputed title to an office, it is well settled, said the court in *Ex parte Lusk*, 82 Ala. 519, 2 So. 140, that it is an appropriate remedy to compel the restoration of a rightful incumbent who has been wrongfully deprived of the enjoyment of his office by removal or suspension.

The reason given in *Ex parte Wiley*, 54 Ala. 226, why a writ of mandamus will lie to restore to office an officer who has been suspended therefrom illegally, is because, while a suspension is temporary, he may, under the pretense of repeated suspensions, be excluded altogether from office.

The legislature has plenary power, by statute, to require the suspension from office of an officer under indictment for a penal offense; and mandamus will not lie to vacate such suspension on the ground of the unconstitutionality of such a statute with respect of a constitutional elective office. *Ex parte Wiley* and *Ex parte Lusk*, *supra*.

Mandamus will not be awarded to restore to his office a suspended officer on the ground that he has not been given notice

and a hearing upon charges to which the statute entitles him, when, pending application for the writ, the suspension has been followed by a trial upon due notice, and a removal by the authority having jurisdiction of the case. *State ex rel. Julian v. Metropolitan Police Comrs. (Ind.)* 83 N. E. 83.

It was decided by the appellate division of the New York supreme court in the case of *Re Croker*, 78 App. Div. 184, 79 N. Y. Supp. 640, that the chief of a municipal fire department who had been granted a leave of absence from duty upon his own request for a stated period upon the ground that his health required that he take a rest for that length of time, and who had prematurely returned to duty and had been directed by the head of the fire department to continue his vacation, and had refused to do so, whereupon he had been suspended, was not entitled to a writ of mandamus to restore him to active duty.

From this decision the suspended officer appealed to the court of appeals, and, upon such appeal, that court was of the opinion that it was error to refuse the writ in such a case because the relator had been invested by statute with certain independent official rights and duties that were not subject to control by the head of the fire department. The court of appeals was of the opinion that, while the head of the department had discretionary power to direct the manner in which the relator should discharge his official duties, and also had discretionary power to suspend him for disobedience generally, he could not prevent the relator from exercising the powers and discharging the duties which had been conferred or laid upon him directly by statute. But, inasmuch as it appeared that the relator had afterwards been charged with dereliction of duty, had been heard in his defense, and had been removed from his office after a trial, there was no practical question to be decided, and he had no right capable of enforcement by mandamus in the then pending proceeding, and consequently the appeal had to be dismissed. 175 N. Y. 158, 67 N. E. 307.

b. Retirements on pension.

A policeman retired from duty by the commissioner of police, and put upon the pension roll upon certification by a surgeon of his permanent disability and unfitness for duty, is not entitled to mandamus to replace him upon the alleged ground that the certificate was untrue in fact. *People ex rel. Price v. Bingham*, 125 App. Div. 722, 110 N. Y. Supp. 136.

The proceeding under the statute (Laws 1894, chap. 708) by which a fireman of the city of Brooklyn is put upon the pension roll of fire insurance by order of the commissioner of the fire department is not a removal, and therefore does not require a public trial. *People ex rel. Shea v. Bryant*, 28 App. Div. 480, 51 N. Y. Supp. 119. 19 L.R.A. (N.S.)

c. Transfers

A municipal officer transferred to another department of the municipal service upon the consolidation of the municipality with other municipalities under one general government and in pursuance of the general plan adopted according to law cannot be said to have been unlawfully removed from office; and therefore is not entitled to a mandamus to reinstate him in his old position. *People ex rel. Percival v. Cram*, 32 App. Div. 414, 53 N. Y. Supp. 110, affirmed in opinion below in 158 N. Y. 666, 52 N. E. 1125.

d. Reductions in rank.

A policeman reduced in rank by his superior is not entitled to a mandamus to restore him thereto upon the ground that his degradation was an arbitrary and summary action without notice or hearing, in the absence of some statute covering his case, which protected him against reduction. *People ex rel. Kisselberg v. Chicago*, 104 Ill. App. 2d affirmed in 210 Ill. 479, 71 N. E. 400.

Mandamus lies to restore a policeman to the position and rank he formerly held when he has been summarily degraded in rank without charges or hearing. *Re Steden*, 174 N. Y. 87, 66 N. E. 655, reversing 78 App. Div. 644, 80 N. Y. Supp. 1149.

When, upon an application for a writ of mandamus to restore to his former rank an officer who has been reduced in grade, prima facie case is made out showing action to have been illegal and violative of the applicant's rights, it is error to deny the application *in toto*, and to refuse an alternative writ of mandamus to try the issue of fact in dispute. *Shepard v. Oakley*, 1 N. Y. 339, 74 N. E. 227, reversing 102 App. Div. 617.

Delay in applying for a writ of mandamus to compel the restoration of a municipal employee to the rank and grade in his department in which he has been reduced in violation of law is sufficiently excused when it appears that at the time of and since reduction the question of the legality of his degradation has been in dispute in courts, and conflicting decisions there made; and that the application has been made peremptory following the final settlement of the conflict by the decision of the court of last resort. *People ex rel. Strahan Feitner*, 49 App. Div. 101, 63 N. Y. Supp. 209, affirming 29 Misc. 702, 62 N. Y. Supp. 969.

XI. When term of office has expired

A writ of mandamus will not lie to restore an officer to office after expiration of the term of such office. *Woodbury v. Cou Comrs.* 40 Me. 304; *State ex rel. Good v. Police Comrs.* 80 Mo. App. 206, affirming 184 Mo. 109, 71 S. W. 215; *Colvard v. Graham County*, 95 N. C. 515; *Durham Case*, Sid. pt. 1, p. 33.

Mandamus will not lie to compel the instatement of a wrongfully discharged

lic school-teacher after the expiration of the term for which he was appointed and to which his contract entitles him. *Fuller v. Brown*, 10 Tex. Civ. App. 64, 30 S. W. 506.

A public officer appointed on probation for a probationary period of a limited term is not entitled to a mandamus to continue him in office after the expiration of the probationary period. *People ex rel. Sweet v. Lyman*, 30 App. Div. 135, 50 N. Y. Supp. 444.

Mandamus will not lie to restore to his office, upon the ground that he has been removed from it in violation of the provision of the civil-service statute, a subordinate in a municipal department who was holding office, when removed, under a temporary assignment and on probation. *Fish v. McGann*, 205 Ill. 179, 68 N. E. 761, affirming 107 Ill. App. 538.

A municipal employee whose duties required him to inspect the construction of a particular bridge work is not entitled to a mandamus to reinstate him in the office upon his discharge by reason of the completion of the work. *Re Kenny*, 52 App. Div. 385, 65 N. Y. Supp. 204.

A veteran soldier employed by a municipality as a bridge tender, and discharged in consequence of the demolition of the bridge to the end that it may be replaced by a new structure, is not entitled to a mandamus either to continue him in his employment, or to transfer him to a new position, for the reason that the granting of such a writ would either compel the city to pay the relator wages while idle, or else to remove another person in order to make a vacancy for him to fill. *People ex rel. Chappel v. Lindenthal*, 173 N. Y. 524, 66 N. E. 407, reversing 79 App. Div. 43, 79 N. Y. Supp. 928.

Mandamus will not issue to keep in office a subordinate officer entitled to a preference as a veteran of the Civil War, after the term of office of his principal and himself has expired, and he has been removed by the new incumbent in favor of a person over whom he is entitled, by statute, to be preferred. *State ex rel. Hawes v. Barrows*, 71 Minn. 178, 73 N. W. 704.

A writ of mandamus will not issue to restore to his office a member of a city fire department appointed for a definite term by virtue of a municipal ordinance, and removed therefrom because of the repeal of such ordinance and the adoption of another reducing the term. *Donaghy v. Macy*, 167 Mass. 178, 45 N. E. 87.

XII. Necessity of public interest.

Mandamus lies to compel the restoration of a person to any office of a public nature. *Burr v. Norton*, 25 Conn. 103.

But mandamus is never awarded, nor can it be, for any office that has not some interest in public government. *Hurst's Case*, 1 Keble, 354.

The essential element of a public office as distinguished from a mere public employment is that the duties to be performed shall
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involve the exercise of some portion of a sovereign power. *People ex rel. Corkhill v. McAdoo*, 98 App. Div. 312, 90 N. Y. Supp. 689.

A mandamus will not lie to restore a person removed from an office of a private nature. *R. v. London*, 2 T. R. 182, note b.

Mandamus will not lie to restore private officers, or mere employees, to positions from which they have been discharged (*Middleton's Case*, Sid. pt. 1, p. 169); and this is so notwithstanding they are discharging quasi public duties.

Mandamus will not lie to restore to his employment a mere employee not an officer. *State ex rel. McLaghlin v. Board of Public Works*, 51 N. J. L. 240, 17 Atl. 112.

A mandamus will lie to restore an officer, such as a churchwarden, sexton, steward of the court, to his office, because the places have relation to public duties. *R. v. Raines*, 3 Salk. 233.

In *R. v. London*, 2 Barnard. K. B. 398, a mandamus was granted to restore a person to the office of clerk of the works of the city of London against the objection that the office was of a private nature for which mandamus would not lie. *Lee, J.*, said since Lord Holt's time mandamus had been granted for sextons and clerks of private companies, and accordingly the rule was made absolute.

But, where the place is of mere service, mandamus will not lie, as for usher of a school. *R. v. Raines*, supra.

A teacher employed by a school board under a contract containing the usual provisions is not a public officer, but a mere employee, whose rights and obligations are contractual; and therefore mandamus will not lie to restore a school-teacher to his position after he has been dismissed therefrom, but his remedy is the ordinary action at law for a breach of his contract, and that remedy is plain and adequate. *Board of Education v. State*, 100 Wis. 455, 76 N. W. 351.

Mandamus lies to restore to office a public school-teacher who has been elected or appointed to the position by the board of education, and not merely employed under a contract of hire and service, when arbitrarily removed from the position without lawful cause. *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042, *Fox, J.*, dissenting; *Butcher v. Charles*, 95 Tenn. 532, 32 S. W. 631.

In *Parkinson's Case*, Comb. 144, there is a note saying it was admitted by the court that a mandamus lies to restore a school-master or parish clerk.

No mandamus will be granted to restore to the office of marshal of the court-leet and court-baron, or to restore a school usher. *Stamp's Case*, Sid. pt. 1, p. 40.

Mandamus will not lie for the office of steward of the court-baron and court-leet because it is but a private office. *Stamp's Case*, 1 Keble, 5.

In Comb. 348, is a note to case of *Cudmore v. Tripe*, asserting that in Hilary term, following in one *Stamp's Case*, a mandamus

was granted to restore one to the office of clerk of the company of masons of London.

When a policeman has been removed by the head of his department from his office without trial, his remedy for reinstatement is by mandamus. *Re Elder*, 118 App. Div. 25, 103 N. Y. Supp. 617, affirmed in 189 N. Y. 509, 81 N. E. 1163.

But a policeman who is unprotected by statute from summary discharge is a mere employee, and not a public officer; hence, he is not entitled to a mandamus to reinstate him in his position in case of his arbitrary discharge by his superior officer. *Com. ex rel. Markley v. Stokley*, 4 Pa. Co. Ct. 334.

An inspector of water supply to shipping in the city of New York is not a "regular clerk," within the meaning of the greater New York charter (Laws 1897, chap. 378, § 1643), so as to render unlawful his removal without an opportunity to explain. *People ex rel. Warschauer v. Dalton*, 159 N. Y. 235, 53 N. E. 1113, affirming 34 App. Div. 302, 54 N. Y. Supp. 216.

In *Williams and Cary*, Comb. 264, the court with some hesitation granted a mandamus to restore one to the office of registrar of the bishop's court of Gloucester.

In *Anonymous*, 1 Barnard. K. B. 195, an application was made for a mandamus to be directed to the conservators of Bedford level to restore a receiver. The counsel said that the defendants were incorporated by statute and were required to appoint a collector and receiver who were only officers at will; but the foundation upon which he made the motion was that the receiver was not turned out by the body; and the court granted the application.

In the *Anonymous* case reported in 12 Mod. 666, an application for a mandamus to swear in a steward of a copyhold court was made to Chief Justice Holt, who replied, the true reason of mandamus was, when aldermen, capital burgesses, or such other officers concerning the administration of justice were kept out, to swear them into, or at least restore them into, their places; and we ought not to grant it to swear a register for a bishop, though it be an office of a public nature; and he said he would not care to do it for the steward of a leet, though heretofore it were used to swear a physician of the college; and it is rare to grant it where one has any other remedy; and here it is a private officer to do service for a lord.

In *Anonymous*, 1 Barnard. K. B. 123, Sergeant Darnell moved for mandamus to be directed to the mayor and aldermen of the city of London to restore one Edmund Turner to the office of woodwarden, because it is an office in which he had a freehold; but the court said that that reason would not do unless the office was of a public nature, and then an affidavit was read which affirmed it to be a public office, but the court said that would not do either, for it is necessary that the affidavit must set forth some particular marks to show that it is such an office; and Judge Reynolds noted the 19 L.R.A. (N.S.)

difference between such offices which are parts of the corporation and concern the public government of the body, and those that are only beneficial offices belonging to the corporation; accordingly, counsel was directed to renew his application upon additional papers. Upon a later date (*Id.* 135), it was shown to the court by affidavit that the office was of a public nature, inasmuch as the business of it was to take care that the wood and coal for the use of the city of London were kept according to the proper assize, and that its incumbent was admitted to his office by the mayor and aldermen. The counsel cited precedents in which mandamus had been granted in like cases to restore a man to the office of master weigher of the King's beam, and the case of *Cudmore v. Tripe*, Comb. 347, to the office of surveyor of the New river; and the court again took the application under consideration.

Although a mandamus does not lie for a deputy, it does lie when a deputy has been removed, for him who deputed him, to have him either admitted or restored, for otherwise he may be deprived of his power to make a deputy. *R. v. Marches*, 1 Lev. 306.

XIII. Questions of practice.

a. Parties.

Several municipal officers discharging like official duties, who have been removed from their offices by a single order after a single trial of them jointly, may join as relator in one application for the writ of mandamus to restore them to their offices. *State ex rel. Denis v. Shakspeare*, 43 La. Ann. 92, 8 So. 893.

A mandamus obtained to restore nine persons to the places and offices of common councilmen was quashed in *Anonymous*, Salk. 436, because, according to Chief Justice Holt, Mr. Justice Eyre being of the same opinion, there ought not to be nine persons in one writ; the motion of one is not the motion of another; their interests are several, and they may have been removed for several different causes, one for one cause and another for another.

When a veteran has been removed from his position in the municipal civil service in violation of a statute, and another person has been appointed in his stead, such other person is a necessary party to mandamus proceedings for reinstatement. *People ex rel. Mesick v. Scannell*, 63 App. Div. 243, 7 N. Y. Supp. 383.

A mandamus to restore a person to his office as Burgess of the corporation, addressed to the mayor, aldermen, and capital burgesses of the corporation, reciting that the relator had been removed by A. B. et al. and commanding the mayor, aldermen, et al. to, in turn, command A. B. et al. to restore the relator, was, in *R. v. Derby*, 2 Salk. 436, quashed, for, said the court, it is absurd that the writ should be directed to one person to command another,

b. Additional relief.

One who has been illegally removed from his office cannot, upon applying for a writ of mandamus to restore him, have the further and additional relief of a writ to compel the payment to him of the salary or emoluments of the office, since his right to the latter does not accrue until, and altogether depends upon, his restoration. *Chicago v. People*, 210 Ill. 84, 71 N. E. 816.

c. Conditional allowance of writ.

A court has no power to annex as a condition to the granting of an alternative writ of mandamus to determine the right of a removed officer to reinstatement in his office that he waive all claims to salary since his removal. *People ex rel. Collins v. Ahern*, 115 App. Div. 171, 100 N. Y. Supp. 716.

d. Abatement.

While the writ of mandamus cannot issue against a sovereign state government, and therefore, when issued against a representative officer of the sovereign state, it necessarily abates upon his death, resignation, or the expiration of his term of office; the rule does not apply to a municipal corporation and the officers thereof, for the reason that municipal corporations can sue and be sued, and against these the rights of individuals can be enforced. *People ex rel. LaChicotte v. Best*, 187 N. Y. 1, 116 Am. St. Rep. 586, 79 N. E. 890, 10 A. & E. Ann. Cas. 58, reversing 112 App. Div. 912, 98 N. Y. Supp. 1112, distinguishing *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791.

The right of an officer to be restored by mandamus to an office from which he has been unlawfully removed is not abated by the resignation, removal, or expiration of the term of the superior officer who removed him; but it may be enforced against the successor or successors of such a superior officer. *Ibid.*

Proceedings by mandamus against a board of fire commissioners composed of several members whose terms of office expire at different times, to require the reinstatement of a subordinate wrongfully removed, do not abate by the expiration of the term of office of one of the members of such board. *People ex rel. Lazarus v. Coleman*, 90 App. Div. 88, 91 N. Y. Supp. 432.

e. Discontinuance.

The applicant for a writ of mandamus to compel his reinstatement to service as a policeman may discontinue his proceeding as of right. *People ex rel. Morgan v. Bingham*, 115 App. Div. 474, 101 N. Y. Supp. 410.

XIV. Conclusion.

An applicant for a mandamus to restore him to his office after he has been wrongfully

ousted is bound to establish certain fundamental conditions, upon the existence of which the granting of the writ ever depends. He must have a clear legal right to reoccupy the office. Both the law and the facts showing the illegality of his removal and right to reinstatement must be beyond controversy. He must be without any other appropriate and adequate remedy. He must not have slept upon his rights. He must apply for the writ promptly, and diligently prosecute. The continued existence of the office from which he was removed, and of the term of office for which he was elected or appointed, is a *sine qua non*; if the office has been abolished in good faith, or if his term has expired, the applicant will be refused the writ. If the office is filled by another under a color of right,—filled, that is, by an incumbent whose title to it is not obviously bad upon bare inspection,—not mandamus, but quo warranto, is the ousted one's proper remedy.

If an officer or public servant holds his place at the will of his superior, and no statute protects him from dismissal, mandamus will not lie to reinstate him if he is ousted, however arbitrarily and unjustly. But, notwithstanding an officer's tenure of office is protected by statute, he may be removed for cause, provided it is adequate. And, if an officer is removed from office for a stated adequate cause after he has been given notice and an opportunity to defend, then, although the conclusions that the cause existed and that he ought to be dismissed were erroneous, mandamus will not lie to restore him to his place; but he must seek a remedy by writ of certiorari.

The writ of mandamus does not run to the sovereign,—a principle that requires it to be refused when sought against the President of the United States, the head of an executive department, or a governor of a state.

As the writ is not one of right, it is not necessarily granted to an applicant who makes out a prima facie case. An officer may have been arbitrarily ousted in defiance of his right to remain at his post, and his right to restoration may be clear, and yet the court will refuse to aid him, by mandamus, to reinstatement if he is liable to be turned out again immediately after restoration by regular proceedings and for just cause.

J. B. G.

CONNECTICUT SUPREME COURT OF ERRORS.

AMERICAN SURETY COMPANY

v.

PACIFIC SURETY COMPANY, Appt.

(— Conn. —, 70 Atl. 584.)

Pleading — fraud.

1. Where by statute fraud is a fact to be specially pleaded, a complaint is not sufficient to assert passive fraud by conceal-

ment, which sets out misrepresentations of fact, stating that the true fact was wilfully concealed, and concludes that by virtue of said fraudulent misrepresentations and concealments damage was done.

Bond — interest — penalty.

2. Interest may be added to the amount of recovery on a bond, although the total sum is thereby made to exceed the penalty of the bond.

Same — when accrues.

3. Interest on a bond to indemnify a surety on a contractor's bond accrues not from the time the surety's liability accrues on the contractor's default, but from the time the duty of the second obligor arises to indemnify the first one for loss suffered because of his undertaking, which, in case he contests liability for the alleged breach of the contractor's duty, is at the time judgment is rendered fixing such liability.

(August 3, 1908.)

Case Note. — Right, in an action on a bond, to recover interest when the total sum is thereby made to exceed the penalty.

In a note to Griffith v. Rundle, 55 L.R.A. 381, upon the general subject of penalty as the limit of liability on statutory bond, the earlier cases upon the question presented in the foregoing case are collected and discussed at page 384. As there shown, the earlier cases did not allow interest where the damages were thereby made to exceed the penalty, but many modern cases hold that interest should be allowed notwithstanding the fact that the amount might thereby exceed the penalty, upon the theory that interest is allowed only by way of damages for delay upon the part of the sureties in making payment after they should have done so, so that all the obligee recovers is the penalty, or rather what it would have been if paid at the proper time. This is now the generally accepted rule. 4 Am. & Eng. Enc. Law, p. 701.

Thus, in Trumpler v. Cotton, 109 Cal. 250, 46 Pac. 1033, 1036, the court said that the general rule was that judgment could not be rendered against sureties for a greater sum than the penalty of the bond, and that they could not be held liable for interest beyond the penalty of the bond, except for such interest as accrued from their own default in unjustly withholding payment after having been notified of the default of their principal.

So in Spokane & I. Lumber Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119, the court said: "We think this objection to the judgment is not well taken. It is true that the surety on a bond cannot generally be held liable for any sum greater than the penalty specified therein; but where, as in this case, it appears that the surety is himself in default, we see no reason why he may not be held liable, in excess of the penalty, for interest upon the amount due, at the legal rate, as damages occasioned by his delay in the payment of his obligation." 19 L.R.A. (N.S.)

A PPEAL by defendant from a judgment of the Superior Court for New Haven County in plaintiff's favor in an action brought to recover the amount alleged to be due on an indemnity bond. Reversed on condition.

Statement by Prentice, J.:

The plaintiff was surety upon a bond given by the National Steam Economizer Company, as principal, to the city of New Haven, to secure the faithful performance, by said principal, of its contract with said city for the installation of certain heating and ventilating apparatus in a city building. The facts relating to the giving of this bond, and those which led up to a suit by the city thereon, are fully stated in the case of New Haven v. National Steam Economizer Co. 79 Conn. 482, 65 Atl. 959. That action finally resulted in a judgment against

So in Ellyson v. Lord, 124 Iowa, 125, 99 N. W. 582, it was held that, while the debt for which the surety could be held liable was limited by the penalty named in the bond, yet interest might be collected on such debt from the time when it became the surety's duty to pay, even though the aggregate of the principal and interest would be more than the penal sum. This decision was cited with approval and followed by Getchel & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550.

And in Holmes v. Standard Oil Co. 18 Ill. 70, 55 N. E. 647, it was held that the general rule that the liability of a surety on a penal bond cannot be extended beyond the amount specified as the penalty of the bond, was not infringed by the rendition of a judgment in an amount in excess of the penalty of the bond, to the extent of the interest on such penalty after the liability accrued.

So in McMullen v. Winfield Bldg. & I. Asso. 64 Kan. 298, 56 L.R.A. 924, 91 Am. St. Rep. 236, 67 Pac. 892, it was held that while the penalty of the bond fixes the limit of liability of the surety at the time the liability arises, yet, if the principal or surety fail to discharge that liability when it matures, interest may be allowed on the amount from the time the liability arises even if the amount of recovery shall exceed the penalty.

So there are numerous other cases which uphold this general rule that interest may be added to the amount of the damages recoverable under a bond, although the amount is thereby made to exceed the penalty. United States v. Walker, 128 Fed. 1015; Pennell v. Card, 96 Me. 392, 52 Atl. 801; Camden v. Ward, 67 N. J. L. 558, 52 Atl. 392; Pennsylvania Co. v. Swain, 189 P. 626, 42 Atl. 297; Grand Lodge A. O. U. V. v. Cleghorn, 20 Tex. Civ. App. 134, 48 S. W. 750.

In Thomas Laughlin Co. v. American Surety Co. 51 C. C. A. 247, 114 Fed. 627, was held that a surety's liability does not

the plaintiff, rendered May 24, 1906, for the sum of \$14,907.56 damages. The cause of action therein was found to have accrued July 27, 1903, and interest from that date was included in the judgment. This judgment the plaintiff subsequently paid, as also the costs of suit and expenses involved.

Shortly after the delivery of the bond to the city, the Economizer company gave to the plaintiff its written order upon the city for the first \$5,000 to become due under said contract. Subsequently the plaintiff released this order, and in part consideration therefor the defendant, on September 11, 1902, executed and delivered to the plaintiff the indemnity bond in suit. This instrument was, in its pertinent parts, as follows: "American Surety Company of New York, hereinafter called the "surety," having, at the request of

the National Steam Economizer Company, executed that certain bond, dated November 11, 1901, in the sum of \$15,000, conditioned, in substance, for the faithful performance by the National Steam Economizer Company, of a contract with the city of New Haven for the construction of a heating and ventilating apparatus in the new high school building in York square in the city of New Haven, a copy of which bond is hereto annexed, and at or about the time of the execution thereof, there having been delivered to the said American Surety Company of New York certain collateral, and the said National Steam Economizer Company having requested the said American Surety Company of New York to release the said collateral: Now therefore, in consideration of the said American Surety Company of New York

ordinarily extend beyond the penal sum of the bond even for interest thereon, unless he has in some way resisted or obstructed the claim against him.

The other view, however, still prevails in some jurisdictions.

Thus, in *People's Sav. Bank v. Campau*, 124 Mich. 106, 82 N. W. 803, the plaintiff claimed that at law, in an action upon a penal bond, interest may be recovered in the form of damages to an amount exceeding the penalty of the bond; that the plaintiff in an action upon a penal bond, with the condition for the payment of money only, is entitled to recover the full amount of the penalty as a debt, and the excess of interest beyond the penalty in the shape of damages for the detention of the debt. But the court held that the plaintiff's claims were in direct conflict with the mass of decisions, and in conflict with the principle which underlies them all, viz., that a penalty is not to be enlarged under any circumstances, and will not be enforced beyond the letter.

So in *Randle v. Barnard*, 99 Fed. 348, affirmed in 49 C. C. A. 177, 110 Fed. 906, the court, following the rule adopted in Missouri, refused to allow a recovery for a sum greater than the penalty, although it was urged by the plaintiff's counsel that he was entitled to interest on the penalty of the bond by way of damages for nonpayment of the money when the liability accrued, from the date of the breach.

So also in *Board of Education v. National Surety Co.* 183 Mo. 166, 82 S. W. 70, it was held that ever since the decision in *Farrar v. Christy*, 24 Mo. 453, decided in 1857, the rule had been adhered to in that state that there could be no recovery on a penal bond in excess of the penalty of the bond.

In *Mutual Ben. Ins. Co. v. Brown*, 80 Mo. App. 459, it was held that no more than the penalty could be recovered from the surety; but where the purpose of a bond was to secure the payment of the interest upon a note secured by a deed of trust, and it stated specifically that the object was to make provision as authorized 19 L.R.A. (N.S.)

by statute for the redemption of property sold under the deed of trust, the court said that they thought it was giving the bond a proper construction to add 6 per cent to the amount of the interest on the note after it was due. It will be noticed that this decision is not opposed to the Missouri decisions cited, but merely holds that the proper construction of the bond would include the interest added to the penalty.

So in *Exchange Bank v. Springer*, 13 Ont. App. Rep. 390, it was held that interest could not be added to the amount recoverable under a bond where it made the judgment more than the penalty.

And in *Knipe v. Blair* [1900] 1 Ir. Ch. 372, it was held that the general rule was that a bond creditor could not recover more than the penalty.

So in *New Home Sewing Mach. Co. v. Seago*, 128 N. C. 158, 38 S. E. 805, it was held that a recovery could not be had upon a bond in excess of the penalty, and the fact that the excess was made up of interest thereon made no difference.

In New York it is provided by statute that the damages to be recovered for a breach or successive breaches of the condition of a bond cannot in the aggregate exceed the penal sum except where the condition is for the payment of money, in which case the damages cannot exceed the penal sum with interest thereon from the time when the defendant made default in the performance of the condition.

Under this statute it was held in *John Polhemus Printing Co. v. Hallenbeck*, 46 App. Div. 563, 61 N. Y. Supp. 1056, that, in an action upon a bond for a breach of a condition to procure for the plaintiff a renewal of a lease of certain premises, the plaintiff was not entitled to interest on the face of the bond.

And the above case was cited with approval and followed in *Sachs v. American Surety Co.* 72 App. Div. 60, 76 N. Y. Supp. 335, affirmed without opinion in 177 N. Y. 551, 69 N. E. 1130, which was an action upon a bond guaranteeing faithful performance of a contract.

releasing said collateral and continuing as surety upon the said bond, the said National Steam Economizer Company, as principal, and the Pacific Surety Company, a corporation organized under the laws of the state of California, as surety, do hereby undertake and agree: (1) That they will at all times indemnify and save harmless the said American Surety Company of New York from and against every claim, demand, liability, cost, charge, expense, suit, order, judgment, and adjudication whatsoever, and will place the said American Surety Company of New York in funds to meet every claim, demand, liability, cost, charge, expense, suit, order, judgment, or adjudication against it by reason of such suretyship and before it shall be required to pay the same. (2) That upon the making of any demand, or the giving of any notice, or the institution of any proceeding, preliminary to determining or fixing any liability which the said American Surety Company of New York may be called upon to discharge by reason of such suretyship, they will immediately notify the said American Surety Company of New York thereof in writing at its office No. 100 Broadway in the city of New York. . . . (5) That the liability of the Pacific Surety Company herein shall be limited to the sum of seventy-five hundred dollars (\$7,500.00); it being understood that the American Surety Company of New York shall be entitled to full indemnification, as hereinbefore provided, from such Pacific Surety Company, up to said amount.

The defendant was duly notified by the plaintiff of the claim made upon it by the city, and counsel for the defendant were, in correspondence with plaintiff's counsel relative to the action upon the bond, aided in the preparation of its answer, were present during a portion of the trial, and were kept advised of the progress of the action. This conduct on the part of the defendant was accompanied with a statement that it was without prejudice to its claim of nonliability. Upon the rendition of the judgment the plaintiff made demand upon the defendant for reimbursement pursuant to the obligation of the bond. At the time of the commencement of the city's action against the plaintiff the Economizer Company was and has since remained insolvent. The defendant's answer contained two defenses in form. The first admitted the first paragraph of the complaint, which set up the execution and delivery of the bond, and pleaded want of knowledge or information as to the remaining allegations, which set up the breach. The second, which was double, contained a defense which played no part in the trial, and the defense of fraud inducing the contract outlined in the opinion. This embodied the 19 L.R.A. (N.S.)

defendant's real defense, in support of which its evidence was offered, and to which its evidence was confined.

Messrs. Fitzgerald & Walsh, and Choate, Hall, & Stewart, for appellant:

A security given by a surety is voidable on the ground of passive fraud.

Bigelow, Fr. p. 595; Cheever v. Union Cent. L. Ins. Co. 5 Ohio Dec. Reprint, 286; Bufe v. Turner, 6 Taunt. 338; New York Bowers F. Ins. Co. v. New York F. Ins. Co. 17 Wend 359; Sun Mut. Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 27 L. ed. 337, 1 Sup. Ct. Rep. 582; Doughty v. Savage, 28 Conn. 146; Owen v. Homan, 3 Macn. & G. 378; Franklin Bank v. Stevens, 39 Me. 532; Sooy v. State, 3 N. J. L. 135; Railton v. Mathews, 10 Clark & F. 934; Franklin Bank v. Cooper, 36 Me. 179; Dinsmore v. Tidball, 34 Ohio St. 411; Lee v. Jones, 17 C. B. N. S. 482; Guardian Fire & Life Assur. Co. v. Thompson, 68 Cal. 208, 9 Pac. 1; Third Nat. Bank v. Owen, 10 Mo. 558, 14 S. W. 632; Wilmington, C. & A. R. Co. v. Ling, 18 S. C. 116; Bellevue Loan & Bldg. Asso. v. Jeckel, 104 Ky. 159, 46 S. W. 482; Connecticut General L. Ins. Co. v. Chase, 72 Vt. 176, 53 L.R.A. 510, 47 At. 825; Wilson v. Monticello, 85 Ind. 10; Fasnacht v. Emsing Gagen Co. 18 Ind. App. 8 63 Am. St. Rep. 322, 46 N. E. 45, 47 N. 1 480; Traders' Ins. Co. v. Herber, 67 Minn. 106, 69 N. W. 701; Denton v. Butler, 99 G. 264, 25 S. E. 624.

Interest should be allowed only from the date of judgment.

Dwyer v. United States, 35 C. C. A. 48 93 Fed. 616; Trumpler v. Cotton, 109 Cal. 250, 41 Pac. 1033, 1036; Folz v. Tradesmen Trust & Sav. Fund Co. 201 Pa. 583, 51 A. 379; Bank of Brighton v. Smith, 12 Allen 243, 90 Am. Dec. 144; Thomas Laughlin Co. v. American Surety Co. 51 C. C. A. 247, 1 Fed. 627.

Messrs. George D. Watrous and Henry F. Parmelee, for appellee:

In an action of debt on bond, interest in excess of the penalty may be allowed after the debt becomes due.

Lewis v. Dwight, 10 Conn. 95; Branch Suretyship & Guaranty, § 93.

Prentice, J., delivered the opinion of the court:

The defendant offered evidence to prove that the plaintiff, in order to induce the defendant to give the bond in suit, made to the defendant certain false and fraudulent representations material to the risk assumed by the terms of the bond, and relied upon by the defendant. The defense of fraud, though attempted to be established, was within the allegations of the special defense, and the evidence offered in support of it was received.

and submitted to the jury with instructions which are not complained of. What is complained of is the instruction of the court, in substance, that, while the defense of fraudulent concealment of truth resulting from false representations was before the jury under the pleadings, one of fraudulent concealment resulting from passive silence only was not, so that, if the defendant should fail to establish the making of false representations as charged, it could not assert the claim of defense that the plaintiff had been guilty of fraudulent conduct in remaining silent with respect to facts within its knowledge material to the risk, when it was its duty to disclose them to the defendant.

Fraud is a fact to be specially pleaded. Practice Book, 1908, p. 250, § 160. The fraud pleaded in this case is active fraud, and none other. The allegations setting up a fraud are confined to the following: First, there are those which aver that the plaintiff, in order to induce the defendant to furnish to the former the bond in suit and the indemnity thereby provided, made to the latter a variety of statements and representations about the risk, to wit, that the contract for the performance of which the plaintiff had become surety was an advantageous one, that there had been no default thereunder, that the contractor was all right in every particular, including solvency and business ability, that the plaintiff was perfectly satisfied with the risk incurred by it under its bond, that it was a safe risk, and that there were no reasons why an indemnity bond to be given by the defendant would not be a safe risk. It is then alleged that each of said representations was material, that the defendant believed and acted upon them and each of them in entering into its obligation, and that each was false and known to be false when made. Then follows a statement of the alleged fact in respect to each of said representations, by which it would appear that each was false and known to be false. In connection with one of these statements, and one only, it is said that the fact was that the contractor, whose contract was the subject-matter of the indemnity, was wholly insolvent at the time of the representation of his solvency, and known to the plaintiff to be so, and it is added: "Which said fact was wilfully concealed." Following these several statements is the conclusion that, "by virtue of said fraudulent misrepresentations and concealments, the defendant was greatly damaged, and would not have given said indemnity bond had the true state of facts been disclosed, and had the plaintiff not been guilty of making said fraudulent misrepresentations and concealments."

The defendant hangs its right to avail itself of the defense of fraud by silence where
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there is a duty to speak, upon the slender thread of the use of the words "concealed" and "concealment," as stated, and the reference to the absence of a disclosure of the true state of facts in the closing sentence. It is, however, too plain for argument that the pleader had in mind only active fraud. He was complaining of misrepresentations of fact; and the concealment of truth referred to was not a concealment by silence, but concealment resulting from the assertion of a contrary fact. The fault found with the plaintiff was not that it did not speak, and thus passively concealed truth, but that it uttered falsehood, and thus actively concealed it. It was thus that the true state of facts was claimed to have been undisclosed, and not, as the defendant now urges that he had the right to show, by the passive act of silence. That this is so is removed from the domain of doubt when it is borne in mind that the fact which alone is alleged to have been concealed relates to a matter concerning which a statement—a false statement—is alleged to have been made. The fact alleged to have been concealed was the Economizer company's insolvency. The prior averment is that it was expressly represented to be solvent. There was no room here for passive concealment by mere silence, and the pleader manifestly and necessarily had no thought of charging any fraud otherwise than by the representations already set up, and he charged none. He was charging fraud through the suppression of truth by falsehood, and not its secretion by silence. The presence in the answer of the isolated words upon which so much reliance is now placed was, it is quite apparent, simply an accident resulting from a choice of language. They were properly used to express an idea in consonance with the allegations of the defense, but not the idea now sought to be imported into the answer through them. The court was therefore right in not permitting the defendant, failing in his proof of false representations, to avail himself of a defense of fraud by the passive means of silence alone. This being the case, we have no occasion to consider the question, discussed at length in argument, as to the rule of duty in the matter of disclosing information possessed, which is applicable to a party in the position which the plaintiff occupied.

The cause of action upon which judgment was rendered against the plaintiff in favor of the city of New Haven accrued on July 27, 1903, and in that judgment, which was for the sum of \$14,907.50, interest from that date on the amount of the default was included. In the present case, the jury was told that, if a verdict was rendered for the plaintiff it should be for the sum of \$7,500,

with interest thereon to date from July 27, 1903. The defendant justly complains of this instruction. Recovery in an action of debt on a bond is not limited to the amount of the penalty. Interest upon the debt after it is due may be allowed, although the total sum is thereby made to exceed the penalty. *Lewis v. Dwight*, 10 Conn. 95, 102; *Carter v. Carter*, 4 Day, 30, 4 Am. Dec. 177. The interest which may thus be recovered is, however, limited to interest from the time in breach; this being the date when the debt is said to accrue. *Carter v. Carter*, supra. The theory upon which this recovery of interest is permitted is that there has been an unlawful detention of money after the duty to pay it came into existence, and the interest is allowed as damages therefor. *Selleck v. French*, 1 Conn. 32, 33, 6 Am. Dec. 185; *Jones v. Mallory*, 22 Conn. 386, 392. As between the plaintiff and the city of New Haven, it was found that the debt from the former to the latter upon the bond then in suit became due July 27, 1903. It does not follow, as the court below seems to have assumed, that this defendant's bond to the plaintiff was broken at the same time. The test inquiry is: When did this defendant, by the terms of its obligation to the plaintiff, come under the duty of paying to the latter the principal sum which it has become holden to pay? Its agreement was to indemnify the plaintiff and save it harmless from and against every claim, demand, cost, charge, expense, suit, order, judgment, and adjudication whatsoever, and place the plaintiff in funds to meet every claim, demand, liability, cost, charge, expense, suit, order, judgment, or adjudication against it by reason of such suretyship and before it shall be required to pay the same. It can scarcely be said that the latter portion of this obligation required the defendant to place the plaintiff in funds until requested, and in this case no such request is claimed. No demand of any sort was made until the judgment in the suit by the city was rendered. Until that time the plaintiff was acting in harmony with this defendant in contesting its liability, and, as the corollary of its assertion of nonliability, was assuming a position in which there was no liability to it on the part of the defendant, and therefore no duty on the latter's part to pay it anything. Until the judgment was rendered which negated this contention and established the plaintiff's liability to the city, there was no such breach of duty on the part of the defendant in not paying the \$7,500, or any part of it, that interest thereon became recoverable as damages for the unlawful detention of the money. The instruction for the inclusion in the verdict of interest upon \$7,500, from July 27, 1903, to May 24, 1906, the date of the 19 L.R.A. (N.S.)

judgment in the city's suit against the plaintiff, was therefore erroneous, and the verdict, upon which judgment was rendered, too large by the separable and ascertainable sum of \$1,271.25.

There is error, and a new trial is granted, unless the plaintiff files a remittur as of the date of the judgment for \$1,271.25.

All concur.

ILLINOIS SUPREME COURT.

MARY C. SPENCE, Plff. in Err.,

v.

CENTRAL ACCIDENT INSURANCE COMPANY.

(236 Ill. 444, 86 N. E. 104.)

Insurance — representation — warranty.

1. To constitute a warranty, a representation by an applicant for insurance must appear in the contract itself.

Same — part of contract.

2. A statement in an accident insurance policy that, in consideration of the warranties and agreements in the application, the applicant is insured, does not make the ap-

Case Note. — What reference in policy to application will make it part of policy.

The conclusion reached in the above case seems to find support in *American Popular L. Ins. Co. v. Day*, 39 N. J. L. 89, 23 Am. Rep. 198, in which it was held that a declaration in a policy that the insurance was made "in consideration of the representations" in the application for insurance would not have the effect of incorporating the application in the contract of insurance, so as to change the representations in the application to warranties.

On the other hand, in *Travelers' Ins. Co. v. Lampkin*, 5 Colo. App. 177, 38 Pac. 335, it was held that a recital in a policy of insurance that it was issued "in consideration of the warranties in application" was sufficient to make the warranties in the application a part of the policy.

The same conclusion was reached in *State ex rel. Young v. Temperance Benev. Asso.* 42 Mo. App. 485, where a certificate of membership in a benefit society recited that the applicant was constituted a member "in consideration of the representations made in the application."

Such, too, was the result reached in *Standard Life & Acci. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105, where the policy stated that it was issued "in consideration of the statements of fact warranted to be true in the application."

So, in *Webb v. Bankers' L. Ins. Co.* 19 Colo. App. 456, 76 Pac. 738; *Higbee v. Guardian Mut. L. Ins. Co.* 66 Barb. 462, affirmed in 53 N. Y. 603, and *Parish v. Mutual Ben.*

plication a part of the contract, so as to render a statement in it as to the age of the applicant a warranty.

Same — construction.

3. Courts will never construe a statement by an applicant for insurance as a warranty unless the language of the policy is so clear as to preclude any other construction.

Same — question of law.

4. Whether or not a statement of age by an applicant for accident insurance is material is not a question of law where it was not made in response to a direct inquiry by the insurer, or its materiality had not been settled by agreement of the parties.

(Cartwright, Ch. J., and Hand, J., dissent.)

(October 26, 1908.)

ERROR to the Branch Appellate Court, First District, to review a judgment affirming a judgment of the Superior Court for Cook County in defendant's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

The facts are stated in the opinion.

L. Ins. Co. 19 Tex. Civ. App. 457, 49 S. W. 153, it was held that by a recital in a policy that the same was issued in consideration of the application, coupled with the further statement that the application was made a part of the policy, such application was incorporated in the contract of insurance.

And in *McLendon v. Woodmen of the World*, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36, where a certificate of membership in a benefit society recited that it was issued in consideration of representations and agreements made in the application, which also provided that it should form the basis of the contract, it was held that the application thereby became a part of the contract of insurance.

And in *Fitzrandolph v. Mutual Relief Soc.* 17 Can. S. C. 333, it was held that an application for insurance was incorporated in the bond of membership issued by the defendant society, where it recited that it insured the holder thereof in consideration of statements made in his application, and in a declaration annexed to the application the insured agreed that the bond should be void if the statements and answers to questions in the application were untrue.

And in the following cases, where the policy referred to the application for a more particular description of the property insured, and then added the words, "forming a part of this policy," it was held that the application formed a part of the contract of insurance: *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 188, 40 Am. Dec. 445; *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, 75; *Egan v. Mutual Ins. Co.* 5 Denio, 326; *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. 285; *Shoemaker v. Glens Falls Ins. Co.* 60 Barb. 84.

In *Kelsey v. Universal L. Ins. Co.* 35 Conn. 19 L.R.A. (N.S.)

Mr. Jesse Wilcox, with Mr. Henry S. Wilcox, for plaintiff in error:

A representation will not be construed to be a warranty, so as to make the validity of the policy dependent upon its exact and literal truth, unless clear, explicit, and unequivocal stipulations require such an interpretation.

Minnesota Mut. L. Ins. Co. v. Link, 230 Ill. 273, 82 N. E. 637; *Moulor v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; *Globe Mut. L. Ins. Asso. v. Wagner*, 188 Ill. 133, 52 L.R.A. 649, 80 Am. St. Rep. 169, 58 N. E. 970, affirming 90 Ill. App. 444; *Smith v. Bankers' Life Asso.* 123 Ill. App. 392; *Provident Sav. Life Assur. Soc. v. Cannon*, 103 Ill. App. 534, affirmed in 201 Ill. 260, 66 N. E. 388; *Globe Mut. L. Ins. Asso. v. March*, 118 Ill. App. 261; *Metropolitan L. Ins. Co. v. Moravec*, 116 Ill. App. 271; *Illinois Masons' Benev. Soc. v. Winthrop*, 85 Ill. 537; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *Hargrove v. Royal Templars*, 2 Ont. L. Rep. 79; *Egan v. Supreme Council, C. B. L.* 32 App. Div. 245, 52 N. Y. Supp. 978;

225, a stipulation in a policy that it was made in the faith of the application, and that the statements in the matter were in all respects true, was held to make the truth of the material facts in the application as much a matter of contract obligation on the part of the assured, and conditions upon which the policy issued, and on the truth of which only it was to bind the company, as if the same had been embodied in the policy itself.

In *Houghton v. Manufacturers' Mut. F. Ins. Co.* 8 Met. 114, 41 Am. Dec. 489, an application was held to be adopted and embodied as part of the contract of insurance to the same effect as if it had been recited and set forth at large in the policy, where the latter provided that it was to be avoided if the representations in the application did not contain a just, full, and true exposition of all the facts and circumstances in regard to the property insured.

And in *Bobbitt v. Liverpool & L. & G. Ins. Co.* 66 N. C. 70, 8 Am. Rep. 494, an application was held to be part of a contract of insurance where the policy provided that the basis of this contract was the application of the insured, and if such application did not truly describe the property this policy should be null and void.

So, in *Steward v. Phoenix F. Ins. Co.* 5 Hun, 261, where the policy in suit provided that, if it was made and issued upon the survey and description of certain property, such survey and description should be taken and deemed to be a portion of such policy and a warranty on the part of the assured; and the policy described the property as "known as the Mackford Mills, per survey No. 18,611, filed in the office of the People's Insurance Company, N. Y.,"—it was held that such survey was not merely referred to

Germania Ins. Co. v. Rudwig, 80 Ky. 223; Continental L. Ins. Co. v. Thoenes, 26 Ill. App. 495; Continental L. Ins. Co. v. Rogers, 119 Ill. 474, 59 Am. Rep. 810, 10 N. E. 242.

Where the statements in an application and policy are such that the language cannot be given effect without assuming that the statements of the assured are intended as representations, they will be so considered, notwithstanding the policy states that they are to be deemed warranties.

Continental L. Ins. Co. v. Rogers, *supra*;

for a description of the property, but constituted the basis of the insurance contract.

But, in Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684, in which it appeared that certain conditions of insurance annexed to a policy and made a part of it required a written application for the insurance, which was to specify divers particulars relating to the description of the premises and the uses to which it was applied; and provided that a false description by the assured should avoid the policy, and that when the policy issued upon a survey and description the same should be deemed a part of the policy and a warranty on the part of the assured,—it was held that other statements in the application not required by the conditions or by the description of the premises were not made a part of the contract, though the survey was referred to in the policy in these words: "For a more particular description of said premises, see survey No. 74, furnished by the insured, which is hereby made a part of this policy."

A different result was reached in Sheldon v. Hartford F. Ins. Co. 22 Conn. 235, 58 Am. Dec. 420, in which the whole of a survey was held to be incorporated into the policy, though the only reference to it was in these words: "Reference is had to survey No. 83, on file in the office of the Protection Insurance Company."

On the other hand, it was held in Jefferson Ins. Co. v. Cotheal, 7 Wend. 72, 22 Am. Dec. 567; Snyder v. Farmers' Ins. & Loan Co. 13 Wend. 92, affirmed in 16 Wend. 481; Wall v. Howard Ins. Co. 14 Barb. 383, and Hartford Protection Ins. Co. v. Harmer, *supra*, that a mere reference to the application, without something further to show that it was intended to be incorporated in the policy, would not make the application a part of the contract of insurance.

So, in Commonwealth Ins. Co. v. Monninger, 18 Ind. 352, it was held that, where the policy stated that, for a more particular description of the property insured "see application and survey, No. 37, on file at the Terre Haute agency office," this was not sufficient to make the application a part of the policy.

And in Newman v. Springfield F. & M. Ins. Co. 17 Minn. 123, Gil. 98, in which it appeared that there was no written application, but that before the insurance was taken out the assured made certain statements at different times when he called at the insurer's office to insure the property, it was 19 L.R.A. (N.S.)

Provident Sav. Life Assur. Soc. v. Cannon, 201 Ill. 260; Minnesota Mut. L. Ins. Co. v. Link, *supra*.

An insurance contract cannot be rescinded after a loss occurs.

Imperial F. Ins. Co. v. Gunning, 81 Ill. 238; Home Ins. Co. v. Heck, 65 Ill. 111; Beebe v. Swartwout, 8 Ill. 184; 21 Am. & Eng. Enc. Law, p. 89.

Whether a representation in an application is material or not is a question of fact. 16 Am. & Eng. Enc. of Law, 2d ed. p. 934.

held that a reference in the policy "to assured's application, No. 127, which is his warranty and a part thereof," was not sufficient to make these several verbal applications a part of the contract of insurance, especially where it was not shown which of these several applications was application No. 127.

And in Vilas v. New York Cent. Ins. Co. 72 N. Y. 590, 28 Am. Rep. 186, where it appeared that the insured, upon the expiration of a policy of fire insurance, directed the agents from whom the policy was obtained to insure the property in another company; that his application for the expired policy was No. 1,234, and was on file with the agents; and that without any other application the agents procured a policy from another company, which, after a statement of the buildings and the amounts they were insured for, added the words "as per application No. 1,234,"—it was held that this was not sufficient reference to the application for the expired policy to make it a part of the new policy.

And in Clinton v. Hope Ins. Co. 45 N. Y. 454, it was held that a reference in a policy to "a survey on file in this office" was not sufficient to make a survey for a former policy which was on file in the office of the insurer's agent a part of the new contract of insurance.

So, in Campbell v. New England Mut. L. Ins. Co. 98 Mass. 391, where the policy provided that it should be avoided if the assured's statements to the insurer as the basis of, or in negotiations for, this contract should be in any respect untrue, but did not specifically refer to the application, the court said that it was "far from ready to concede" the reference to be sufficiently definite to make the application a part of the policy.

In Miller v. Mutual Ben. L. Ins. Co. 31 Iowa, 216, 7 Am. Rep. 122, where the application for the insurance comprised several papers headed with different designations, and the policy referred to one of such papers by name as a part of the policy, it was held that no other of the several papers going to make up the application could be treated as a part of the contract of insurance.

This note does not include those cases which, in determining whether the assured's statements in his application were warranties or representations, assume that the application was duly incorporated in the policy.

Messrs. Musgrave, Platt, & Lee, for defendant in error:

The statement of the assured in his application as to his age was a warranty, and was made a part of the consideration; and, if untrue, the policy was voidable at the option of the company.

Central Acci. Ins. Co. v. Spence, 126 Ill. App. 32; Treat v. Merchants' Life Asso. 198 Ill. 431, 64 N. E. 992; National Union v. Arnhorst, 74 Ill. App. 482; Connecticut Mut. L. Ins. Co. v. Young, 77 Ill. App. 440; Bright v. Equitable Life Assur. Soc. 50 How. Pr. 367; O'Neill v. Ottawa Agri. Ins. Co. 30 U. C. C. P. 151; Pickel v. Phoenix Ins. Co. 119 Ind. 201, 21 N. E. 898; Kelly v. Life Ins. Clearing Co. 113 Ala. 453, 21 So. 361; Hutchinson v. Hartford Life Ins. & Annuity Co. (Tex. Civ. App.) 39 S. W. 325; Linz v. Massachusetts Mut. L. Ins. Co. 8 Mo. App. 363; Commonwealth Mut. L. Ins. Co. v. Huntzinger, 98 Pa. 41; Jeffries v. Economical Mut. L. Ins. Co. 22 Wall. 47, 22 L. ed. 833; Fishblate v. Fidelity & Co. 140 N. C. 589, 53 S. E. 354; Vose v. Eagle Life & Health Ins. Co. 6 Cush. 42; Johnson v. Maine & N. B. Ins. Co. 83 Me. 182, 22 Atl. 107; Foot v. Aetna L. Ins. Co. 61 N. Y. 571; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Dwight v. Germania L. Ins. Co. 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; Cushman v. United States L. Ins. Co. 63 N. Y. 404; Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230; Baumgart v. Modern Woodmen, 85 Wis. 546, 55 N. W. 713; Alabama Gold L. Ins. Co. v. Garner, 77 Ala. 210; Breese v. Metropolitan L. Ins. Co. 37 App. Div. 152, 55 N. Y. Supp. 775; Schmitt v. National Life Asso. 84 Hun, 128, 32 N. Y. Supp. 513; Kabok v. Phoenix Mut. L. Ins. Co. 21 N. Y. S. R. 203, 4 N. Y. Supp. 718; Aetna L. Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401; Dolan v. Mutual Reserve Fund Life Asso. 173 Mass. 197, 53 N. E. 398; 25 Cyc. Law & Proc. p. 808.

The statement as to age being by the terms of the policy a warranty, its materiality is not open to question, since the parties to the contract have seen fit to make it material, the only question being as to its truth or falsity.

Central Acci. Ins. Co. v. Spence, supra; Thomas v. Fame Ins. Co. 108 Ill. 102; Northwestern Benev. & Mut. Aid Asso. v. Hall, 118 Ill. 169, 8 N. E. 764; Continental L. Ins. Co. v. Rogers, 119 Ill. 474, 59 Am. Rep. 410, 10 N. E. 242; Aetna L. Ins. Co. v. King, 84 Ill. App. 175; Connecticut Mut. L. Ins. Co. v. Young, 77 Ill. App. 440; Bliss, Ins. p. 58; 16 Am. & Eng. Enc. Law, 2d ed. p. 919; Dewees v. Manhattan Ins. Co. 34 N. J. L. 244; Petitpain v. Mutual Reserve Fund Life Asso. 52 La. Ann. 503, 27 So. 113; 19 L.R.A. (N.S.)

Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 553; Aetna L. Ins. Co. v. France, supra; Satterlee v. Modern Brotherhood, 15 N. D. 92, 106 N. W. 561.

If the statement of age was not a warranty, it was a representation material, as matter of law, to the risk, and gave the company the same right, upon discovery of its falsity, to avoid the policy, as though the statement were a warranty.

Central Acci. Ins. Co. v. Spence, supra; Goddard v. Monitor Mut. F. Ins. Co. 108 Mass. 56, 11 Am. Rep. 307; Columbian Ins. Co. v. Lawrence, 2 Pet. 49, 7 L. ed. 344; Perine v. Grand Lodge, A. O. U. W. 51 Minn. 224, 53 N. W. 367; 1 May, Ins. 4th ed. § 181.

Age is considered a material and vital fact for the company to know before it issues its policy of insurance; and a misstatement of it, either by way of warranty or representation, is fatal to the right of recovery on the policy.

Central Acci. Ins. Co. v. Spence; Aetna L. Ins. Co. v. France; and Dolan v. Mutual Reserve Fund Life Asso.,—supra; McCarthy v. Catholic Knights, 102 Tenn. 345, 52 S. W. 142; Preuster v. Supreme Council, O. C. F. 135 N. Y. 417, 32 N. E. 135; Alabama Gold L. Ins. Co. v. Garner and Schmitt v. National Life Asso. supra; Low v. Union Cent. L. Ins. Co. 6 Ohio Dec. Reprint, 1088; Linz v. Massachusetts Mut. L. Ins. Co. 8 Mo. App. 363; Swett v. Citizens' Mut. Relief Soc. 78 Me. 541, 7 Atl. 394; United Brethren Mut. Aid Soc. v. White, 100 Pa. 12; Cerri v. Ancient Order of Foresters, 25 Ont. App. Rep. 22; Kabok v. Phoenix Mut. L. Ins. supra; Dinan v. Supreme Council C. M. B. A. 201 Pa. 363, 50 Atl. 999; Mutual Reserve L. Ins. Co. v. Jay (Tex. Civ. App.) 101 S. W. 545; 25 Cyc. Law & Proc. p. 808.

Vickers, J., delivered the opinion of the court:

This is an action of assumpsit on an accident insurance policy brought by Mary C. Spence against the Central Accident Insurance Company to recover \$5,687.50, which the company promised to pay to the plaintiff in the event of the accidental death of her husband, Robert Spence. The insurance company, by several special pleas, alleged a breach of warranty as to the age of the assured at the time the policy was applied for. The plaintiff below demurred to these several pleas, which demurrer was overruled, and she elected to abide by her demurrer. To the fourth plea, which set up that the assured in and by his application represented that he was sixty-two years of age, when, in fact, he was over the age of sixty-two and was of the age of sixty-four, the plain-

tiff replied, by leave of court, first, that the age of Robert Spence was not material to the risk assumed under said policy; second, that the understatement of the age of Robert Spence did not increase the risk or hazard of the defendant. The court sustained a demurrer to these replications, and the plaintiff elected to abide by her replications to the fourth plea, whereupon judgment was rendered against her for costs. This judgment having been affirmed by the appellate court for the first district, the plaintiff below has sued out a writ of error to obtain a further review of the judgment.

The policy and the application therefor are both set out in *hæc verba*, in the declaration. The only question involved in the record is whether the statement of the age of the assured in the application is a warranty or a representation. If the former, the judgment must be affirmed; but, if the statement is only a representation, the judgment will have to be reversed and the cause remanded for a new trial. There is a well-defined difference between a warranty and a representation in the law of insurance. A warranty enters into and is a part of the contract, and must be literally true in order to entitle a party to recover upon a policy of insurance, while a representation is not a part of the contract, but is an inducement thereto. A representation must relate to a material matter, and is only required to be substantially true. *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474, 59 Am. Rep. 810, 10 N. E. 242; *Minnesota Mut. L. Ins. Co. v. Link*, 230 Ill. 273, 82 N. E. 637; *Metro-politan L. Ins. Co. v. Moravec*, 214 Ill. 186, 73 N. E. 415.

In his application for the policy in question the assured stated: "I hereby apply for an accident policy, to be based upon the following statement of facts, all of which I hereby warrant to be true: My full name is Robert Spence; height 5 ft. 10 in.; weight 134 lbs.; age sixty-two years. My residence is Chicago, Illinois. My postoffice address is 122 La Salle street. My occupations are fully described as follows: Collector publishing house." The application also contained the following: "I hereby agree that this application and warranty, together with the premium paid by me, shall be the basis of the contract between the company and me; and I accept the policy which said company shall issue upon the application, subject to all conditions, provisions, and classifications contained in such policy or referred to therein, which I understand cannot be altered, changed, or waived by any agent of said company before or after the issuing thereof." If the language above quoted from the application was in the policy, or by reference thereto made a part of the

policy, it would be much easier to sustain the defense than it is under the facts of this record. But these statements are only found in the application. A warranty, being a part of the contract itself as contradistinguished from a representation, which is a mere inducement to the contract, must necessarily appear in the contract itself. In *Mutual Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123, 126, 14 Am. Rep. 8, this court, on page 126, said: "A warranty is in the nature of a condition precedent; it must appear on the face of the policy, or, if on another part of it or on a paper physically attached, it must appear that the statements were intended to form a part of the policy, or, if on another paper, they must be so referred to in the policy as clearly to indicate that the parties intended them to form a part of it. A warranty cannot be created nor extended by construction,"—citing *Reynolds. Life Ins.* 85 et seq.; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill. 188, 40 Am. Dec. 345; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72, 22 Am. Dec. 567.

Defendant in error contends that the application in this case is a part of the policy. The only language in the policy that makes any reference to the application is found in the first sentence of the policy, where it is recited: "In consideration of the warranties and agreements in the application for this policy and of \$25 does hereby insure Robert Spence, of Chicago, state of Illinois, by occupation a collector publishing house," etc. It will be observed that the reference here to the application does not expressly make it a part of the policy; nor does such effect necessarily follow by a fair construction of the language, even if a warranty could thus be imported into the contract. The doctrine of warranty, in the law of insurance, is one of great rigor and frequently operates very harshly upon the assured, and courts will never construe a statement as a warranty unless the language of the policy is so clear as to preclude any other construction. As was said by Justice Gray in *McClain v. Provident Sav. Life Assur. Soc.* 4 C. C. A. 31, 110 Fed. 80: "The practice operation of such literal warranties is so often harsh and unfair that courts require their existence to be evidenced clearly and unequivocally, and are not inclined to allow it to rest upon a mere verbal interpretation where a reasonable construction of the contract as a whole will authorize a different meaning. . . . 'All reasonable doubt as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the insured.'" By statute at least two states (Pennsylvania and Ohio

have eliminated warranties from the law of insurance in those states, and the constitutionality of such statutes has been sustained by the Supreme Court of the United States. *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535. The usual method adopted by insurance companies to make the statements and stipulation embraced in the application a part of the policy is to refer to the application and by express terms make it a part of the contract, or they are declared to be the basis upon which the contract is made, or the policy is declared to be issued upon the faith thereof. May, *Ins.* 2d ed. § 158. Where this course is pursued, there is no room for doubt. A mere reference to the application in the policy is not sufficient. If the reference appears to be for a special purpose, and not with a view to import the application into the policy as a part of the contract, the statements it contains will not thereby be changed from representations into warranties. When the reference to the application is expressed to be for another purpose, or when no purpose is indicated to make it a part of the policy, it will not be so treated. *Jefferson Ins. Co. v. Cotheal*, supra; *Snyder v. Farmers' Ins. & Loan Co.* 13 Wend. 92; *Campbell v. New England Mut. L. Ins. Co.* supra. In *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 423, 59 Am. Dec. 192, Shaw, Chief Justice, said: "If by any words of reference the stipulation in another instrument, such as the proposal or application, can be construed a warranty, it must be such as make it in legal effect a part of the policy." The language in reference to the consideration in the policy in question is not contractual, but merely by way of recital. "In consideration of the warranties and agreements in the application and of \$25" is no part of the written contract, in the sense that it embodies any of the engagements or agreements of the parties. It is a mere recital of a consideration, which is always open to contradiction by parol. Page, *Contr.* § 1203. The recital of a given consideration is not a promise to pay it. If it were, parol evidence could not be received to contradict the recital. It has been held in many cases in this state, and is the settled law, that a recital of a given consideration may be contradicted by parol evidence for all purposes except to destroy the legal effect of the instrument. *Illinois Cent. Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Morris v. Tillson*, 81 Ill. 607; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317. The effect, and the only effect, of the recital in the policy, is to show that the company acknowledged a valuable consideration, which is so far binding as to preclude either party from destroying the legal effect of the policy by showing that no consideration was, in 19 L.R.A. (N.S.)

fact, given. Certainly a mere recital such as the one in this policy falls far short of an expressed stipulation that the application is made a part of the policy, which, under the law, is necessary before it can be so treated. The application itself cannot be considered in determining the preliminary question whether it is a part of the policy. This fact must affirmatively appear from the policy itself. It is only after it is determined from a consideration of the language of the policy that the two papers constitute the contract that the application can be resorted to. The application not being a part of the contract, any statements contained therein are mere representations, and not warranties. May, *Ins.* § 158. As such, they may avoid the policy if found to be "false" and "material," within the legal meaning of these terms. The materiality of a representation is sometimes a question of law, where the statement is made in response to a direct inquiry, or where by the contract the parties have settled the materiality by agreement. But this is not true in this case under either division of the rule.

The court erred in holding that the statement in the application that the assured is sixty-two years of age was a warranty. Such statement is merely a representation, the falsity and materiality of which are questions of fact, and should have been disposed of by the trial court as such.

For the errors indicated, the judgments of the Appellate and trial Courts are reversed, and the cause remanded to the Superior Court of Cook County for further proceedings in conformity with the views herein expressed.

Cartwright, Ch. J., and Hand, J., dissent.

Petition for rehearing denied December 3, 1908.

INDIANA SUPREME COURT.

STATE OF INDIANA EX REL. RAILROAD COMMISSION, Appt.,

v.

ADAMS EXPRESS COMPANY.

SAME, Appt.,

v.

AMERICAN EXPRESS COMPANY.

SAME, Appt.,

v.

UNITED STATES EXPRESS COMPANY.

(— Ind. —, 85 N. E. 337.)

Express companies — free deliveries — Interstate commerce.

1. A state cannot compel express compa-

nies to make free deliveries, within cities of a certain class, of interstate shipments committed to their care, in view of the railroad rate law of Congress requiring the filing by transportation companies with the Interstate Commerce Commission of schedules of rates for transportation or any service connected therewith, and empowering the commission to determine what regulations in respect to transportation are reasonable, and to require the carrier to conform to such regulations.

Same — contract — violation.

2. A state cannot compel an express company to make free delivery of parcels committed to its care, in violation of contracts made at the place where the parcels are received in another state, that delivery charges shall be paid by the consignee.

On Petition for Rehearing.

Same — common-law duty.

3. The common-law duty of express companies to make free deliveries of parcels

committed to their care is not such as to preclude them from fixing charges for transportation which will not include such deliveries, and requiring consignees to pay for making a personal delivery to them.

Same — statute.

4. A state statute requiring express companies to make free delivery of parcels committed to their custody for transportation is not in aid of the common law to such an extent that it cannot be said to be in conflict with the Federal statutes governing the regulation of rates of interstate shipments.

Same — free delivery — interstate commerce.

5. A state statute requiring express companies to make free deliveries of parcels committed to them for transportation is, as applied to interstate shipments, invalid as an attempted regulation of interstate commerce.

(June 23, 1908.)

Case Note. — Statute requiring express companies to make free deliveries in certain cities, as interference with interstate commerce.

Aside from *United States Exp. Co. v. State*, 164 Ind. 196, 73 N. E. 101, no other case has been found presenting the question as to the right of the state to require express companies to deliver goods transported by them under defined circumstances and conditions as affected by Federal statutes relating to interstate commerce. At common law it was the duty, in the absence of a custom or usage to the contrary, of an express company, to deliver goods transported by it to the consignee at his residence or place of business. (See note to *Hutchinson v. United States Exp. Co.* 14 L.R.A. (N.S.) 393.) Indeed, that was the original purpose or object of the organization of express companies,—because delivery could and would be made in a different and, perhaps, more satisfactory manner than by the usual common carrier.

The question considered by the court in *STATE EX REL. RAILROAD COMMISSION v. ADAMS EXP. CO.* was the right of the state to legislate in reference to deliveries by express companies as affected by Federal statutes relating thereto. In *United States Exp. Co. v. State*, supra, the right of the state so to legislate in the absence of any legislation on the part of Congress was declared. That case was, however, held not controlling because of subsequent legislation by Congress, which was construed by the state court to be an attempt to regulate the same matters as were formerly regulated by the statute construed in *United States v. State*, but which was held in *STATE EX REL. RAILROAD COMMISSION v. ADAMS EXP. CO.* to be superseded by the Federal acts of 1906. The rule is well settled that, so long as state legislation, for the purpose of facilitating the safe transmission of goods and carriage of passengers, is not in conflict with any 19 L.R.A. (N.S.)

valid Federal legislation, and merely intended and in fact operates to aid commerce, and expedite, instead of hindering, safe transportation of persons and property from one commonwealth to another, and creates or imposes no direct burden upon interstate commerce, it is not repugnant to the Federal Constitution, and may be enforced either as supplementary to congressional legislation relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at all. This principle is not denied in *STATE EX REL. RAILROAD COMMISSION v. ADAMS EXP. CO.*, but is held not to apply because of the amendments of 1906 to the interstate commerce act.

While, as already stated, no other decisions can be found presenting the same state of facts as were involved in *STATE EX REL. RAILROAD COMMISSION v. ADAMS EXP. CO.*, yet the right of a state to legislate in reference to interstate commerce, where the burden imposed is indirect, and where the matter has also been covered in a general manner by congressional legislation, has recently been twice before the Supreme Court of the United States. While these cases are not strictly within the scope of this note, yet they are sufficiently analogous in principle to justify their inclusion herein. The first of the two cases referred to is that of *Southern R. Co. v. McNeill*, 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722. In that case an attempt by state railroad commissioners, by virtue of a state statute, to direct common carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way onto a private siding, was held manifestly to impose a burden so direct and onerous upon interstate commerce as to leave no room for question that it was a regulation of interstate commerce, and amounted to the assertion of a power concerning a subject directly covered by the act of Congress to reg-

APPEALS by the relator from judgments of the Superior Court for Marion County in defendants' favor in mandamus proceedings to compel defendants to make free deliveries of parcels committed to them for transportation. Affirmed.

The facts are stated in the opinion.

Messrs. Merrill Moores, Walter Myers, and John Ogden, with Mr. James Bingham, Attorney General, for appellant:

It is the common-law duty of express carriers to deliver express matter at the address of the consignee.

American Union Exp. Co. v. Robinson, 72 Pa. 274; *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *American Exp. Co. v. Hockett*, 30 Ind. 250, 95 Am. Dec. 691; *United States Exp. Co. v. State*, 164 Ind. 196, 73 N. E. 101; *American Standard Jewelry Co. v. Witherington*, 81 Ark. 134, 98 S. W. 695; *Southern Exp. Co. v. Holland*, 109 Ala. 362, 19 So. 66; *Southern Exp. Co. v. Van Meter*, 17 Fla.

783, 35 Am. Rep. 107; *Baldwin v. American Exp. Co.* 23 Ill. 197, 74 Am. Dec. 190; *Gulliver v. Adams Exp. Co.* 38 Ill. 503; *American Merchants' Union Exp. Co. v. Wolf*, 79 Ill. 430; *American Exp. Co. v. Wettstein*, 28 Ill. App. 96; *Burr v. Adams Exp. Co.* 71 N. J. L. 263, 58 Atl. 609; *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *Alsop v. Southern Exp. Co.* 104 N. C. 278, 6 L.R.A. 271, 10 S. E. 297; *Bennett v. Northern P. Exp. Co.* 12 Or. 49, 6 Pac. 160; *Union Exp. Co. v. Ohleman*, 92 Pa. 323; *Weil v. Express Co.* 7 Phila. 88; *Marshall v. Wells*, 7 Wis. 1, 73 Am. Dec. 381; 5 Am. & Eng. Enc. Law, p. 218.

The express delivery act is remedial and to be liberally construed.

Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *United States Exp. Co. v. State*, 164 Ind. 196, 73 N. E. 101; *Latshaw v. State*, 156 Ind. 194, 59 N. E. 471; *State ex rel. Gris-*

late commerce, and the amendments to that act, and as such was invalid because unlawfully interfering therewith.

The other case is that of *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 53 L. ed. —, 29 Sup. Ct. Rep. 214. In this case it was sought by a mandamus against a railroad company to enforce a state law requiring a common carrier to discharge its common-law duty to treat all shippers alike by resuming the transfer and return of cars, loaded and unloaded, between the line of a connecting carrier and a flour mill and elevator of a particular shipper. Such a regulation was enforced, and held not so directly to burden interstate commerce as to be an attempt to regulate it, within the prohibition of the Federal Constitution, because the regulation was simply the requirement on the part of the carrier that it perform its common-law duties; and it is on this ground that the case is distinguished from the *McNeill* Case. It was urged in this case, also, as a ground for defeating the state regulation, that Congress had already acted in the matter, and that therefore the case was not within the rule relating to regulation of interstate commerce by states where Congress had not acted in reference to the matter to which the regulation referred. In that respect it was claimed that the creation of the Interstate Commerce Commission, and intrusting it with control over such questions as that presented, excluded state regulation,—the objection being much the same as that made in *STATE EX REL. RAILROAD COMMISSION v. ADAMS EXP. CO.* Answering this contention, the court, speaking through Justice Brewer, said: "The fact that Congress has intrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto; and 19 L.R.A. (N.S.)

yet, this has not been held to interfere with the power of the state in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can, in advance, anticipate what it will do when it acts. Until then, the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. . . . Until specific action by Congress or the commission, the control of the state over these incidental matters remains undisturbed." In distinguishing the case under consideration from the *McNeill* Case, the court further said that there was presented in that case, and determined, solely the power of the state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier onto a private siding,—an order which affected the movement of the cars prior to the completion of the transportation. While the case then under consideration was said to present the question of the power of the state to prevent discrimination between shippers, and enforce the common-law duty resting upon a carrier; this common-law duty, the court says, a state may—at least in the absence of congressional action—compel a carrier to discharge. Justice Moody dissented, and with him concurred Mr. Justice White. Mr. Justice Holmes concurred in the prevailing opinion on the ground that the cars in question had not yet been appropriated to interstate commerce.

wold v. Blair, 32 Ind. 313; Traudt v. Hagerman, 27 Ind. App. 150, 60 N. E. 1011; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; 26 Am. & Eng. Enc. Law, p. 676.

The statute is not a "regulation" of commerce.

Gibbons v. Ogden, 9 Wheat. 1, 190, 6 L. ed. 23, 68; Western U. Teleg. Co. v. James, supra; Western U. Teleg. Co. v. Tyler, 90 Va. 297, 4 Inters. Com. Rep. 481, 44 Am. St. Rep. 910, 18 S. E. 280; Gray v. Western U. Teleg. Co. 108 Tenn. 39, 56 L.R.A. 301, 91 Am. St. Rep. 706, 64 S. W. 1063; Providence Coal Co. v. Providence & W. R. Co. 15 R. I. 303, 4 Atl. 394; United States Exp. Co. v. State, supra; Adams Exp. Co. v. Southern Indiana Exp. Co. 167 Ind. 293, 78 N. E. 1021; Pittsburg, C. C. & St. L. R. Co. v. Hartford City (Ind.) 82 N. E. 787.

The act, if such regulation, is within the power of the state.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Judson, Interstate Commerce, § 116; Gulf, C. & S. F. R. Co. v. Dwyer, 75 Tex. 572, 7 L.R.A. 478, 16 Am. St. Rep. 926, 12 S. W. 1001; Missouri, K. & T. R. Co. v. Simonson, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; New v. Walker, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; Reeves v. Corning, 51 Fed. 774; Hart v. Chicago & N. W. R. Co. 69 Iowa, 485, 29 N. W. 597.

The act cannot be evaded by contract or usage.

Lake Erie & W. R. Co. v. Holland, 162 Ind. 406, 63 L.R.A. 948, 69 N. E. 138; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 884, 71 Am. St. Rep. 301, 49 N. E. 582; Indianapolis v. Wann, 144 Ind. 175, 31 L.R.A. 743, 42 N. E. 901; Winchester Electric Light Co. v. Veal, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353.

Wherever a contract is made, it is void if forbidden by the laws of a state where it is to be performed.

Pittsburgh, C. C. & St. L. R. Co. v. Shepard, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61; Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274; Curtis v. Delaware, L. & W. R. Co. 74 N. Y. 116, 30 Am. Rep. 271; Burekle v. Eckhart, 3 N. Y. 132; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 19 L.R.A. (N.S.)

434; Adams Exp. Co. v. Walker, 119 Ky. 121, 67 L.R.A. 412, 83 S. W. 106; Junction R. Co. v. Bank of Ashland, 12 Wall. 226, 20 L. ed. 385; Hughes v. Pennsylvania R. Co. 202 Pa. 222, 63 L.R.A. 513, 97 Am. St. Rep. 713, 51 Atl. 990; Lake Shore & M. S. R. Co. v. Teeters, 166 Ind. 335, 5 L.R.A. (N.S.) 425, 77 N. E. 599.

The express delivery act is an exercise of the police power not in conflict with the Federal law.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Smith v. Alabama, supra; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 109 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; United States Exp. Co. v. State, 164 Ind. 204, 73 N. E. 101; 8 Cyc. Law & Proc. p. 874; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1080; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; Pound v. Turck, 95 U. S. 459, 24 L. ed. 525; Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033; Brechbill v. Randall, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Platt v. Le Cocq, 150 Fed. 391.

Messrs. A. G. Cavins, E. M. White, and H. M. Dowling also for appellant.

Messrs. Baker & Daniels for appellees.

Gillett, Ch. J., delivered the opinion of the court:

These appeals involve a single question, and will therefore be disposed of together. The state of Indiana, on the relation of the railroad commission of Indiana, has appealed in each of said cases from a judgment which followed the sustaining of a demurrer to the relator's petition and the alternative writ which issued thereon. Omitting the distinctive part of the name of the defendant express company, the command of each writ was as follows: "Now, therefore, you, the ——— Express Company, are hereby ordered and commanded to deliver

free of any delivery charge, in all cities within the state of Indiana having a population of 2,500 or more inhabitants according to the United States census of 1900, in which you, the ——— Express Company, are engaged in the express business, and where you maintain an office for the transaction of such business, all express matter handled by you, consigned to persons living in any and all such cities, at the proper residence or place of business or other address of the consignee in such cities, according to the address furnished by the consignor of such express matter, or, on failure so to do, that you appear," to show cause, etc. The matters complained of relate, either to the imposing of delivery charges upon express matter delivered beyond certain territorial limits, to the refusal to deliver beyond certain limits, or to the practice of making delivery beyond certain limits by means of a local express company, which exacts a delivery charge. It is the settled practice, relative to the law of mandamus, that it is ground of demurrer if the command of the alternative writ exceeds the legal duty of the defendant as disclosed by the averments of the petition and writ. State ex rel. Good v. Johns (Ind.) 84 N. E. 1, and cases cited. If, therefore, it was not the duty of the companies in all circumstances to deliver express matter received by them free of any delivery charge in the cities described, the demurrers were properly sustained. Relator's counsel almost wholly rely upon the act of March 6, 1901 (Acts 1901, chap. 62, § 3312a, p. 97, Burns's Anno. Stat. 1901), to support their contention that it is the duty of express companies to make free delivery of express matter in said cities; but attention is called to the fact that, according to the common law, it was the intentment of a general undertaking upon the part of such a company that it would make personal, as distinguished from warehouse, delivery. We held in United States Exp. Co. v. State, 164 Ind. 196, 73 N. E. 101, that an express company which refused to make delivery of express matter at the residence of the consignee, in a city of more than 2,500 inhabitants, in accordance with its implied undertaking, based on the receipt of a package so addressed, was liable to the penalty of said statute. It was pointed out in that case that there was no Federal enactment relative to the interstate shipment of goods by express, and we expressed our conclusion, so far as concerned the objection that the statute was invalid as an attempted regulation of interstate commerce, that it was competent for the state, under a penalty, to require such carriers to live up to their legal duties. Since the decision of said case, Congress has amended and supple-

mented the several acts known as the "interstate commerce act" (act February 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154) by the enactment of what is termed the "railroad rate act" (act of June, 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1907, pp. 392 et seq.). It is well settled that the amendatory sections of the latter act are to be treated, as to matters occurring after the enactment of said statute, as if said sections had been in the original act. Walsh v. State, 142 Ind. 357, 33 L.R.A. 392, 41 N. E. 65; Pomeroy v. Beach, 149 Ind. 511, 49 N. E. 370; Parks v. State, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862; Given v. State, 160 Ind. 552, 66 N. E. 750. In § 1 of the railroad rate act it is provided that "the term 'common carrier,' as used in this act, shall include express companies."

As the command of the alternative writs in the cases before us to deliver free of any delivery charge is broad enough to include interstate shipments, the question arises whether Congress has not so far legislated upon the subject-matter as to forbid interference therewith on the part of the state, either by its legislative department, or by its judicial writs. In the section above referred to it is provided that the term "transportation" shall include, among other things, "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported." It is further provided in said section that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." Section 2 of said act requires that the schedules, which the common carrier is required to file with the commission, and to keep open to public inspection, shall show "all the rates, fares, and charges for transportation between different points on its own route." It is further provided by said section that the schedules "shall plainly state the places between which property and passengers will be carried, . . . and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service, rendered to the passenger, shipper, or consignee." Said section

law is unquestionably one within the competency of Congress to enact, under the power given to regulate commerce between the states. The state statute must therefore give way."

In *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628, it was held that, under the case of *Gulf, C. & S. F. R. Co. v. Hefley*, supra, a railroad company was not liable in damages for exacting upon an interstate shipment the rates specified in its schedule, although the company had quoted the plaintiffs a lower rate, and they had made sales on the strength thereof. The court pointed out that the clear effect of said decision was to declare that, whatever may have been the rate agreed upon, the carrier's lien upon the goods was, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges.

But, aside from the general objection already pointed out, the effect of a requirement of free local delivery would be to make it necessary to adjust the interstate rate with reference to the fact that a local burden has been imposed on the business. It also appears to us that the mandate sought is open to the objection that it would preclude the imposition of a delivery charge where, by contract in another state, it is provided that the transportation charges shall be paid by the consignee, and also where, by such contract, it is expressly agreed that the delivery shall be made on payment of the general transportation charges plus a delivery fee. All portions of the transit involve expense to the carrier, and he can only charge reasonable rates therefor. Some idea of the importance of the factor of terminal expenses may be gathered from the fact that in *Kindel v. Adams Exp. Co.* 13 Inters. Com. Rep. 475, 495, the commission states that it fairly appears from the evidence in that case that the terminal expenses of the company aggregate about 25 per cent of the entire operating expenses of all kinds, including transportation. If the carrier cannot exact a delivery charge, or, what would be to accomplish the same thing by indirection, cover it in his general charges, it necessarily follows that the local transportation must be free, and that the expense therefor must be treated as a factor in and a charge upon his general business. As was observed in *Re Exchange of Free Transportation*, 12 Inters. Com. Rep. 40, 45: "It must be borne in mind that every extension of the privilege of free transportation casts an appreciable additional burden upon those who pay for their transportation, and thus contribute to the earnings that carriers are entitled to as a just return upon the capital invested. The 19 L.R.A. (N.S.)

whole spirit of the act is that this burden should be distributed as equally and equitably as possible."

In *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, which was decided before the enactment of the interstate commerce law, it was held that that part of the continuous transportation of goods shipped from one state to another, which was within the state where the shipment was made, was interstate commerce, and that, as a consequence, a statute of the state where the shipment originated, forbidding discrimination in charges, was invalid as applied to such a shipment. In that case the court, referring to the commerce clause of the United States Constitution, said: "And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce." After considering a number of its earlier decisions, the court said: "We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits for a transportation which constitutes a part of commerce among the states is a valid law." After pointing out the manner in which the regulation in question in that case would operate to circumscribe the power of the carrier in fixing rates, in order to avoid discrimination, the court, in conclusion, said: "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the state, it may be very just and equitable, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply, to transportation through an entire series of states, a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states, and upon the transit of goods through those states, cannot be overestimated. That this

species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And, if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court conceded it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

In *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277, the court, after pointing out the manner in which the statute there under consideration might injuriously affect interstate commerce, added: "Other cases may be supposed where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust, or fix his entire interstate rates with some reference, at least, to his rates within the state, thus enabling the state, by constitutional provision or by legislation, to directly affect, and in that way to regulate to some extent, the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress."

It is our conclusion that the court did not err in sustaining the demurrers to the petitions and alternative writs. We may further say that it appears to us that, if the conduct of the express companies in respect to interstate commerce is objectionable by reason of a failure to pursue the course demanded of them by the alternative writs, complaint should be made to the Interstate Commerce Commission, and not to the courts.

The judgments are affirmed.

A petition for rehearing having been filed, Gillett, Ch. J., handed down the following response on October 3, 1908.

In their brief on petition for rehearing counsel for relator state that it is the common-law duty of express companies to make personal delivery, except at small stations, and that the Indiana statute is declaratory of the common law as applied to cities of 2,500 or more inhabitants; and it is insisted that the Federal enactment was not designed to add to or take from the common law duties of such carriers. It is true that the courts have treated common carriers by express as analogous to common carriers by wagon, and, with the exception mentioned above, have held that it is an implication of their undertaking that they will make

personal delivery. The authorities, however, seem to rest on the theory that this responsibility springs from the nature of the undertaking where otherwise unrestricted. Judge Redfield refers to the duties of such carriers to make personal delivery as the *prima facie* rule (*Redfield on Carriers and Other Bailees*, § 58), and the doctrine is so stated by Cowen, J., in *Gibson v. Culver*, 17 Wend. 306, 31 Am. Dec. 297. Judge Story says: "If there is any special contract between the parties, or any local custom or usage of trade on the subject, that will govern; the former as an express, and the latter as an implied, term in the contract." *Story, Bailm.* § 543. Angell on Carriers (§ 295) lays down the rule that, "when the carriage is by land, and in the absence of any established usage, or any special contract to the contrary, the goods must be carried to the residence of the consignee." It is stated by a modern text writer that "in all cases where a special contract or usage is shown to exist which relieves the carrier from personal delivery, unless the provisions of the contract are unreasonable, the carrier is not liable if delivery be made in accordance with such special contract or usage." *Moore, Carr.* § 28, p. 194. See also *American Exp. Co. v. Hockett*, 30 Ind. 250, 95 Am. Dec. 691; *Conway Bank v. American Exp. Co.* 8 Allen, 512; 2 Parsons, *Contr.* 5th ed. 186, 187. The case of *Bullard v. American Exp. Co.* 107 Mich. 695, 33 L.R.A. 66, 61 Am. St. Rep. 358, 65 N. W. 551, goes still further. It was there held that it was competent for a carrier by express to establish reasonable delivery limits within a city as against persons having knowledge of the regulation. The court said: "It is clear that a reasonable limit is not in all cases the city limit. Conditions are often varied. If not the city limit, can it be said that a certain number of miles from the office, in either direction, would be a reasonable limit? We think where the company, in apparent good faith, has assumed to fix limits, . . . that with regard to persons who have dealt with it, having knowledge of this fact, it is not bound to deliver beyond these limits." An analogous principle has been recognized as to common carriers by telegraph; for, although *prima facie* their undertaking is to deliver to the addressee or his authorized agent, yet their right has been recognized to fix reasonable delivery limits within a town or city and to impose a reasonable charge for deliveries beyond such limits. *Whittemore v. Western U. Teleg. Co. (C. C.)* 71 Fed. 651; *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419; *Western U. Teleg. Co. v. Trotter*, 55 Ill. App. 659; *Reynolds v. Western U. Teleg. Co.* 81 Mo.

App. 223; Jones, Teleg. & Teleph. Cos. § 196. Apart from the matters heretofore referred to, we have no doubt of the common-law right of carriers by express reasonably to fix their tolls with reference to the extent of the service to be rendered.

In view of the above considerations, it certainly cannot be said that the Indiana statute is merely in aid of the common law. On the contrary, if the statute is to be construed as relator's counsel must necessarily contend, express companies are, as it were, put into a straitjacket, being denied the right by contract or by reasonable regulation to limit their duty in respect to delivery, and being also denied the right to equalize their tolls by the making of fair charges for delivery beyond certain limits. Whatever may be said of the statute, if thus construed, as applied to intrastate shipments, it certainly cannot be said that, as applied to interstate shipments, it is not a regulation of commerce, much less that it could not come in conflict with the power of regulation which has been imposed in the Interstate Commerce Commission. It might be that the very practices complained of would commend themselves as just and reasonable to the commission, and that, if it were found that the companies were casting upon their other traffic the expense of long and burdensome free deliveries, an order would be made forbidding the same and substituting a reasonable regulation or practice designed to give greater equality. *in view of all the circumstances, among the patrons of such companies.* This very consideration must, in view of the railway rate act (Acts 1901, chap. 62, p. 97 [Burns's Anno. Stat. 1901, § 3312a]), operate to suspend the state statute, if construed as appellant contends that it should be, as to interstate shipments by express; and, besides, as we pointed out in the principal opinion, under the authority of the Supreme Court of the United States, any state enactment which imposes a local burden of transportation which in its operation would require the carrier to adjust his interstate rate with reference thereto amounts to an attempted regulation of interstate commerce, and is therefore void as to such transactions.

On their brief on petition for rehearing counsel for relator say: "The opinion handed down in this case is based wholly on the construction by this court of a Federal statute which has not been construed by the Federal courts, the final arbiters as to such matters. This court has held as a result of such construction of the law of a foreign jurisdiction that the Indiana statute previously sustained is not effective." The above extract abounds in errors: (1) Our 19 L.R.A. (N.S.)

holding is not based solely on the construction of a Federal statute, since, in the absence of such a statute, the act, as applied to interstate shipments, would, upon the construction contended for, amount to an attempted regulation of interstate commerce within the holding of *Louisville & R. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416, 22 Sup. St. Rep. 277. (2) The Indiana statute has not been sustained by this court as applied to a case which is within the principle of this one. (3) The statutes of the United States are not, as to this court, the law of a foreign jurisdiction. On the contrary, we find it provided in the Constitution of the United States that "this Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

There is no ground for a rehearing; and the petition is therefore overruled.

IOWA SUPREME COURT.

PARN KIRKPATRICK

v.

LONDON GUARANTEE & ACCIDENT
COMPANY, Limited, Appt.

— Iowa, —, 115 N. W. 1107.)

Insurance — omission of application — breach of conditions in policy.

An insurance company is not precluded from relying on breach by the insured of conditions and warranties inserted in the policy by failure to attach to it a copy of the application, which is not referred to in the policy, although they are similar to those contained in the application, under a statute providing that omission to attach a copy of the application to the policy will preclude the company from alleging or proving any such application or representations, or falsity thereof or any parts thereof, in an action on the policy, but permits the insured to plead or prove the application or representation at his pleasure.

(April 11, 1908.)

Case Note. — Failure to attach copy of application to policy as affecting right of insurer to rely on representations or warranties incorporated in the policy itself.

The only other case which an extensive search has disclosed in which this question was presented for adjudication is *MacKinnon v. Mutual F. Ins. Co.* 89 Iowa, 175, 56 N. W. 423, which is fully set forth in the above opinion.

The case of *Dunbar v. Phenix Ins. Co.*

APP^{EAL} by defendant from a judgment of the District Court for Poweshiek County in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident-insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Carr, Hewitt, Parker, & Wright and Will C. Rayburn, for appellant.

The application forms no part of the contract, but the statute does not prohibit the making of defenses based upon breaches of warranties contained in the policy.

MacKinnon v. Mutual F. Ins. Co. 89 Iowa, 170, 56 N. W. 423; Johnson v. Des Moines L. Ins. Co. 105 Iowa, 273, 75 N. W. 101; Mutual L. Ins. Co. v. Kelly, 52 C. C. A. 154, 114 Fed. 268; Lenox v. Greenwich Ins. Co. 165 Pa. 575, 30 Atl. 940; Rauen v. Prudential Ins. Co. 129 Iowa, 725, 106 N. W. 198; Queen Ins. Co. v. May (Tex. Civ. App.) 35 S. W. 829; Mutual L. Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200; Dunbar v. Phenix Ins. Co. 72 Wis. 492, 40 N. W. 386; Wilcox v. Continental Ins. Co. 85 Wis. 193, 55 N. W. 188.

Mr. R. J. Folonle also for appellant.

Messrs. Norris & Norris and W. R. Lewis, for appellee:

The application was no part of the contract, and the statements therein could not be given in evidence.

MacKinnon v. Mutual F. Ins. Co. 89 Iowa, 170, 56 N. W. 423; Seiler v. Economic Life Asso. 105 Iowa, 87, 43 L.R.A. 537, 74 N. W. 941; Parker v. Des Moines Life Asso. 108 Iowa, 117, 78 N. W. 826; McConnell v. Iowa Mut. Aid Asso. 79 Iowa, 757, 43 N. W. 188; Dunbar v. Phenix Ins. Co. 72 Wis. 492, 40 N. W. 386; Johnson v. Des Moines L. Ins. Co. 105 Iowa, 273, 75 N. W. 101; Newman v. Covenant Mut. Ins. Asso. 76 Iowa, 56, 1 L.R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87; Rauen v. Prudential Ins. Co. 129 Iowa, 725, 106 N. W. 198; Cook v. Fed-

eral Life Asso. 74 Iowa, 746, 35 N. W. 500; Goodwin v. Provident Sav. Life Assur. Asso. 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; Grimes v. Northwestern Legion of Honor, 97 Iowa, 315, 64 N. W. 806, 66 N. W. 183; Moore v. Union Fraternal Acci. Asso. 103 Iowa, 424, 72 N. W. 645; Corson v. Anchor Mut. F. Ins. Co. 113 Iowa, 641, 85 N. W. 806; Stork v. Supreme Lodge K. P. 113 Iowa, 724, 84 N. W. 721; Northwestern Mut. L. Ins. Co. v. Hazelett, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582; Imperial F. Ins. Co. v. Dunham, 117 Pa. 460, 2 Am. St. Rep. 686, 12 Atl. 668; Capital Ins. Co. v. Bank of Blue Mound, 48 Kan. 393, 29 Pac. 570; Capitol Ins. Co. v. Bank of Pleasanton, 48 Kan. 397, 29 Pac. 578; National Life Asso. v. Berkeley, 97 Va. 571, 34 S. E. 469.

McClain, J., delivered the opinion of the court:

On January 5, 1906, the defendant company issued to the plaintiff a policy of insurance for one year, providing that, for loss of life on account of bodily injury effected directly and independently of all other causes through external, violent, and accidental means, the company would pay to plaintiff \$20,000, and for loss of either hand by severance, etc., one half of that sum. Plaintiff's claim was for \$10,000 on account of the loss of a hand, within the terms of the policy, and \$50 under a provision for the payment of that amount in addition for an amputation. The defenses relied upon were that the policy was procured with the fraudulent purpose of cheating the defendant by voluntarily bringing about his injury so as to secure the indemnity provided for; that the injury for which recovery was sought was not accidental, but was voluntarily and intentionally self-inflicted; and that certain material statements and warranties on the part of the insured were false, and that the policy was, by its terms, void on ac-

72 Wis. 492, 40 N. W. 386, also reviewed in KIRKPATRICK v. LONDON GUARANTEE & ACCL. Co., cannot be deemed any authority upon this question, inasmuch as the court based its decision chiefly upon the ground that the insurer, having made inquiries about the matters which it regarded material to the risk, and having failed to require disclosure as to encumbrances, waived that provision in the policy.

But in Wilcox v. Continental Ins. Co. 85 Wis. 193, 55 N. W. 188, also referred to in the KIRKPATRICK CASE, in which the policy in suit had been issued upon an oral application, the court said that, if the insured had "made a written application for the insurance in question, and falsely stated therein that there was no prior insur-

ance or encumbrance, then the defendant, to make such misrepresentations available as a defense, would have been obliged, under the statute, to 'attach to such policy, or indorse thereon, a true copy of any application or representations of the assured which, by the terms of such policy, are made a part thereof . . . or referred to therein,' or be precluded from disproving the statements so made in such application upon the trial." Inasmuch as the policy itself contained provisions against encumbrances or other insurance, such language would seem to mean that the insurer could not rely upon the conditions expressed in the policy itself, where it had failed to attach thereto a copy of the application.

count of such false statements and warranties. The court submitted to the jury the issues raised by the pleadings as to the alleged fraud in the procurement of the policy and as to whether the injury was accidental or self-inflicted, but, by various rulings in striking out portions of defendant's answer, in refusing instructions asked, and in withdrawing certain issues remaining under the pleadings from the consideration of the jury, held that the falsity of statements and warranties on the part of insured, found in the policy, could not be inquired into, for the reason that a true copy of an application containing statements and warranties on the part of the assured somewhat different from those found in the policy had not been attached to such policy or indorsed thereon, as required by Code, § 1741, which, under Code, § 1709, ¶ 5, is applicable to policies of accident insurance. The section referred to reads as follows:

"Sec. 1741. Copy of Application.—All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid; but, if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging, or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

The policy sued on contains the statements and warranties on the part of the assured, falsity of which is relied upon by the defendant; but it makes no reference whatever to any application as constituting the basis for the policy or a part thereof. The application, so called, which plaintiff contends is such application as should have been attached to the policy by true copy, under the section of the statute just quoted, is not in the form of an application. It is headed "Daily Report for Accident Insurance," and purports to set out, among other things, the statements which the assured warrants to be true, and recites that "such statements are hereby made part of this contract," and it is signed by the assured, although, as it appeared from the evidence, it was intended to be signed by the agent.

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But, in determining the applicability of the statute, we think this so-called application must be treated as an application within such statutory provisions. As counsel have presented a question as to the interpretation of the statute, which can be determined without particularly reciting the allegations as to false statements and breaches of warranties under the policy itself; and as it is conceded on both sides that the solution of the question argued as to the proper interpretation of the statute will dispose of the appeal,—we shall proceed at once to determine the question of interpretation thus argued.

The contention for appellee in the lower court and on this appeal is that, if representations or warranties were made in the application, a copy of which was not incorporated into or attached to the policy as required by statute, then no issue can be raised by the company as to representations or warranties found in the policy, although the policy makes no reference to such application; in other words, that, although there are statements and warranties in the policy which, without reference to the application, are material to the contract, the defendant cannot raise any issue under such statements and warranties relating to the same subject-matter, a copy of which was not incorporated into or attached to such policy. The appellant, on the other hand, insists that the existence of an application, not incorporated into or attached to the policy by reference, does not preclude it from relying by way of defense on falsity of statements or breaches of warranty available to it under the policy as delivered, without reference to any application which may have been made, but which was not thus incorporated or attached. Appellant did not, as the question was finally presented in the lower court, plead or attempt to rely upon the falsity of any statements or the breach of any warranty found in the application itself, but relied exclusively upon the terms of the policy as furnishing the basis for the defenses which it interposed in this respect. The section of the Code which we are now asked to interpret has frequently been considered by this court, and has been liberally applied in excluding an insurance company from relying in any way upon representations or warranties contained in an application, a copy of which has not been incorporated into or attached to the policy; and the purpose of the statute has been declared in a general way to be the prevention of any representations or warranties in the application being considered a portion of the contract, or available to the company as a defense, unless a copy of the application is

incorporated or attached. *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507, 20 N. W. 782; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; *Seiler v. Economic Life Asso.* 105 Iowa, 87, 43 L.R.A. 537, 74 N. W. 941; *Corson v. Anchor Mut. F. Ins. Co.* 113 Iowa, 641, 85 N. W. 806. "An evident purpose of this statute is that, when the application is made a part of the contract, . . . a true copy must be attached to the policy, so that the writings composing the contract may all appear together, and that the insured may be in possession of the evidence of what his contract is." *Johnson v. Des Moines L. Ins. Co.* 105 Iowa, 273, 75 N. W. 101.

With reference to a similar statutory provision in Pennsylvania, the supreme court of that state has said: "It is well known that the evil aimed at in this legislation was the custom of insurance companies to put in their blank forms of application long and intricate questions or statements to be answered or made by the applicant, printed usually in very small type, and the relevancy or materiality not always apparent to the inexperienced, and therefore liable to become traps to catch even the innocent unwary. The general intent was to keep these statements before the eyes of the insured, so that he might know his contract, and, if it contained errors, have them rectified before it became too late." *Lenox v. Greenwich Ins. Co.* 165 Pa. 575, 30 Atl. 940. It is true this court has gone further than the Pennsylvania court in applying the statute, and has insisted upon compliance with it in reference to oral representations made to an agent. *Ellis v. Council Bluffs Ins. Co.* supra. An earlier Pennsylvania case has already been cited with approval by this court in connection with the statement that "the effect of this provision is to exclude or eliminate from the contract all reference to an application a copy of which is not attached to the policy, and to render ineffective all defenses based upon anything contained in such application. . . . We are therefore disposed to hold that, if the application be not attached in obedience to the statute, the policy should be treated, construed, and enforced as if no written application had been made." *Rauen v. Prudential Ins. Co.* 129 Iowa, 725, 106 N. W. 198.

Nothing said in any of our cases gives confidence to the thought, however, that a failure to incorporate or attach a true copy of the application in or to the policy should preclude the company from relying on any defense available to it under the terms of the policy as to which no reference to an application not incorporated or attached by copy

is necessary. There is no language in this policy indicating a purpose or attempt on the part of the company to make anything found in the application a part of the contract. The policy was complete in itself, and purports to contain all the terms and stipulations of the contract of insurance. If the company sees fit to ignore the statements and warranties of the application, and to issue a policy which purports to contain in plain terms all the stipulations and conditions of the contract, and such a policy is accepted by the assured as constituting the contract, we see no reason for holding that the company has, by omitting to incorporate or attach a copy of an application, debarred itself from insisting upon the policy as written as constituting the complete and conclusive contract between the parties. The assured has no cause to complain if the company fails to give any consideration to his representations and warranties in the application. The provision of the last clause of the section, that the plaintiff may, in an action on the policy, at his option, prove the terms of an application or representation not incorporated in or attached to the policy by the company, evidently contemplates that the assured may prove such application and representation by way of estoppel or waiver to defeat some defense which the company might otherwise make under the provisions of the policy. If the company has been conversant with facts which constitute a breach of a condition precedent, and nevertheless delivers or gives effect to the policy containing such stipulation, it cannot afterwards rely upon a breach of such condition precedent to defeat recovery under the policy, and the clauses of the statute referred to plainly indicate that the assured may prove the statements in the application for this purpose, although the company is not authorized to rely upon them by way of defense. *Newman v. Covenant Mut. Ins. Asso.* 76 Iowa, 56, 1 L.R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87.

But we have not given countenance in case to the thought that, for the purposes of precluding the company from relying on the stipulations and conditions of the policy, the plaintiff may prove that similar stipulations and conditions were contained in an application which the company failed to incorporate in or attach to the policy by copy. The contrary conclusion is plainly suggested in *MacKinnon v. Mutual F. Ins. Co.* 89 Iowa, 170, 56 N. W. 423, where, with reference to this statutory provision, we said: "One of the purposes of this statute, if not the sole purpose, is to cause all parts of the contract of insurance to appear in or upon the policy. It is certainly not intended that

representations appearing on the face of the policy shall also appear by copy indorsed thereon or attached thereto. It is only applications and representations of the assured that are made a part of the contract and which may affect its validity, and that do not appear therein, that are required to be indorsed upon or attached to the policy." And in that case it is held that evidence showing a breach of a warranty in the policy was admissible in behalf of the company, although it did not appear that there was not an application or representation on the subject to which the warranty in the policy related.

Counsel for appellee rely upon *Dunbar v. Phenix Ins. Co.* 72 Wis. 492, 40 N. W. 386, a case decided under a statutory provision similar to the one we are now considering, in which it was held, as they claim, that, if an insurance company fails to attach to a policy a true copy of an application which is made a part thereof or referred to therein, the statements made in such application will, as against such corporation, be conclusively presumed to be true. In that case the company relied upon the falsity of a statement in the policy that it would be void if the property insured was encumbered and the fact was not stated to the company in the written part of the policy, and it also relied on a representation in the application that the property was unencumbered. The evidence showed that the agent had inserted this statement in the application without the knowledge of the insured. And the court held that, as the agent had made an unauthorized statement on the subject in the application without calling the attention of the insured thereto, it could not rely upon a breach of the condition as to the same subject in the policy. This conclusion could well be supported on the ground that the unauthorized statement of the agent was binding upon the company. *Hingston v. Aetna Ins. Co.* 42 Iowa, 46. And it is to be borne in mind that in the Wisconsin case the application was, by reference, made part of the policy, and should have been considered in construing it, but for the failure of the company to attach a copy; whereas in the case before us no reference whatever was made in the policy to any application. But, without attempting to fully fathom the reasoning of the Wisconsin court in the case cited, we are clearly of the opinion that the effect of failure to incorporate or attach an application by copy is to preclude the company from relying on any representations or statements in the application for the purpose of making out its defense, and that it is still open to the company to make any defense it may have under the 19 L.R.A. (N.S.)

terms of the policy without reference to such application; and this seems to be the view taken by the Wisconsin court in *Wilcox v. Continental Ins. Co.* 85 Wis. 193, 55 N. W. 188, in which the company was allowed to rely on a provision in the policy containing no reference to any written application or representation of the assured. The Wisconsin case last referred to and our own case of *MacKinnon v. Mutual F. Ins. Co.* supra, are cited by Mr. Cooley in his Briefs on Insurance in support of the proposition that the failure to attach the application does not affect the admissibility of the policy itself, nor prevent the insurer from showing breach of conditions contained in the policy. 1 Cooley, Briefs on Insurance, 687.

The purpose of the statute being to require all the terms of the contract and the representations affecting its validity to be embodied in the policy, it would evidently be violative of such purpose to allow the assured to prove that oral or written representations were made in an application not incorporated in or attached to the policy as required by statute, for the purpose of defeating the provisions of the policy which has been issued and accepted as containing such contract, save as the right is preserved to the insured by the last clause in the section to prove such representations in order to show that the company has, by issuing the policy with knowledge on the subject, waived breach of conditions or warranties found in the policy.

No complaint is made of the rulings of the court or the instructions with reference to the submission to the jury of the issues as to fraud or accidental loss, as to which there was a verdict for the plaintiff. But, on account of the rulings and instructions withdrawing from the jury any consideration of defenses based on the conditions and warranties contained in the policy, the judgment is reversed.

Petition for rehearing denied.

IOWA SUPREME COURT.

C. L. VOSS, Cashier of Bank of Denison,
v.

E. N. CHAMBERLAIN et al., Appts.

(— Iowa, —, 117 N. W. 269.)

Note — misappropriation — return.

1. The return by a bank officer to the private receptacle of a customer, of negotiable paper indorsed in blank which such official had wrongfully taken from such receptacle and pledged for his own indebtedness, and had recovered from the pledgee

ostensibly for collection, does not render the owner a new holder for value, which will render his rights superior to those of the pledgee.

Same — indorsement.

2. The indorsement by the payee of a note, of his name under a guaranty of payment combined with a waiver of demand, notice, and protest, constitutes a blank indorsement, so as to pass title to one who takes the paper in due course for value.

Same — value.

3. One taking negotiable paper as a substitute for other securities held as collateral for a debt which he surrenders at the time is a holder for value.

Same — fraud — consideration.

4. A transferee of negotiable paper need not show that he paid for it in order to hold it against the payee, from whom it

was obtained by fraud, under a statute providing that a bona fide holder for value may not recover against the maker a greater sum than he paid for the paper if it was procured by fraud upon the maker.

Same — misappropriation — priorities.

5. The rights of the owner of negotiable paper which is indorsed in blank and deposited in a receptacle in a bank for safe-keeping are inferior to those of a transferee for value without notice in due course of business, from a bank official who wrongfully misappropriates the paper and uses it for purposes of his own.

Same — defective title — transfer — effect.

6. One taking a pledge of negotiable paper from a bank official as collateral for his own debt is not bound to show diligence in ascertaining the official's right to the

Case Note. — Rights of owner of negotiable paper, payable to bearer, or indorsed in blank, as against bona fide purchaser from one unlawfully in possession thereof.

It is not intended in this note to include cases involving the rights of bona fide purchasers of negotiable instruments fraudulently diverted; or cases involving the rights of a bona fide purchaser of negotiable paper from one in possession thereof because deposited with him by the owner as an escrow, to be by him held until the performance of certain conditions; or cases involving the rights of bona fide purchasers from one other than the owner, whose possession was obtained through fraud; or cases where the execution of the negotiable paper involved therein was induced by fraud. To be within the scope of this note, there must be lacking the element of voluntary delivery by the owner to the person disposing of the instrument to a bona fide holder. It is settled law that a negotiable instrument duly executed and delivered, and payable to bearer or indorsed in blank, will pass by delivery. There is but little, if any, question but that title to such an instrument will pass by delivery to a bona fide purchaser for value, without notice, without reference to the title of the one from whom it was obtained, although the instrument may have been stolen or otherwise unlawfully obtained from the owner.

This doctrine was stated in *London & County Bkg. Co. v. London & River Plate Bank*, L. R. 21 Q. B. Div. 535, a case very similar, as to the facts, to *VOSS v. CHAMBERLAIN*. A servant of a bank abstracted negotiable securities from the vaults of the bank, and turned them over to a third person to be used in carrying on a stock transaction on a board of trade; the same securities, or similar ones, were afterward returned to the vaults of the bank, without knowledge on the part of the bank that they had ever been abstracted; the securities, when returned, however, were really the property of a purchaser, who had in good faith purchased them on the board of trade, from

whom they had thereafter been wrongfully taken. It was held that, while a purchaser of the securities from the employee of the bank obtained a valid title thereto, because he was a bona fide purchaser for value, yet, when taken from him and restored to the bank, that the bank became a bona fide purchaser thereof, and was entitled to them for that reason, although it had no knowledge, either of the loss of the securities, or of their return. The decision was based on the ground that the bank, at the time of the abstracting of the securities, could have brought an action against the guilty person for their wrongful conversion; but this right was lost when the securities were restored; and the destruction of this right of action was said to be a value moving from the bank, making a sufficient consideration to bring it within the rule of a purchaser for value, without notice; and the fact that the bank had no knowledge of the transaction either way was immaterial.

In *Whiteside v. First Nat. Bank* (Tenn. Ch. App.) 47 S. W. 1108, it was said that the holder of a negotiable paper, regular on its face, could negotiate it and give good title to a party who took it in due course of business before maturity, although he had stolen it or was wrongfully possessed of it.

So, in *Franklin Sav. Inst. v. Heinsman*, 1 Mo. App. 336, where negotiable promissory notes indorsed in blank had been left with plaintiff for collection, and were stolen from it by a third person, who thereafter added his indorsement and sold them to defendant, who was a bona fide purchaser for value, without notice, it was held that title vested in the bona fide purchaser.

Walters v. Tielkemeyer, 72 Mo. App. 371, also holds that an unmaturing negotiable instrument, payable to bearer, or indorsed in blank, stolen and afterward sold in the usual course of business for value, the purchaser having no notice of the theft, passes title, although the thief himself had none.

Where a negotiable promissory note indorsed in blank was accidentally left by the owner in a broker's office, and was negotiated by him to a bona fide purchaser for value, the doctrine was enunciated that such

paper as against the payee who has indorsed it in blank and left it in a receptacle in the bank for safe-keeping, under a statute providing that the rule that, when it is shown that the title of any person who has negotiated such paper was defective, the burden is on the holder to prove title acquired in due course, does not apply in favor of a person who became bound on the instrument prior to the acquisition of defective title.

(July 9, 1908.)

APPEAL by defendants from a judgment of the District Court for Crawford County in plaintiff's favor in an action brought to recover damages for conversion of certain promissory notes. Affirmed.

The facts are stated in the opinion.

purchaser, in order to be entitled to claim the same, must show that it was taken in the usual course of business, and for a valuable consideration, without notice of any defect in its title. *Merriam v. Granite Bank*, 8 Gray, 254.

It is sufficient, however, for the purchaser of a negotiable note to show that he got it from the payee a short time after its date, and paid substantially its face in installments; and that he had no knowledge or information calling into question the payee's title until he presented it for payment at its maturity. *Arons v. Ziegfeld*, 52 Misc. 571, 102 N. Y. Supp. 898.

Under the Massachusetts negotiable instruments act, *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959, held that a negotiable promissory note payable to bearer, complete in form and execution, was valid in the hands of a bona fide holder for value, although wrongfully transferred by the maker; and that the first sentence of Rev. Laws, chap. 73, § 33, which provides that every contract or negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto, was inapplicable because the note had been executed and delivered.

Upon proof by the owner of a draft that it had been lost or stolen, the burden of proof is on the purchaser thereof from the thief to show that he took it for value and in the usual course of business. The fact that the holder is a banker, had a very large business, and therefore that it was difficult for him to show the facts of this particular transaction among a great multitude of others, was held not to change this rule. *Kuhns v. Gettysburg Nat. Bank*, 68 Pa. 445.

It was also applied in *Poess v. Twelfth Ward Bank*, 43 Misc. 45, 86 N. Y. Supp. 857, to a stolen certified check indorsed in blank prior to its theft; and in *Marsh v. Small*, 3 La. Ann. 402, 48 Am. Dec. 452, to a stolen check.

The doctrine that negotiable instruments once delivered will thereafter pass by transfer or indorsement to bona fide purchasers 19 L.R.A. (N.S.)

Messrs. Mayne & Hazelton for appellants.

Messrs. Shaw, Sims, & Kuehnle, for appellee:

The purchaser for value before maturity, and in due course of trade, of negotiable paper indorsed by the payee in blank, from one who has stolen it, acquires a title good even against the owner.

Whiteside v. First Nat. Bank (Tenn. Ch. App.) 47 S. W. 1108; *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858.

The consideration for the notes was sufficient.

Code Supp. § 3060a25; *Robinson v. Lair*, 31 Iowa, 9; *Selover, Neg. Inst.* § 88.

A guaranty is only an indorsement with an enlarged liability.

for value, without reference to any defects in the holder's title, was also enunciated and applied as to municipal bonds stolen from the owner thereof and payable to blank, the payee's name afterward being filled in by the thief, in *Manhattan Sav. Inst. v. New York Exch. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079.

The doctrine has been applied to government bonds stolen after issuance. *Jones v. Nellis*, 41 Ill. 482, 89 Am. Dec. 389; *Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 583; *Brown v. United States*, 20 Ct. Cl. 416. In *Com. v. Emigrant Industrial Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126, it was applied to state bonds that had been stolen from a holder thereof. It was applied in *Garvin v. Wiswell*, 83 Ill. 215, to county bonds that had been lost by the owner and afterwards came into the hands of a bona fide holder; and in the following cases to municipal bonds that had been stolen after issuance: *Elizabeth v. Force*, 29 N. J. Eq. 587; *Boyd v. Kennedy*, 38 N. J. L. 146, 20 Am. Rep. 376; *Consolidated Asso. of Planters v. Avegno*, 28 La. Ann. 552; and *Dutchess County Mut. Ins. Co. v. Hachfield*, 73 N. Y. 226. In the last case the court said: The bonds were negotiable, and the rule is that the purchaser of such paper for value will be protected unless the circumstances are such that inference could be fairly and legitimately drawn that the purchase was made with notice of a defective title in the seller, or in bad faith. It is not sufficient that a prudent man would be put upon inquiry, nor that the purchaser was negligent, nor that he did not exercise a proper degree of precaution. A purchaser of such securities for value will be protected if he is honest and believes that the seller has a good title.

The doctrine has also been applied to bonds of private corporations. *Mason v. Frick*, 105 Pa. 162, 51 Am. Rep. 191; *Wylie v. Missouri P. R. Co.* 41 Fed. 623; *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108; *Murray v. Lardner*, 2 Wall. 110, 17 L. ed. 857 (bonds of joint-stock association).

Negotiable coupon bonds which were negotiable by delivery were held in *Murray v.*

Belden v. Hann, 61 Iowa, 42, 15 N. W. 591; *Robinson v. Lair*, supra; *German American Sav. Bank v. Hanna*, 124 Iowa, 374, 100 N. W. 57.

McClain, J., delivered the opinion of the court:

In April, 1903, one H. S. Green, a banker at Dow City, Iowa, acting as agent for the defendants, effected a sale for them of a tract of land in Nebraska, receiving in payment a small sum in cash and certain promissory notes which were made payable to "E. N. Chamberlain, Amos Weatherbee, and H. S. Green, or order." Green appropriated the cash payment and the proceeds of the first of the notes to become due in point of time, which he collected, to the payment of

his commission, and turned over the other notes, of the face value of \$4,350, to the defendant Chamberlain as the property of defendants, signing his name on the back of the notes to a stamped guaranty of payment, waiving demand, notice of nonpayment, and protest. In November, 1903, defendant Chamberlain, intending to negotiate the notes, indorsed his own name, and had the name of his co-owner, Weatherbee, indorsed, under the name of Green, on the back; but, as the sale of the notes was not then effected, they were replaced among the private papers of Chamberlain, which were kept for safety in the Exchange Bank of Dow City, of which Green was owner. At some time between November, 1903, and March 19, 1904, these notes were pledged by

Lardner, 2 Wall. 121, 17 L. ed. 859, to pass by delivery to an innocent purchaser for value, although he purchased them from a thief who had stolen them from the fire-proof safe of the owner the previous night.

It is also applicable to coupon bonds of a private corporation, payable to bearer, pledged as collateral security for a loan to the thief in the ordinary course of business. *Cochran v. Fox Chase Bank*, 209 Pa. 34, 103 Am. St. Rep. 976, 58 Atl. 117.

Gibson v. Lenhart, 111 Pa. 624, 5 Atl. 52, held that the title to bonds of a railroad company, pledged by the owner, which were thereafter taken possession of by him and pledged to another who was a bona fide pledgee, and who was given possession of the bonds, passed as against the first pledgee.

In *Texas Bkg. & Ins. Co. v. Turnley*, 61 Tex. 365, the court applied the doctrine to a railroad bond owned by a wife whose husband, without her knowledge, took it and pledged it as collateral security for his individual indebtedness contracted at the time.

The doctrine was also recognized in *New Orleans, J. & G. N. R. Co. v. Mississippi College*, 47 Miss. 560, wherein the court held that, in order that the loser of ordinary coupon bonds, payable to bearer, may be entitled to restrain the railroad company issuing the same from paying them when presented, and also to secure a mandatory order requiring the corporation executing the bonds to reissue other bonds in the place of those lost, indemnity in an amount sufficient to protect the maker of the bonds against the reappearance of the bonds alleged to be lost, in the hands of bona fide holders, must be given.

It has also been frequently applied to stolen bank bills and notes. *Miller v. Race*, 1 Burr. 452; 1 Smith, Lead. Cas. 8th ed. 838; *Worcester County Bank v. Dorchester & M. Bank*, 10 Cush. 488, 57 Am. Dec. 120; *United States v. Read*, 2 Cranch, C. C. 150, Fed. Cas. No. 16,125; *Robinson v. Bank of Darien*, 18 Ga. 67; *Olmstead v. Winstead Bank*, 32 Conn. 278, 85 Am. Dec. 260; *Sinclair v. Piercy*, 5 J. J. Marsh. 63. The doctrine

was also stated in *First Nat. Bank v. Gates*, 66 Kan. 505, 97 Am. St. Rep. 383, 72 Pac. 207.

In applying the doctrine to stolen bank notes, in *Raphael v. Bank of England*, 17 C. B. 161, it was said: "A person who takes a negotiable instrument bona fide for value has undoubtedly a good title, and is not affected by the want of title of the party from whom he takes it."

Necessity of original delivery.

A distinction is drawn in most cases between a negotiable instrument actually delivered for any purpose, thus being fully executed, and one not fully executed because of the lack of any intention to deliver it for any purpose. This distinction is drawn and applied in *Hall v. Wilson*, 16 Barb. 548, where it appeared that, after having drawn a negotiable note, the maker left it in his desk as a place of deposit, from which it was stolen by an employee, and, by him, transferred to one who claimed to be a bona fide purchaser for value, without notice. The case, however, seems to have been disposed of, and the transfer held not to pass title, on the theory that, if it had any valid inception, it must have been by reason of its delivery by the thief to the purchaser; and, as it had been discounted in such delivery to such an extent as to amount to usury, the purchaser was not a bona fide purchaser for value. The other objection, that such a note had no valid inception because not delivered by the maker, is also suggested by the court.

A very similar case, wherein the same conclusion was reached, is *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497, wherein the doctrine was enunciated that delivery of a negotiable promissory note is necessary to its validity. That, while possession thereof by the payee is prima facie evidence of delivery, the fact of delivery may be disputed by the maker, although the note may have been transferred or indorsed to a bona fide purchaser for value, without notice. Considering this subject, it is said: "When a note payable to bearer, which has

with any other rights than those which they had prior to the abstraction of the notes from the wallet by Green and their delivery to the Bank of Denison. The return of the notes to Chamberlain's possession without his knowledge, and without his having parted with any new consideration or voluntarily incurring any detriment, did not make the defendants new holders for value in due course.

The sole question to be determined, then, is whether, by the original pledge of the notes by Green, the Bank of Denison became holder thereof in due course for value and without notice of the wrongful act of Green

in thus transferring paper to which in fact he had no title. The notes were not yet due at the time of their transfer by Green to the Bank of Denison, and the bank, therefore, took any rights which it acquired before maturity. But it is contended for appellants that it acquired no rights whatever because the notes were payable to the persons named therein or order, and were not so indorsed as that title would pass by delivery. As appears from the facts stated, the indorsement by Green when the notes were first procured by him and delivered to the defendants was by means of his signature to a guaranty of payment entered on

livered or reissued. "They had run their career and fulfilled their mission, and had returned to the dusty depository of dead matter in the treasury; and they had been substituted by outstanding equivalents which represent the legal and moral obligations of the state. They had no longer any legal inception or existence as the bonds of the state, and they were and are as though they never had been; and their vitality could never be restored with intentional and voluntary redelivery by the state."

And in *Dinsmore v. Duncan*, 57 N. Y. 573, 15 Am. Rep. 534, where United States treasury notes which, on their face, were convertible into United States bonds at the election of the holder, were indorsed on the back by the holder thereof for conversion, and mailed to the United States Treasurer for that purpose, and were lost or stolen during transit, and the indorsement removed, it was held that the act of the wrongdoer was pure spoliation, leaving the rights of the parties wholly unaffected; that the thief did not, as in the case of stolen notes payable to bearer or indorsed in blank, have even the nominal title. The court said: "There can be no pretense of any legal ground upon which his act could destroy the plaintiff's right, any more than if he had mutilated the instrument or wholly destroyed it."

In other jurisdictions the same result has been reached, but the cases have turned upon the question of negligence of the owner or of the purchaser. Thus, in *Scholey v. Ramsbottom*, 2 Campb. 485, where the maker of a check, because it was made for an incorrect sum, undertook to destroy it by tearing it into pieces, which he threw away, which were afterwards picked up by a third person and pasted together, and paid by the bank, it was held that, under these circumstances, the bank was not justified in making payment, as the rents in the check were quite visible and the face of the check was soiled and dirty.

In *Northern Bank v. Farmers' Bank*, 18 B. Mon. 506, a torn bank note, which had been put together in such a way as to present upon its face unmistakable evidence of fraud and forgery, was held not to be valid in the hands of one claiming to be a bona fide purchaser for value, who had taken it in good faith as against the bank 19 L.R.A. (N.S.)

which had issued it, and which was the true owner.

But, where the maker of a bill, intending to cancel it, tore it and threw it away in such a way that it was afterward picked up by a third person and so pasted together that its appearance was as consistent with its having been divided into two, for the purpose of its safer transmission by the post, as with its having been torn for the purpose of annulling it, it was held, in *Ingham v. Primrose*, 7 C. B. N. S. 82, that it was properly a question for the jury whether the bill exhibited appearances which would have led a man of ordinary intelligence to the conclusion that it had been torn for the latter purpose.

In *Eckert v. Cameron*, 43 Pa. 120, one who, before maturity, had discounted a note for the maker, which had been indorsed by third persons, was held entitled to recover thereon against any of the parties thereto, although as a matter of fact the note had been paid upon the day of its execution, and its reissuance by the maker was a fraud upon the indorsers and without their authority.

The doctrine that negotiable securities, although stolen from the true owner, will become enforceable in the hands of a bona fide purchaser for value, without notice, was applied in *Rockville Nat. Bank v. Citizens' Gaslight Co.* 72 Conn. 576, 45 Atl. 301, and *Ehrlich v. Jennings*, 78 S. C. 269, 58 S. E. 922, to bonds issued by corporations, which had been paid before maturity, but had not been canceled, and which were afterwards stolen while in this condition and negotiated to bona fide purchasers for value, before maturity. These cases were distinguished from the case of *District of Columbia v. Cornell*, 130 U. S. 655, 32 L. ed. 1041, 9 Sup. Ct. Rep. 694, a case very similar as to facts, except that in this case the bonds that were paid were duly marked "canceled" across their face, which mark was removed by the thief before he negotiated them to a bona fide purchaser for value. The marking of the bonds "canceled" was here held to be a sufficient destruction of them to make their reissue under the circumstances of no validity as against the maker.

the back of the notes with a waiver of demand, notice, and protest. The names of defendants were, at a subsequent time, written by them under the name of "Green" following this guaranty. If it were material to determine whether defendants indorsed the notes in blank, or merely joined with Green by the subsequent act in guaranteeing payment, it might be difficult to say whether they became blank indorsers or only guarantors. But, according to the weight of authority and the recent holding of this court, the signing of a guaranty of payment combined with waiver of demand, notice, and protest constitutes the signers of such an indorsement who are payees of the note indorsers, and not guarantors, and, as no indorsee is named, such indorsement is a blank indorsement, and the subsequent delivery of the instrument to one who takes in due course and for value passes title. *German American Sav. Bank v. Hanna*, 124 Iowa, 374, 100 N. W. 57.

In determining whether the Bank of Denison became a holder for value, it is not necessary to consider the conflict in authorities as to whether a transfer as security for a pre-existing debt constitutes the transferee a holder for value, for the evidence shows that the notes were delivered to the Bank of Denison by way of substitution for other collateral which was surrendered in the same transaction; and, beyond question, a transferee who thus takes collateral by way of substitution for other collateral surrendered becomes a holder for valuable consideration. *Park Bank v. Watson*, 42 N. Y. 490, 1 Am. Rep. 573; *Greenwell v. Haydon*, 78 Ky. 332, 39 Am. Rep. 234; *Cherry v. Frost*, 7 Lea, 1; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. ed. 235; 1 Dan. Neg. Inst. § 827. Since the adoption in this state of the negotiable instruments act (Acts 29th Gen. Assem. Laws 1902, p. 86, chap. 130), there is no question, however, as to a holder who takes by way of security for pre-existing indebtedness being a holder for value. By § 52 of that act (Code Supp. 1907, § 3060a-52) a holder in due course must be a holder "for value," and the term "value" means valuable consideration (§ 191), and by § 25 it is declared that "an antecedent or pre-existing debt constitutes value." In no view of the case, therefore, can the Bank of Denison be said not to have been a holder for value.

In this connection, it is contended, however, that, as the value of the collateral surrendered when the notes in question were accepted by the Bank of Denison is not shown, the bank is not entitled to recover because, under Code, § 3070, a bona fide holder for value may not recover, as against the maker of negotiable paper, a greater sum than the

holder paid for the instrument if it has been procured by fraud upon such maker. This section evidently has reference, however, to recovery on instruments as to which the maker has a defense. The defendants in this action were not the makers of the notes which they are charged with having converted, nor are they sued as makers. There is no contention that any fraud was perpetrated upon the maker, and there is no occasion, therefore, to limit the recovery of plaintiff to the amount or value of the security surrendered when these notes were accepted by way of substitution. The indebtedness of Green to the Bank of Denison exceeds the amount of this collateral, and plaintiff is entitled to recover, therefore, if at all, in the full value of the notes converted. If the bank was holder in due course and free from defenses, it might enforce payment against the maker of the notes and the defendants as indorsers for the full amount thereof. See negotiable instruments act (Acts 29th Gen. Assem. Laws 1902, p. 87, chap. 130), § 57; Code Supp. 1907, § 3060a57. And the amount which the bank might have recovered on the notes had they not been converted by the defendants would be the measure of recovery against defendants for their unlawful conversion. The main contention for the appellants is that Green had no title to these notes when he transferred them to the Bank of Denison, and that the bank could not, therefore, acquire title or right thereto as against defendants, the lawful owners. The rule invoked is that applicable to personal property in general, that one who has such property in his custody, but without any title, as, for instance, a thief or the finder of lost goods, cannot, by delivery even to a purchaser in good faith and for value, transfer title which will be valid as against the real owner, who has not by any act of his conferred apparent authority to transfer title upon the one who has such apparent custody. This rule is applicable not only to goods and chattels, but to instruments quasi negotiable in character, representing property and intended to pass for it by delivery, such as bills of lading. *Shaw v. North Pennsylvania R. Co.* (*Shaw v. Merchants' Nat. Bank*) 101 U. S. 557, 25 L. ed. 892; *McMahon v. Sloan*, 12 Pa. 229, 51 Am. Dec. 601. But to this rule there is a distinct and universally recognized exception in case of current money and negotiable instruments payable to bearer or indorsed in blank, which are considered as standing for and representing money, coming into the hands of a holder in due course; that is, before maturity for value and without notice of defect in the title. In such cases the title of the holder is not dependent upon that of the person

from whom the money or instrument is obtained. This is, as said by Lord Chief Justice Holt in *Anonymous*, 1 Salk. 126, "by reason of the course of trade which creates a property in the assignee or bearer," and this reason is repeated by Lord Mansfield in *Miller v. Race*, 1 Burr, 452, with the suggestion that "the bearer is a more proper expression than assignee," and with the more explicit statement with reference to bank notes payable to bearer that "they are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes." Lord Mansfield in the later case of *Peacock v. Rhodes*, 2 Dougl. K. B. 633, stated the law to be "settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties;" and he continues: "I see no difference between a note indorsed blank and one payable to bearer. They both go by delivery, and possession proves property in both cases." And he adds, with reference to the particular case under consideration, that, as the jury had found that the bill indorsed in blank on which action was brought by a holder taking by delivery was received in course of trade, the case was clear that the holder could recover, although it had been stolen from a previous holder. In *Miller v. Race*, supra, Lord Mansfield further explains the rule with reference to bank bills payable to bearer, in answer to the suggestion that it was based on the lack of earmarks, which would limit it to money. "'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said that the reason why money cannot be followed is because it has no earmark; but this is not true. The true reason is upon account of the currency of it. It cannot be recovered after it has passed in currency. So in case of money stolen the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and bona fide consideration; but, before money has passed in currency, an action may be brought for the money itself." This reasoning of Lord Mansfield has received unqualified approval both as to money and as to negotiable instruments payable to bearer or indorsed in blank. In *Saltus v. Everett*, 20 Wend. 267, 277, 32 Am. Dec. 541, it is said: "A long series of decisions, beginning with *Miller v. Race*, 1 Burr, 452, has now settled the law that possession of such paper is presumptive proof of property, and that he who received it in the course

of trade for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker, and other parties, even if the paper had been stolen from or lost by the former holder; such former holder retaining all his original rights only against the thief or the finder, or whoever received the paper from them under suspicious circumstances." See also *Murray v. Lardner*, 2 Wall. 110, 118, 17 L. ed. 857, 858; *Tucker v. New Hampshire Sav. Bank*, 58 N. H. 83, 42 Am. Rep. 580; 2 Randolph Com. Paper, 2d ed. § 736; 1 Dan. Neg. Inst. §§ 663, 729. If the bank took these notes in due course of business, its title was not affected by the fact that Green unlawfully abstracted them from the possession of defendants. *Wheeler v. Guild*, 20 Pick. 545, 32 Am. Dec. 231; *Greenwell v. Haydon*, 78 Ky. 332, 39 Am. Rep. 234; 2 Negotiable Instruments Act (Acts 29th Gen. Assem. [Laws 1902, pp. 86, 87] chap. 130) §§ 56, 57; Code Supp. 1907, § 3060a56, 57.

It is argued, however, that plaintiff did not show the Bank of Denison to be a holder in due course, because there was no competent evidence with reference to one of the owners of the bank that he had no notice of the want of right or authority on the part of Green to transfer the notes by delivery, and counsel rely upon cases of which *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, and *Keegan v. Rock*, 128 Iowa, 39, 102 N. W. 805, are examples, holding that, as against a defense by the maker that the instrument was procured and negotiated through fraud or in breach of trust, the holder must affirmatively establish want of notice. But the cases thus relied upon are those in which it is held that, by reason of defective execution of the instrument itself or lack of assent on the part of the person sought to be charged as maker, it has not become a negotiable instrument to which the rules relating to indorsement and transfer are applicable. No such question arises in this case. The notes were fully executed and delivered as negotiable instruments to the defendants, and as such were held by them when they were abstracted from the possession of defendant Chamberlain and delivered by Green to the bank. The authorities already cited expressly negative any obligation on the part of the holder to prove diligence in ascertaining the right of the person in actual possession purporting to transfer title, and charge the holder with the defective title of the person making the transfer only where bad faith is shown. In the United States there has been a continuing conflict of authority on this question. See 2 Randolph, Com. Paper, §§ 996-1001; 2 Dan. Neg. Inst. § 1680. This un-

certainly in the law has been remedied by the adoption in this state of the negotiable instruments act by which it is provided, in § 59 (Code Supp. 1907, § 3080a59), as follows: "Every holder is deemed prima facie to be a holder in due course; but, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Defendants cannot, therefore, overcome the presumption that the Bank of Denison became the holder of the notes in due course—that is, without notice—by showing that the title of Green to such notes was defective. In other words, to defeat the title of the bank, defendants have the burden of proving want of good faith on the part of the bank in accepting the notes from Green.

A rule often applied in deciding a controversy like this, between a holder of negotiable paper and a party who has given it apparent validity in the hands of one transferring it without right, is that, when one of two innocent persons must suffer by reason of the wrongful act of a third party, that one must bear the loss who made it possible for the third party to commit the wrong. It is not always easy to say whether, in a particular case, the one upon whom it is sought to cast the responsibility under this rule has done an act such as to charge him for the wrongdoing of another who has proceeded without legal authority; but the case before us is one coming well within the rule as often applied. The defendants held these notes payable to the order of Green and themselves and indorsed by Green. In this condition the notes could not have been put in circulation so as to come into the hands of a holder in due course without notice. Defendants intentionally indorsed the notes with the purpose that they should be negotiated, and, although this purpose was not at the time carried out, they left the notes in this condition, apparently indorsed for negotiation and transfer by delivery, in the custody of the Exchange Bank of which Green was the owner and manager. By this act of placing the notes within the control of Green, they enabled him to make a transfer of them by delivery as owner, and to put the Bank of Denison in such condition as to suffer a loss without any fault on its part if the apparent title acquired by it from Green should be held defective. It has often been held that, under such circumstances, the rights of the holder are superior to those

of the previous party who has made the transfer of the instrument practicable. *Emerson v. Crocker*, 5 N. H. 150; *Tucker v. New Hampshire Sav. Bank*, 58 N. H. 83, 42 Am. Rep. 580; *Cherry v. Frost*, 7 Lea, 1. A motion of appellants submitted with the case to strike appellee's additional abstract from the files is overruled.

The judgment is affirmed.

IOWA SUPREME COURT.

IOWA DRUG COMPANY

v.

WEBB SOUERS.

(— Iowa, —, 117 N. W. 300.)

Corporate contract — execution — record.

1. Communication by one employed as manager of a corporation, to its directors, of acceptance of a proposition contained in its duly adopted resolution, that, in case of his inability to dispose of his private business, the corporation purchase it for a certain sum at any time before a certain date, is sufficient to constitute a sale without the necessity of entering the fact of the acceptance in the records of the corporation.

Evidence — corporate action.

2. Parol evidence is admissible to show formal action by the directors of a corporation upon a proposition which came before them.

Corporation — ultra vires — repudiation.

3. A corporation organized to transact a wholesale drug business, with power to purchase such personal property as may

Case Note. — Right of corporation itself to complain that property purchased by it was of less value than the stock issued in exchange therefor, in the absence of actual fraud.

Although the fundamental question involved in the decision of the case reported, that a corporation cannot, in the absence of fraud, maintain an action to cancel shares of stock issued in exchange for property, upon the ground that the property was not actually worth the valuation placed upon it, is presented in a rather unusual form, the rule that a corporation issuing stock as fully paid by transfer of property cannot thereafter treat it as partly paid, is well established by decisions of various kinds, of which perhaps the most numerous are those in which the right of the corporation to levy assessments on stock so issued has been denied. See *Scovill v. Thayer*, 105 U. S. 153, 26 L. ed. 973; *Dickerman v. Northern Trust Co.* 176 U. S. 181, 46 L. ed. 423; *Northern Trust Co. v. Columbia Straw-Paper Co.* 75 Fed. 936, affirmed in 25 C. C. A. 549, 53 U. S. App. 270, 80 Fed. 450; *Great Western*

be deemed advisable in the conduct of said business, cannot repudiate a consummated purchase by its directors of the retail drug business of a person whose services they desired to secure as manager, after the value of such business has been destroyed.

Same — stock subscription — payment in property.

4. The trust-fund doctrine, requiring one paying for corporate stock in property to show that the property was actually worth the value of the stock, has no application as between the corporation itself and the stockholder who has received his stock in exchange for property surrendered at an agreed valuation.

Action — cancellation of stock subscription — subscriber's rights.

5. An action by a corporation to cancel stock on account of overvaluation of the property for which it was issued is not for the benefit of other stockholders, so as to permit an adjustment in it of their grievances for being induced to invest money in the enterprise through fraud.

(July 9, 1908.)

CROSS-APPEALS from a decree of the District Court for Polk County in an action brought to cancel shares of stock in

Min. & Mfg. Co. v. Harris, 63 C. C. A. 51, 128 Fed. 321, affirmed in 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770; Gillin v. Sawyer, 93 Me. 151, 44 Atl. 677; Thompson v. Knight, 74 App. Div. 316, 77 N. Y. Supp. 599 (even though the corporation law prohibited the issuance of stock for less than par value); Orton v. Edson Reduction Machinery Co. 5 Ohio C. C. N. S. 540; San Antonio Street R. Co. v. Adams (Tex. Civ. App.) 25 S. W. 639, reversed on other grounds in 87 Tex. 125, 26 S. W. 1040; 26 Am. & Eng. Enc. Law, 2d ed. pp. 842, 843.

It is also uniformly held that the corporation cannot refuse to deliver such stock or to recognize it as valid.

Thus, in Arapahoe Cattle & Land Co. v. Stevens, 13 Colo. 534, 22 Pac. 823, it was held that, where an agreement to compensate one for his services in securing a loan, by issuing to him stock of the face value of one third of the amount of the loan, was entered into in good faith, the fact that the result showed that the price agreed to be paid for such service was extravagant, of itself furnished no ground for releasing the company from its contract; the court saying: "We think the company might lawfully have agreed to pay him a similar amount in cash for his services, and we know of no reason why the contract to pay for such services in the capital stock of the company should not be enforced; particularly as no claim is made that any other creditor would be in the least prejudiced thereby."

And in Protection L. Ins. Co. v. Osgood, 93 Ill. 69, it was held that a corporation could not lawfully refuse to transfer, on its books, shares of stock purchased from one to whom they were issued in exchange for securities in good faith, upon the ground that such securities had subsequently turned out to be of little or no value.

In Roll v. St. Louis & C. Smelting & Min. Co. 52 Mo. App. 60, an action to compel a corporation to issue new certificates for stock issued originally to plaintiff's assignor, or to pay him the value thereof, it is said that the question whether the shares which had been issued in exchange for property were issued for full value was entitled to no consideration.

In Wells v. Green Bay & M. Canal Co. 90 Wis. 442, 64 N. W. 69, an action against the corporation to compel the delivery of stock, 19 L.R.A. (N.S.)

it was held that the conveyance of property to the company was a sufficient consideration, as between the stockholders and the corporation, for the issue of the stock as fully paid.

Other cases recognizing the rule that the corporation itself is bound by its contract whereby it has acquired property in exchange for stock are: Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 364, in which the issuance of stock in exchange for an equity of redemption in property covered by a mortgage exceeding its value was held valid as to the corporation itself, there being no deception or concealment; Parmelee v. Price, 208 Ill. 544, 70 N. E. 725, in which it is said that, while a transaction in which stock was paid for property fraudulently overvalued was voidable as to creditors or other stockholders prejudiced thereby, it was binding upon the corporation; Hill v. Atoka Coal & Min. Co. 124 Mo. 153, 25 S. W. 926, 32 S. W. 111, in which it was said that, when a corporation issues stock as fully paid, it cannot afterwards assert the contrary, though only a small percentage of the value was in fact paid; Goodnow v. American Writing Paper Co. (N. J. Ch.) 66 Atl. 607, an action to enjoin the payment of a dividend on stock issued for property purchased, upon the ground that, the property being overvalued, there can be no net profits or surplus from which dividends can be paid, unless the impairment of the capital, caused by the overvaluation, has been supplied, in which it was held that a contract between a corporation and its stockholders, that the stock issued to them is fully paid and not subject to further call, is, in the absence of fraud affecting other stockholders, binding upon the company and its stockholders, although subject to attack by creditors; Boardman v. Keystone Standard Watch Co. 8 Lanc. L. Rev. 25, in which it is said that a sale to a corporation of property in exchange for its capital stock cannot be set aside in the absence of fraud, on the ground that the value of such property was not equal to the value of the stock; and Jenkins v. Bradley, 104 Wis. 540, 80 N. W. 1025, in which it was held that, where stock was issued in exchange for an interest in land believed to be much greater than it subsequently proved, the consideration for such stock did not entirely fail.

the plaintiff corporation; plaintiff appealing from so much of the decree as refused it the full measure of relief demanded; and defendant appealing from so much as canceled a portion of his stock. Reversed on defendant's appeal.

Action in equity to cancel shares of stock held by the defendant in the plaintiff company. Decree for plaintiff. Defendant appeals. There is also an appeal by plaintiff on the ground that the decree entered in its favor does not give to it the full measure of the relief to which it is entitled. The defendant, having first appealed, will be treated as appellant.

Messrs. Brown & Dille, for plaintiff:

The corporate records do not disclose a sale, and these records cannot be disputed except where the evidence of the matter sought to be interpolated into the record is clear, satisfactory, and convincing.

Hawkshaw v. Supreme Lodge, K. H. 29 Fed. 770; Metropolitan Elev. R. Co. v. Manhattan R. Co. 11 Daly, 373.

A written instrument was necessary to the sale.

Herrington v. District Twp. 47 Iowa, 13; Young v. Blackhawk County, 66 Iowa, 464, 23 N. W. 923; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 270; First Nat. Bank v. Drake, 35 Kan. 564, 57 Am. Rep. 193, 11 Pac. 445; 3 Clark & M. Priv. Corp. p. 2074.

The transaction was a fraud on the bona fide subscribers of stock.

Hinkley v. Sac Oil & Pipe Line Co. 132 Iowa, 396, 119 Am. St. Rep. 564, 107 N. W. 629; Hallam v. Indianola Hotel Co. 56 Iowa, 180, 9 N. W. 111; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 25 L.R.A. 90, 42 Am. St. Rep. 159, 29 Atl. 303; Teachout v. Van Hoesen, 76 Iowa, 113, 14 Am. St. Rep. 206, 40 N. W. 96; Osgood v. King, 42 Iowa, 478; Jackson v. Traer, 64 Iowa, 479, 52 Am. Rep. 449, 20 N. W. 764; Flinn v. Bagley, 7 Fed. 785; White Mountains R. Co. v. Eastman, 34 N. H. 124; Coit v. North Carolina Gold Amalgamating Co. 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; Camden v. Stuart, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. Rep. 585; Coleman v. Howe, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 727; Oliphant v. Woodburn Coal & Min. Co. 63 Iowa, 338, 19 N. W. 212; 10 Cyc. Law & Proc. p. 795; Forcum v. Montezuma Independent Dist. 99 Iowa, 439, 68 N. W. 802; Independent School Dist. No. 6 v. Wirtner, 85 Iowa, 387, 52 N. E. 243; Rice v. Plymouth County, 43 Iowa, 136; Cook v. Independent School Dist. 40 Iowa, 444; Gambrell v. Lenox Dist. Twp. 54 Iowa, 417, 6 N. W. 693; Eden Independent Dist. v. Rhodes, 88 Iowa, 577, 55 N. W. 524; Independent School Dist. v. Hubbard, 110 Iowa, 69, 80 Am. St. Rep. 271, 81 N. W. 19 L.R.A. (N.S.)

241; Tracy v. Guthrie County Agri. Soc. 47 Iowa, 27.

Messrs. Read & Read, for defendant:

Parol evidence is admissible to show the minutes of the proceedings of a corporation not preserved or recorded.

Zalesky v. Iowa State Ins. Co. 102 Iowa, 512, 70 N. W. 187, 71 N. W. 433; Selley v. American Lubricator Co. 119 Iowa, 591, 93 N. W. 590; German Ins. Co. v. Independent School Dist. 25 C. C. A. 492, 49 U. S. App. 271, 80 Fed. 366; Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552; 2 Cook, Corp. 4th ed. § 714, p. 1499.

The shares of stock were issued on an agreed valuation of the property, and, there being no actual fraud, the corporation itself is estopped from denying its value.

State Trust Co. v. Turner, 111 Iowa, 664, 53 L.R.A. 136, 82 N. W. 1029; Esgen v. Smith, 113 Iowa, 25, 84 N. W. 954; 1 Cook, Corp. 4th ed. § 38; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; First Nat. Bank v. Gustin Minerva Consol. Min. Co. 42 Minn. 327, 6 L.R.A. 676, 18 Am. St. Rep. 510, 44 N. W. 198; Krohn v. Williamson, 62 Fed. 869, 13 C. C. A. 668, 31 U. S. App. 325, 66 Fed. 655; Northern Trust Co. v. Columbia Straw-Paper Co. 75 Fed. 936; John R. Proctor Land Co. v. Cooke, 103 Ky. 96, 44 S. W. 391; Bank of Ft. Madison v. Alden, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332.

The plaintiff is estopped from denying the validity of the purchase, it having ratified the action of its board of directors and its officers in purchasing and taking over defendant's business.

Moore v. First Ruthven Circuit M. E. Church, 117 Iowa, 33, 90 N. W. 492; Watts v. Equitable Mut. Life Assn. 111 Iowa, 90, 82 N. W. 441; Church v. Johnson, 93 Iowa, 545, 61 N. W. 916; Field v. Eastern Bldg. & L. Assn. 117 Iowa, 185, 90 N. W. 717; Beach v. Wakefield, 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197; Haney & C. Mfg. Co. v. Adaza Co-op. Creamery Co. 108 Iowa, 320, 79 N. W. 79; Lull v. Anamosa Nat. Bank, 110 Iowa, 537, 81 N. W. 784.

McClain, J., delivered the opinion of the court:

In February or March, 1903, the defendant associated with himself a few other persons in promoting the organization of a wholesale drug company to carry on business in Des Moines, which, as subsequently legally organized, became the plaintiff company. On August 26th following, there was a meeting of the board of directors of the plaintiff company, then duly organized, at which defendant, as president, and directors Brown, Wilcoxon, and Steelsmith were present. At this meeting there were some

resignations of officers and directors, and the vacancies thus created were filled, so that from this date until March 13, 1905, the persons above named and Connell and Rawson constituted the board, the officers of the board being the defendant, president and treasurer, Rawson, vice president, and Connell, secretary. The defendant had been for many years engaged in the retail drug business in Des Moines, and, at the date of the meeting of directors above referred to, owned and was conducting a retail drug store. On August 27, 1903, at an adjourned meeting of the board of directors, at which all the officers and directors were present, a resolution was passed and duly recorded, reciting that, as the affairs of the company required the immediate personal attention of at least one person at that time, and the conditions were such that no one but the president of the company was available for this purpose, and the defendant, as president of the company, was willing to assume immediate personal charge of its business, provided he could dispose of or make some personal arrangement in regard to his retail business, he was employed as manager, to act in such capacity from and after the 10th day of September, 1903, until the company was ready for business, at a compensation of \$250 per month, on condition that he give his whole time and undivided attention to the business; and that, in case he did not sell and dispose of his retail business to any other person, the company purchase his stock, fixtures, and business for the sum of \$9,000, at any time on or before December 1, 1903, with the further recital that "the invoice price of said stock and fixtures is about \$11,850." The record further recites that defendant accepted such employment, and would engage some person to manage his retail business until he could dispose of it, or the company saw fit to purchase at the price named, which amount he would be willing to accept if sold to the company. At the next meeting of the directors, on October 2, 1903, at which all the officers and directors, except director Brown, were present, by-laws were adopted fixing the duties of officers, and defendant was unanimously elected manager, Rawson assistant manager, and Connell credit man and head bookkeeper, and contracts with these persons for employment for definite periods, at fixed salaries, were provided for; it being expressly recited that, whereas defendant "has been elected business manager, and as heretofore on resolution of this board has been devoting his time and attention to the business of the company at the compensation fixed at \$250 per month, therefore be it resolved that said employment, at the salary of \$250 per month, be discontinued on 19 L.R.A. (N.S.)

the 31st day of December, 1903. That the president and secretary of this company be and are hereby authorized and directed that, in case said Webb Souers shall purchase and pay for capital stock of this company in the amount of \$14,000, and shall agree to devote his entire time and attention to the business of this company, as provided in the by-laws, to enter into a written contract with said Webb Souers as business manager for a period of five years from and after January 1, 1904, at a compensation of \$3,500 per annum, payable monthly, and upon such other terms and conditions as may be mutually agreed upon for the best interests of the company." At the next meeting of the board, held on October 8, 1903, at which all the members of the board except Steel-smith were present, the minutes of the previous meeting were read and approved, and the board approved a contract submitted, with defendant as general manager. It appears otherwise without controversy that the defendant subscribed and received certificates for \$15,000 of the stock of the company, and paid therefor \$6,000 in cash, with the understanding that the balance of his stock was fully paid for by the sale to the company of his retail business, including the stock and fixtures, at \$9,000.

The plaintiff seeks in this action to have canceled defendant's stock in the company to the extent of \$7,367.62 as unpaid for, the contention being that the sale of defendant's retail business, including the stock and fixtures, to the plaintiff company, had never been consummated. The lower court found that, although defendant had turned over to the plaintiff company in payment of his stock, in addition to the \$6,000 paid in cash, the further sum of about \$3,000 as the proceeds of the sale by him of his stock of fixtures, and had delivered to plaintiff unsold portions of said stock, the value of the stock so turned over fell short by \$3,000 in value of the balance of his subscription, and ordered the cancellation of \$3,000 in value of the stock in plaintiff company held by him. On defendant's appeal, it is contended that defendant's stock was fully paid for, and that the court erred in canceling any portion thereof; while on plaintiff's appeal it is contended that the court should have canceled \$9,000 of value of the stock held by defendant, upon the return by plaintiff to defendant of the proceeds of defendant's retail stock, so far as the same should be found to have been received by plaintiff, and such portions of such retail stock as still remained in plaintiff's custody or possession. It is apparent that the controversy between the parties relates to the fact as to whether defendant's retail business, including the stock and fixtures, was sold to the plaintiff

for \$9,000, and whether, if not sold to plaintiff for cash, it was exchanged in payment for \$9,000 stock subscription to the plaintiff, and being of less value than that at which it was thus exchanged, plaintiff is entitled to have the entire subscription for \$9,000 in stock canceled, or to have an amount of stock canceled corresponding to the shortage in value of the retail business, including the stock and fixtures which had been transferred, or attempted to be transferred, to the plaintiff in exchange for stock in the plaintiff company. The principal contention for appellee is that no sale of defendant's retail business, including stock and fixtures, was ever made to the plaintiff company, and, if such sale was in fact attempted to be made through the action of plaintiff's board of directors, such sale was *ultra vires* and void.

It is conceded that the recorded resolution of August 27th did not effect a consummated sale, for it remained optional with the defendant to turn over his retail business to the company, or to dispose of it as his own property if he should see fit. But we think that the resolution bound the plaintiff company to accept defendant's retail business at any time before December 1st if the defendant should elect to dispose of it to the company at that agreed price, and that, if defendant did so elect, and advise the directors of such election, then the defendant's retail business became the property of plaintiff company, unless the transaction was invalid for want of authority on the part of the board of directors to consummate such a contract of sale. It is conceded that the records of the board of directors do not show the acceptance by the company of defendant's retail business in pursuance of the resolution of August 27th. But this we think was not necessary in order to establish the fact of a consummated sale under such resolution. Defendant had the option to turn over his retail business to the plaintiff company at the agreed price, if he should elect to do so, within the proper time, and all that was necessary to complete a sale and transfer the title to the property was the communication to the board of directors of his acceptance of its proposition. The evidence shows conclusively, if parol evidence is admissible for that purpose, that, on October 2d, before adopting the resolution authorizing the employment of defendant as general manager for a term of years at a fixed salary, on condition that he should purchase and pay for capital stock in the company to the amount of \$14,000, and agree to devote his entire time and attention to the business of the company, defendant had indicated to the directors of

the company present at that meeting his acceptance of the proposition for the sale, to the plaintiff company, of his retail business, in order that he might devote his entire attention to the business of the company. If there was any necessity for formal action by the board of directors affirming the sale to the company of the defendant's retail business after he had unequivocally accepted the proposition, then we have to say that the evidence shows that such action was, in fact, taken at that meeting, and not made of record. It is well settled that parol evidence is admissible to show formal action of a board of directors to have been in fact taken, although no record thereof is found in the minutes of its meetings. *Selley v. American Lubricator Co.* 119 Iowa, 591, 93 N. W. 590. No doubt, as has been said in *Hawkshaw v. Supreme Lodge, K. H. (C. C.)* 29 Fed. 770, proof of this kind must be so convincing and satisfactory as to leave no doubt that the matter attempted to be interpolated into the records of the proceedings of the corporate body actually occurred. But the testimony of all the directors, save Connell, who was deceased before the trial of the case, and Rawson, confirms the contention of defendant that such action was had, and this testimony is entirely consistent with and is in fact supported by the record as to what was actually done; for it appears that defendant agreed to give his entire time to the business of the company, and it is shown without controversy, by the records and otherwise, that he had made the disposal of his retail business a necessary condition of his undertaking to render such exclusive services. Rawson contradicts any such arrangement at the meeting of October 2d, but his contradiction is based upon the failure of the minutes to show the fact, and he admits that during October or November the matter was talked over in the store, and the defendant seemed to think the sale to the plaintiff had been completed. The subsequent sale of the retail business to one Hoover, apparently made by defendant in his own interest, the insurance of the stock in his name, and the subsequent foreclosure by him of a chattel mortgage for a portion of the purchase price, are explained by an arrangement, testified to by all the directors except Rawson, that defendant should thus act, apparently in his own name, though in fact as trustee for plaintiff, in order that the opposition of other dealers, with whom the plaintiff company expected to do business, might be averted.

If the sale of the retail business by defendant to plaintiff was in fact consummated as provided for in the resolution of August 27th, then the only question left for

determination is whether plaintiff can avoid the transaction on the ground of want of authority of its board of directors to purchase defendant's retail business. The general nature of the business to be transacted by plaintiff is described in its articles to be "the wholesale drug business as it is usually conducted; to purchase, handle, and sell drugs, medicines, patent medicines, chemicals, druggists' sundries, surgical instruments, and such other lines of merchandise as may be determined by the board of directors or the managing officers." It is further provided that "said corporation may also purchase, hold, and convey real estate, and other personal property as may be deemed advisable, in the conduct of said business." Under this authority, the board could undoubtedly buy a stock of drugs and also druggists' fixtures. Whether they could buy a retail drug business as such, and continue to conduct it as a business, may be more doubtful; but there is nothing in the resolution of August 27th necessarily involving the carrying on of this retail business by the plaintiff company after its sale to plaintiff. If the board of directors, for the purpose of securing the exclusive services of defendant, saw fit to purchase his retail business with a view of adding the stock to its wholesale stock, and disposing of the fixtures as such, it was perfectly competent to do so, even though such transaction involved some loss in value. But in any event plaintiff is not in a situation to insist that the action of its board was *ultra vires*. The power which the board attempted to exercise was not contrary to law or public policy, and a corporation cannot rely upon the want of authority of its board to defeat a consummated transaction of which it has accepted and retained the benefit. *Watts v. Equitable Mut. Life Asso.* 111 Iowa, 90, 82 N. W. 441; *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa, 591, 103 N. W. 958. It would be most inequitable for the court to hold that the plaintiff could rescind the transaction, on the ground of *ultra vires*, after the value of defendant's retail business had been destroyed, in consequence of the express request of plaintiff's board of directors in order to secure for itself the value of defendant's exclusive services.

We agree with the trial court in holding that there was no actual or intentional fraud committed by defendant in selling his retail business to plaintiff at the agreed value of \$9,000. The relief asked by plaintiff is not the rescission of the sale on the ground of fraud, but the cancellation of so much in value of stock held by defendant as exceeds the value of the property received in exchange therefor. After defendant's retail

business had been destroyed, the plaintiff could not put him *in statu quo* by tendering back the proceeds actually received by it from the appropriation of such business. Had defendant been guilty of actual and intentional fraud, the inability of plaintiff to put him *in statu quo* would not defeat its right to relief, but, as already said, actual fraud was not shown. The evidence tends to show that the stock and fixtures were not of the value of \$11,850, which he represented to be the invoice price, but it does not appear that they had not been fairly invoiced, as substantially of that value, for the purposes of a retail business. The erroneous theory of the trial court seems to have been that where stock is issued in consideration of the transfer to the company of property of less real value than that at which it is taken, the transaction is fraudulent in law as to the corporation. The rule adopted by the court is based on the so-called "trust-fund" doctrine, in accordance with which a stockholder, seeking to escape personal liability to creditors on the ground that his stock has been fully paid for, must show that he has in good faith invested in the enterprise the value of the stock received by him, either in money or its equivalent. But this doctrine has no application as between the corporation itself and the stockholder, who has received his stock in exchange for property surrendered at an agreed valuation. *State Trust Co. v. Turner*, 111 Iowa, 664, 53 L.R.A. 136, 82 N. W. 1029; *Esgen v. Smith*, 113 Iowa, 25, 84 N. W. 954. In the transaction between the corporation and the stockholder the latter does not occupy any position of trust or confidence, although he may be a promoter or officer of the company; and, in the absence of actual fraud, the transaction is to be upheld, although it may subsequently prove to have been disadvantageous to the corporation. *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332.

The cases relied upon by the trial judge in reaching his conclusion, and now insisted upon for appellee as supporting such conclusion, are not in point. In *Hallam v. Indianola Hotel Co.* 56 Iowa, 178, 9 N. W. 111, it was held that a director owed to the corporation the duty of dealing in good faith with reference to the corporate property in the enforcement of a claim by him as creditor against the corporation, and, for his bad faith in buying the corporate property at much less than its real value, the sale to him was set aside. In *Hinkley v. Sac Oil & Pipe Line Co.* 132 Iowa, 396, 119 Am. St. Rep. 564, 107 N. W. 629, it was held that a

stockholder was allowed to have his stock canceled on account of fraudulent representations of the promoters as to the value of the business in which he had been induced to invest. Other cases relied on for appellee are equally inapplicable. In *Camden v. Stuart*, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. Rep. 585; *Coit v. North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231, and *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, the controversy was between creditors and stockholders, and the holdings simply were that, as against creditors, the stockholder cannot escape liability by showing payment for his stock in property grossly overvalued. This is not a controversy between creditors of the plaintiff corporation and defendant as a stockholder, nor between stockholders who have been induced to purchase in the belief that the stock of the company had been fully paid for in cash, and the corporation itself, with a view of the cancellation of the stock thus purchased. If the stockholders who became such after the transaction between the plaintiff and defendant was consummated desire to have their stock in the plaintiff company canceled, and the consideration paid therefor returned, their grievances should be made the basis of an independent action by them against the corporation, or perhaps against the promoters or officers of the company who, by fraudulent misrepresentations, have induced such stockholders to invest their money. The plaintiff is not insolvent, and is a going concern, and, as a corporation competent to make contracts for the issuance of stock and to act through a duly selected board of directors, it cannot complain of a transaction entered into in good faith, although, as the result of such transaction, it has not received full value in money for stock lawfully issued. Counsel for appellee insists that the action is for the benefit of the stockholders of the plaintiff company, but this is true only in the sense that any action of the corporation is presumably for the benefit of its stockholders. The stockholders themselves are not parties to the suit, and as such they make no complaint, nor is the action one in which any relief to the stockholders, as distinct in interest from the corporation, is asked.

The trial court erred in decreeing a cancellation of any portion of the stock of defendant, and on defendant's appeal the decree is reversed. It follows that there was no error of which the plaintiff can complain. The result is that the decree is affirmed on plaintiff's appeal, and on defendant's appeal it is reversed.

Bishop, J., takes no part.
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MARYLAND COURT OF APPEALS.

NELLIE K. BENNETT, Appt.,
v.
WILLIAM A. BENNETT.

(106 Md. 122, 66 Atl. 706.)

Will — caveat — dismissal.

1. After issues have been framed covering all the grounds relied on in a caveat to a will, and sent to a court of law for trial, the caveator should not be permitted to dismiss them for the purpose of filing a new caveat, without the consent of the caveatee.

Appeal — record — rules.

2. The court of appeals will not consider an objection based on a rule of the nisi prius court unless a copy of the rule appears in the record.

(May 17, 1907.)

Case Note. — Right to dismiss or withdraw proceedings to probate or contest a will or issues thereunder.

Although no other case has been found which places quite so much emphasis on the question as to what bearing the consent of the proponent of a will has on the dismissal of the action by the contestant, it may be said generally that, in a proceeding to contest the validity of a will, whether before or after probate, at least without the consent of the opposing party, neither the contestant nor the proponent has the right to suffer a nonsuit or dismiss the proceedings after the issues have been made up.

Thus, in *Lasak's Will*, 23 Abb. N. C. 54, 7 N. Y. Supp. 2, it was held that, after the parties to the contest of a will offered for probate appear on the return day, an executor has no power to discontinue or withdraw the proceeding without the consent of all; and this is especially true where, as in this case, he had duly examined the subscribing witnesses to the alleged will. This case was affirmed in 57 Hun, 417, 10 N. Y. Supp. 844, which in turn was affirmed in 131 N. Y. 624, 43 N. Y. S. R. 101, 30 N. E. 112, where the court took occasion to say: "In such a case, if all the parties cited, being of full age, should ask that the proceedings be dismissed, no one appearing in support of the will, it would be the duty of the surrogate to dismiss the proceeding. The same result could be produced if all the parties cited should formally admit that the will was not legally executed, or that the testator was incompetent. But so long as any person cited is before the surrogate in support of the will, he has no right, upon the motion of any other party, arbitrarily to arrest or dismiss the proceeding."

In *Re Greeley*, 15 Abb. Pr. N. S. 306, where two wills were propounded for probate, the beneficiaries in the earlier contesting the validity of the later one, the court, while recognizing that if all parties were adults they might enter into a stipulation permitting the court to admit the first will

APPEAL by defendant from a judgment of the Court of Common Pleas permitting the dismissal of a caveat which had been filed to the will of Henry C. Bennett, deceased. Reversed.

The facts are stated in the opinion.

Messrs. William J. O'Brien, Jr., and William Milnes Maloy, for appellant:

When a caveat to a will is filed before the same has been admitted to probate, the court has no power to admit the will to probate until the caveat has been disposed of.

Keene v. Corse, 80 Md. 20, 30 Atl. 569; Berry Will Case, 93 Md. 560, 49 Atl. 401; Townshend v. Townshend, 7 Gill, 10; Yingling v. Hesson, 16 Md. 112; Edelen v. Edelen, 6 Md. 288; Higgins v. Carlton, 28 Md.

115, 92 Am. Dec. 666; Stocksdales v. Cullison, 35 Md. 322; Hinkley, Testamentary Law, p. 255; Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85; McMahon v. McMahon, 100 Mo. 97, 13 S. W. 208; 6 Enc. Pl. & Pr. p. 867; Benoist v. Murrin, 48 Mo. 48; Pegg v. Warford, 4 Md. 385; St. John's Lodge, No. 1 v. Callender, 26 N. C. (4 Ired. L.) 335; Roberts v. Trawick, 13 Ala. 68.

The right to dismiss a suit is not absolute.

Riley v. First Nat. Bank, 81 Md. 14, 31 Atl. 585; Berry Will Case, 93 Md. 592, 49 Atl. 401; 14 Cyc. Law & Proc. pp. 394, note 17, 406, d; Andrews v. Central Nat. Bank, 77 Md. 21, 25 Atl. 915; Chappell v. Chappell, 86 Md. 532, 39 Atl. 984; Miller, Eq. ¶ 102, p. 132.

Mr. E. L. Painter for appellee.

to probate and withdraw the contest as to the other, nevertheless held that, one of the parties being an infant, neither the guardian *ad litem* nor his counsel could make any admissions affecting unfavorably his interests, and therefore the court must proceed to a decree on the merits.

And see the Maryland cases cited and sufficiently set out in BENNETT v. BENNETT.

In many cases the question as to the effect of consent of the opposing party is not raised; but on the ground that an action contesting the validity of a will is an action *in rem* the courts have, in the majority of cases, refused either party the right to dismiss his action or submit to a nonsuit.

In St. John's Lodge, No. 1 v. Callender, 26 N. C. (4 Ired. L.) 335, where the party proposing to establish the will moved for leave to take a nonsuit, which motion was overruled by the trial court, the supreme court in sustaining that decision said: "We are not sure that we understand what was meant by the appellants' asking leave to suffer a 'nonsuit,' as the term is not appropriate to proceedings in a court of probate. But, from analogy to actions at law, we suppose the object was to withdraw from the court before a verdict was rendered on the issue, *devisavit vel non*, so as to prevent the delivery of a verdict, and leave the party at liberty to institute another proceeding of the same kind. If so, we think it inconsistent with a proceeding of this sort and contrary to the nature of the jurisdiction of the court of probate. The instrument propounded is always brought into court in the first instance, and the jurisdiction is *in rem*. The inquiry is whether the party deceased died testate or intestate; and if the former, whether the script propounded be his will or a part of it, or not. When once regularly raised, the court must pronounce on those questions, without reference to the presence of this or that person, for the sentence, until annulled, binds all the world."

To the same effect is Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85.

It was also recognized in Re Young, 123 N. C. 358, 31 S. E. 626.

So in Benoist v. Murrin, 48 Mo. 48. a 19 L.R.A. (N.S.)

suit for the contest of a will was transferred from the probate court to the circuit court. After the case had been pending for some time in the circuit court, and subsequently to the framing of issue, the petition was dismissed without prejudice to the contestants' rights and upon their motion. The contestees thereupon moved to set aside the order of dismissal and to reinstate the cause, upon the refusal of which by the circuit court the supreme court said: "The question here is—all the requisite parties being before the court, and every preliminary step having been taken—whether it lies with the contestants to defeat the whole proceeding by a voluntary nonsuit or dismissal. In my view every consideration of public policy is against the allowance of such claim. It is opposed to the authorities and in conflict with the policy and nature of probate proceedings of this character. It has repeatedly been held that the propounders of a will—those in the affirmative—cannot take a nonsuit, that it is the right of the contestants in such cases to insist on a verdict. . . . If the contestants may insist on the proceedings going forward to verdict, certainly those on whom is the burden of establishing an instrument assailed and drawn in question by the action of the contestants ought to have the same privilege."

To the same effect are McMahon v. McMahon, 100 Mo. 99, 13 S. W. 208; Bradford v. Blossom, 207 Mo. 177, 105 S. W. 289; and Cash v. Lust, 142 Mo. 630, 64 Am. St. Rep. 576, 44 S. W. 724.

It was also recognized in Bradford v. Andrews, 20 Ohio St. 208, 5 Am. Rep. 645.

In Hoyt v. Jackson, 2 Dem. 450, the court in referring to a peculiarity of probate proceedings which distinguishes them from almost all other judicial investigations, said *arguendo*: "When once an instrument purporting to be a will has been produced before the surrogate, and parties in interest have been summoned to attend its probate, it is no longer under the control of the persons who have propounded it. They cannot claim the right to withdraw it from the files, even though all persons interested consent to that course. Nor, on the other hand, can they, by

Schmucker, J., delivered the opinion of the court:

It appears from the record in this case that Henry C. Bennett, late of Baltimore county, died on December 28, 1903, leaving the appellant as his widow, but no children. One week thereafter a paper purporting to be his last will, and on its face duly executed and attested as such, was offered for probate in the orphans' court for Baltimore county. On the same day, but before the offer of the will for probate, the appellee, who is a nephew of the testator, filed a caveat to it, which was answered by the appellant on March 1, 1904. On petition of the caveator issues were framed and sent for trial to the circuit court for Baltimore county on March 1, 1905; the caveator be-

ing designated by the orphans' court as plaintiff. The proceedings were removed to the circuit court for Howard county on August 1, 1905, on the suggestion of the caveator that he could not have a fair trial in Baltimore county, and on the 2d of February, 1906, they were removed to the court of common pleas of Baltimore city upon the suggestion of the caveatee that she could not have a fair trial in Howard county. On January 23, 1907, the caveator's attorney filed in the office of the clerk of the court of common pleas an order entitled in this case to "enter the above-entitled case dismissed." On the same day the caveatee filed in the case a petition and motion of *ne recipiatur* as to the order of dismissal. This petition was answered by the caveator,

obtaining the consent of all such persons, procure its admission to probate."

In *Roberts v. Trawick*, 13 Ala. 68, it was said that the court acted properly in refusing to permit the proponent of a will to take a nonsuit with a view to revision in the supreme court, since such court is by statute required to proceed with the investigation and to determine the matters put in issue.

In *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268, it was held that after a will had been propounded, and an issue made up to try its validity, the probate court committed no error in refusing to allow the proponent to withdraw from the contest and become a witness in favor of the will.

So in *Deslonde v. Darrington*, 29 Ala. 92, where two executors propounded a will, it was held that, after an issue had been made up to test its validity, it was too late for either of them, at the trial, to renounce the executorship in order that he might become a witness to sustain the will, although the other offered to deposit a sum of money sufficient to cover the costs.

In *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522, it was held that the petition could not be dismissed, although the contestant stipulated in writing that she would no longer contest, and that she conceded the validity of the will.

However, in *Crow v. Blakey*, 31 Ala. 728, it was held that, where a will is propounded for probate and contested by one of the heirs at law and distributees, the court may allow the proponent, on the day set for hearing, to withdraw his application, the contest being considered a proceeding *inter partes*.

In *Heermans v. Hill*, 4 Thomp. & C. 602, it was held to be within the power of a surrogate court to permit the proponent of a will to withdraw it from probate.

The right to withdraw a caveat by a caveator was recognized, also, in *Thurston v. Gough*, 42 N. J. Eq. 346, 7 Atl. 573.

In *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271, it was held that the voluntary dismissal of a suit to contest a will which had been admitted to probate will not preclude the bringing of another suit within the statute. 19 L.R.A. (N.S.)

utory period of limitations. The court in this case said: "A period of three years is given a plaintiff for investigation and decision. He may begin at any time within the period, and carry the proceeding forward to final judgment even after the period has expired. And we find nothing in the statute or in the nature of the action to prevent him from dismissing his suit as any other plaintiff, without prejudice, if before trial he becomes convinced that the facts or witnesses relied upon are untrustworthy or insufficient to entitle him to recover. Nor do we find anything in the statute to prevent him from renewing the same at any time within the statutory period, if, from the discovery of new facts or witnesses, he desires to do so."

If the citations have not yet been issued or the issues made up, the courts do not seem to deny a party to a contest of a will the right to dismiss or withdraw the proceedings or suffer a nonsuit.

Thus, in *Re Fisher*, 49 N. J. Eq. 517, 24 Atl. 1019, it was held, where a caveat is filed with the surrogate and the will subsequently propounded to him for probate, the proponent may, before citations have been issued, withdraw his application without prejudice to a new application to the ordinary, who has concurrent jurisdiction with the surrogate and orphans' court of such matters.

So in *Re Leonard* (N. J.) 47 Atl. 222, it was held that a proponent of a will, having the right to withdraw application to the surrogate for probate before citations are issued, may do so where the citations name as return day a day already passed, they having no force.

In *Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476, it was held that under a statute permitting the dismissal of an action without prejudice to a future action, by the plaintiff, before the final submission of the case to the jury, one of the contestants had the right, before the case was finally submitted, to have the action dismissed as to herself without prejudice.

In *Osborne v. Davies*, 60 Kan. 695, 57 Pac. 941, it was held error to refuse the contestant of a will permission to dismiss his ac-

and upon a hearing of the matter the court passed an order overruling the motion and dismissing the petition, and the caveatee appealed from the order. Before the passing of the order appealed from, the caveator gave notice to the orphans' court of Baltimore county of his intention to file another caveat to the will.

The single issue raised by the appeal is whether the caveator was entitled to dismiss the caveat at the stage of the proceedings at which he filed the order for that purpose, without the consent of the caveatee. The precise question of the extent of a caveator's right to dismiss the entire proceedings upon a caveat filed by him against the objections of the caveatee, after an answer has been filed to the caveat and issues sent to a court of law for trial, has not, we believe, been passed upon by this court. There have been, however, a number of cases decided by us sufficiently similar to the one at bar to throw much light upon the principles involved in its determination. The right of the plaintiff, as a general rule, in an action at law, to dismiss the case or suffer a nonsuit at any time before verdict, has long been recognized; but in suits in equity this court, in the case of *Riley v. First Nat. Bank*, 81 Md. 26, 31 Atl. 585, held after careful consideration that the plaintiff had no such unrestricted right of dismissal. It was said in that case: "After a bill has been filed and proceedings had under it, when counsel have appeared and costs have been incurred, it would be an unfair advantage to allow the plaintiff's attorney the right to dismiss his client's complaint as to parties, either plaintiff or defendant, without the previous sanction of the court." In support of the views thus expressed the court cited *Dan. Ch. Pl. & Pr.* 790; *Wiswell v. Starr*, 50 Me. 384; and *Camden & A. R. Co. v. Stewart*, 19 N. J. Eq. 69.

tion, it appearing that the court had submitted to the jury certain particular questions of fact which covered only part of the issues.

In *Storey v. Storey*, 30 App. D. C. 41, it was held not error to overrule a caveator's motion, on the day fixed for the trial of issues framed to test the validity of a will, to assign a later day for trial, on the ground that a copy of the issues and notice of trial had not been served on him, where it appeared that, at the time the issues were framed and the date of trial fixed, the caveator appeared in person and by attorney.

The following cases, although of some interest, yet are not strictly in point with this note, and no effort has been made to make this class exhaustive. Among these cases is *Slocum v. Grandin*, 38 N. J. Eq. 485, affirmed in 40 N. J. Eq. 342, where the court, after expressly saying that its decision did not depend upon the question whether

In *Price v. Taylor*, 21 Md. 356, where issues upon a caveat to a will were dismissed upon the *ex parte* order of the caveator, filed in the court of law where they had gone for trial, the court, in discussing his right to discontinue the proceeding, applied to the case the ordinary rule in actions at law, that the plaintiff may discontinue the suit at any time by a written order to the clerk to that effect. But in that case the court said, in its opinion, on page 364: "We do not intend to say, however, that parties plaintiff would always have the right to dismiss issues without trial." In *Levy v. Levy*, 28 Md. 25, the court, relying on the decision in *Price v. Taylor*, supra, again applied to issues under a caveat to a will the rule applicable to actions at law, and held that a caveator might dismiss the issues upon the caveat by an order to that effect filed in the case. It is to be observed, however, that neither in *Price v. Taylor* nor *Levy v. Levy* did the caveatee object to, or attempt to prevent, the dismissal of the issues, or show cause why it ought not to have been permitted. In the *Berry Will Case*, 93 Md. 560, 49 Atl. 401, we have for the first time an attempt by a caveator to dismiss issues, over the objection of the caveatee, in the court of law to which they had been sent for trial. The lower court in that case permitted the dismissal, and this court upon appeal reversed the action of the lower court. It is true that *Berry's Case* differs from the one at bar, in that there the effort was to dismiss only certain ones, and not all, of the issues, and that the effort was made during the trial of the case after the jury had been sworn; but the reasoning there employed by the court applies with great force to the situation presented by the record now before us. We said in *Berry's Case*: "The right of a plaintiff to discontinue a case

er or not the caveator had full control over the caveat, and could withdraw or subduct it at his pleasure, held that after a surrogate's jurisdiction over the probate of a will has been taken away by the filing of a caveat thereto, and the orphans' court has made an order fixing a time for hearing upon the caveat, the surrogate's jurisdiction is not restored merely by the withdrawing of the caveat.

In *Dillard v. Dillard*, 78 Va. 208, it was held that the withdrawal of a motion to contest a will by a contestant before probate would not preclude him from again contesting the will after probate.

Validity of agreement to defeat probate of will, see case note to *Cochran v. Zachary*, 16 L.R.A. (N.S.) 235.

Validity of contract not to contest probate of will, see case note to *Grochowski v. Grochowski*, 13 L.R.A. (N.S.) 484.

after it has been instituted is not absolute. *Riley v. First Nat. Bank*, 81 Md. 14, 31 Atl. 585. 'We don't intend, however,' observed this court in *Price v. Taylor*, supra, 'to say that parties plaintiff could always have the right to dismiss issues without trial.' In *Pegg v. Warford*, 4 Md. 385, it was held that the orphans' court had no power to revoke an issue which had been sent to the superior court for trial; but 'that by consent of the parties to the proceeding' the issues may 'be abandoned in the court of law where they are pending for trial,' and others may be framed by the orphans' court." After observing that it would be subversive of sound policy in the administration of justice to permit the caveators to dismiss a portion of the issues during the trial of the case, as was there attempted to be done, it is further said in the opinion in *Berry's Case*: "The issues having been made up by the orphans' court, and having been sent to a court of law for trial, neither side to the contest has control of them; and, unless they are disposed of by consent or are all dismissed, they must be tried, and part of them cannot be withdrawn by either contestant."

All that we decided or were called upon to decide in that case, in reference to the power of a caveator to dismiss issues after they had been sent to a court of law, was that he had no right to make the partial dismissal of them which he there attempted. But the conclusions to which expression was given in the opinion, that the right of a plaintiff to dismiss issues without trial is not absolute, and that after issues have been made up by the orphans' court and sent to a court of law for trial neither side to the contest has control of them, embody propositions conducive to the orderly and efficient administration of justice, which apply with special propriety to the regulation of proceedings founded on caveats to wills under our testamentary system. Although issues framed on caveats are triable in courts of law, their trial differs from the ordinary action at law between opposing suitors, in that it is in the nature of a proceeding *in rem*, and each side bears a part of the burden of proof. *Cecil v. Cecil*, 19 Md. 80, 81 Am. Dec. 626; *Levy v. Levy*, 28 Md. 31. Furthermore, other persons than the parties to the proceeding, such as creditors, heirs at law, next of kin, legatees, devisees, may be and usually are directly interested in the result of the caveat. For these reasons, and because a sound public policy requires that the settlement of the estates of deceased persons be made without unreasonable expense or delay, we are of opinion that, after issues have been framed, covering all of the grounds relied

on in a caveat to a will, and sent to a court of law for trial, the caveator should not be permitted to dismiss them for the purpose of filing a new caveat, without the consent of the caveatee.

In the present case the caveat, alleging undue influence, want of testamentary capacity, and other grounds, was filed on January 4, 1904, and issues fully covering all of the reasons alleged in the caveat for refusing probate of the alleged will were sent by the orphans' court to a court of law on March 1st of the same year. After various delays covering a period of nearly three years, and when the issues had been specially set for trial on a particular day, the attorney for the caveator filed in the clerk's office the order to dismiss, and at once, and before the will could be again presented to the orphans' court for probate, he gave notice to that court of his intention to file another caveat, and admitted to the caveatee's attorney that he intended to ask for issues on the new caveat to be sent to a court of law. By that time the administration of the estate had already been prevented for fully three years from the offer of the will for probate. It appears from the record that in the meantime the creditors of the testator had filed a bill in equity for the sale of his real estate for the payment of his debts, and receivers had been appointed in that suit, who were in charge of the property. In these circumstances, as the caveator had not under the decisions of this court an absolute right to dismiss the issues, the court below should have granted the appellant's motion *ne recipiatur*, and stricken out the entry of dismissal made by the clerk on the caveator's order, and required the case to proceed to trial in due course. If the appellee were accorded the right to dismiss at will the issues on his caveat after they had been in the court of law for nearly two years, and at the same moment file another caveat, he might by a capricious exercise of that right indefinitely postpone the administration of the estate, to the great inconvenience and injury of other persons interested therein, who would be without remedy. Such persons, not being parties to the proceedings, would not be entitled to costs against the appellee, and would not even receive that compensation which, though often meager in fact, has in a legal sense been held to be adequate for the inconvenience of double litigation.

At the hearing in this court the appellee insisted that, under the 16th rule of the court of common pleas, which provides that the court will not hear any motion grounded on facts unless the facts are apparent from the record, or verified by oath, or agreed upon by the parties, the appellant

was not entitled to have her motion *re oipiatur* considered. The answer to that objection is twofold. In the first place, a copy of the rule does not appear in the record; and, in the second place, in passing upon the motion we have considered only facts appearing from the record or the written agreement of the parties found therein, without reference to the reasons *de hors* the record set forth in the motion.

For the reasons stated in this opinion, the order appealed from must be reversed and the case remanded for further proceedings in accordance with this opinion.

Order reversed, with costs, and case remanded for further proceedings.

MAINE SUPREME JUDICIAL COURT.

JESSE H. ROGERS

v.

RICHARD C. DAVIS.

(103 Me. 405, 69 Atl. 618.)

Limitation of action — account — single transaction.

A single transaction on an account which has been dormant less than the statutory period, consisting of the debit of a small item and the credit of the amount necessary to cancel it a short time afterwards, is sufficient to bring the account within the operation of a statute providing that the

Case Note. — Effect of specific application of payment to last item of open account upon the statute of limitations.

The consideration of the question as presented by this note necessarily proceeds upon the assumption that the account is of such a nature that, in an action to recover the items as represented by the account, the statute of limitations as to all items would be held to run from the date of the last item.

Notwithstanding that the question would seem to be a very common one in practical affairs, and likely to arise under many circumstances, very little authority has been found which tends in any way towards its solution.

An interesting case on this question, and one more nearly approaching *ROGERS v. DAVIS* than any other found, is *Rickard v. Geach*, 26 Nev. 444, 69 Pac. 861. Here an open mutual and current account sued on would have been barred by limitations but for the last two items, one a very small item and charged to defendant on his own credit and the other a larger one upon the guaranty of a third person. Thereafter the creditor presented to such guarantor a bill for both items, and the latter, without knowing that the smaller item was included, paid the whole bill, upon which the defend-

cause of action on mutual accounts shall be deemed to accrue at the time of the last item proved in such account.

(February 10, 1908.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Piscataquis County made during the trial of an action brought to recover the amount alleged to be due on an account, which resulted in a judgment in defendant's favor. Sustained.

The facts are stated in the opinion.

Messrs. Hudson & Hudson for plaintiff.

Mr. John S. Williams for defendant.

Savage, J., delivered the opinion of the court:

Action of assumpsit upon an account. The writ was dated December 19, 1905. Plea, the statute of limitations. The account opened January 13, 1894, and until December 17, 1898, was admittedly a mutual and unsettled account, with items both of debit and credit. The case was sent to an auditor, who reported that, after December 17, 1898, there were only two entries made on the account, namely, a charge of 20 cents for tobacco, on November 15, 1902, and a credit of cash 20 cents December 15, 1902. And he reported, further, that the cash payment of December 15, 1902, was made for the express purpose of paying for the tobacco charged thirty days before. Thereupon the

ant was credited on the account with a cash payment for the amount as represented by the bill. In an effort to collect the remainder of the account, it was insisted by the defendant that the payment and receipt of the small item as above stated so eliminated that item as to let in the bar of the statute of limitations as to the old account. The court, however, thought otherwise on the ground that it could not be presumed that the plaintiff put that item on the bill and thereby intentionally let in the bar of the statute for a claim many times larger, and also that neither the guarantor nor the defendant could have had that intention, since the one thought it was part of his bill and the other had nothing to do with putting it thereon; and that, if the plaintiff did wrong in putting the small item on the bill, it was a wrong against the guarantor, and not against the defendant.

In *Hodge v. Manley*, 25 Vt. 210, 60 Am. Dec. 253, where the defendant was indebted to the plaintiff for store, blacksmithing, and postoffice accounts, all of which were treated as one account, it was held that payment made under specific application to the postoffice accounts only, without any circumstances showing a recognition of any other dealing between them, or of an open and subsisting account, was insufficient to prevent the statute of limitations from barring

auditor found that the account was barred by the statute of limitations, "unless renewed by the transactions of November 15 and December 15, 1902." But, if renewed, he found there was due the plaintiff from the defendant the sum of \$169.45. The case was heard before the presiding justice, who, on the facts stated by the auditor, ordered judgment for the defendant. The plaintiff excepted.

It is well to observe at the outset that the correctness of the ruling or otherwise does not depend upon an application of the principle by which partial payments take an account out of the statute of limitations, concerning which many cases have been cited by the defendant's counsel, but of the statutory rule relating to mutual accounts. The partial-payments principle has reference solely to credits or payments, and regards such a payment as a recognition of the debt and a renewal of the promise to pay. The statutory rule rests upon other grounds.

The defendant particularly cites and relies upon *Benjamin v. Webster*, 65 Me. 170, but we do not think that case is conclusive as an authority on the point now involved. In that case the debit account was a single item, and the payment relied upon to take the account out of the statute of limitations was made generally on account, and not specifically, as here, to pay a single, separate item. It is true that the court used language which seems to sustain the defend-

ant's contention. But the language related to a condition which did not exist in that case, and it was not necessary to the decision. In fact, the whole tenor of the opinion was based upon the principle of partial payments. And that principle was applicable to that case as was pointed out on page 172 of 65 Me.

But this is a different case. Here the plaintiff's right of action does not depend upon proof of one item of credit within six years. The plaintiff relies upon a debit item within six years of the last preceding item, and within six years of the date of the writ. The item and date are undisputed. If the account stopped with the debit item of November 15, 1902, unquestionably it would not come within the operation of the statute of limitations relating to mutual accounts. That statute reads as follows: "In actions of debt or assumpsit to recover the balance due, where there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both, the cause of action shall be deemed to accrue at the time of the last item proved in such account." Rev. Stat. chap. 83, § 90. The statute begins to run with the last item of the account, and it makes no difference whether it is a debit or a credit item, or which party kept or proved it, or whether it appears in the plaintiff's credits or in the defendant's charges, if only it be an account of

the other claims. The court, in this case, said: "The auditor has found that these payments, when made, were credited on the postoffice account, and that the parties afterwards settled that account by making that specific application as credited. From the character of the payments, and the facts as found, we are led to regard those payments as having been made under a specific application on those items, and without any intention of having them enter into a general account, to be the subject of future adjustment; and that such is in fact the finding of the auditor. The payments are, therefore, not to be regarded as credits, or as proper items of entry on book. Their effect is to extinguish those items of account on which they were to apply; so that the items of charge and payments are not to be regarded as subsisting claims; and the account should be considered by the auditor as if those items constituted no part of the account."

In *Harris v. Howard*, 56 Vt. 605, it was held that the payment of two specific items of debit on an account soon after they were incurred was insufficient to prevent the operation of the statute of limitations upon an earlier debit item.

This was also recognized in *Hicks v. Blanchard*, 60 Vt. 673, 15 Atl. 401.

In *Peck v. New York & L. U. S. Mail S. S. Co.* 5 Bosw. 226, it was said that a spe-

cific payment directly appropriated to a specific item in an open account leaves the statute to its operation as to the rest.

In *Moore v. Blackman*, 109 Wis. 528, 85 N. W. 429, a married woman living upon her own farm, but operated for her by her husband, purchased goods of plaintiff upon an open account, which, however, was never settled. Some years thereafter her husband bought seed and wire from the plaintiff, the former of which appeared to be a cash transaction, and the latter, to have been paid for by notes. In an action to recover on the original account, it was claimed by plaintiff that, because the wire and seed purchased by the husband were used on the wife's farm, these transactions might be tacked to the original account and thus avoid the bar of the statute of limitations. It was held, however, that, since the evidence conclusively showed that the seed transaction, no question being raised as to the wire transaction, was one by itself, wholly disconnected with the old account, it could not be tacked to the old account so as to rejuvenate it. And see *Perry v. Chesley*, 77 Me. 393, sufficiently set out in *ROGERS v. DAVIS*.

Revival of barred debt by application of general payment, see case note to *Anderson v. Nystrom*, 13 L.R.A. (N.S.) 1141.

mutual dealings between the parties which have not been settled. It is no longer a question of the recognition of the account and of the renewal of the promise to pay it by making a partial payment on account of it.

It follows, then, that, when the defendant bought the tobacco on November 15th on credit, and the price was charged to him on his account, it had the effect of taking the account out of the operation of the statute for six years longer. It was an item of an unsettled account of mutual dealings between the parties, and it was then the last item.

The defendant, however, contends that the specific payment, on December 15, 1902, of the price of the tobacco, had the effect of taking that item out of the account, destroying the extension of the statute which the purchase had effected, and placed the parties back in *statu quo*. And, in support of this contention, the defendant relies on *Perry v. Chesley*, 77 Me. 393, as being conclusive. That case is in some respects similar to the case at bar, but it differs at a vital point. In that case there was one debit item and one credit item within the six years. But it was admitted that the debit item was "paid at the time in cash by the defendant, and a receipt given therefor." And this payment was the credit item. It was therefore a cash, and not a credit, transaction. It was never really a matter of account. The plaintiff, having been paid at the time, had nothing to charge to the defendant. Entering both the charge and the contemporaneous payment did not make them real items of account. In the present case, on the contrary, the tobacco was bought on credit and properly charged as an item of the mutual account. The case of *Perry v. Chesley*, therefore, does not sustain the defendant's contention.

Nor do we think it can be sustained by any reasonable interpretation of the statute. When the parties by their mutual dealings by some item of debit or credit have extended the time of the operation of the statute upon the balance of the account, we do not think it lies in the power of the debtor then to shorten the time by making specific payment of debit items. The statute was evidently intended to preserve the right of action upon a mutual unsettled account for six years after the last item, no matter how far back the account commenced. Until there has been a period of at least six years during which there are no items, either debit or credit, the account is alive and suable. But this may be of little avail to a creditor if, as is claimed by the defendant here, the latter may at any time pay specifically all the items which have accrued 19 L.R.A. (N.S.)

within six years and leave his creditor remediless as to the remainder of the account. The creditor is helpless. The debtor may choose what item he will pay, and the creditor must apply the payment as the debtor directs. If, then, the creditor, relying upon the statute, as he ought to be safe in doing, has forborne to sue until only one item is less than six years old, the debtor, if the present contention is to be sustained, may, against the will of the creditor, pay that item, and escape the payment of all the rest. If he can do so in thirty days after the item is charged, he can, with like effect, do so at any time before six years have elapsed. The time is not material. We do not think this contention can be sustained. The effect would be to rob the statute in great measure of its intended efficacy.

The court below erred in ordering judgment for the defendant. Upon the facts found by the auditor, it should have ordered judgment for the plaintiff.

Exceptions sustained.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM D. CARTER, Admr., etc., of
Ida M. Carter, Deceased.
v.

WEST JERSEY & SEASHORE RAILROAD
COMPANY, Plff. in Err.

(— N. J. —, 71 Atl. 253.)

Death — of parent — action.

1. Where children are supported in a home maintained with the earnings of the father, and the mother performs the ordinary household duties, including such care of the children as a mother usually takes, and the mother loses her life through the wrongful act of a third party, the statute (P. L. 1848, p. 151; Gen. Stat. 1895, p. 1188, § 10) permits an action to be maintained by the administrator of the mother to recover, for the benefit of the

Headnotes by PITNEY, C.

Case Note. — Elements of damages recoverable by child for death of mother.

The law presumes substantial damages in favor of children surviving their mother's death; and the pecuniary loss of her services in keeping the home of one of them and assisting the family of the other is recoverable in an action for their benefit. *Dukeman v. Cleveland*, C. C. & St. L. R. Co. 237 Ill. 104, 86 N. E. 712.

Education in religion, morals, and virtue, which, owing to the peculiar confidence inspired by the relationship of mother and child, can be imparted to children by the

children, the damages occasioned by the deprivation of the expectation of pecuniary advantage which would have resulted by a continuance of the mother's life.

Same — pecuniary benefits.

2. The statute (P. L. 1848 p. 151; Gen. Stat. 1895, p. 1188, § 10) does not require the plaintiff to show that the next of kin would probably have received from the deceased contributions of money, or of things purchased with money.

(Garrison, Reed, and Voorhees, JJ., dissent.)

(November 16, 1908.)

ERROR to the Circuit Court for Camden County to review a judgment in plaintiff's favor in an action brought to recover damages for the negligent killing of his intestate. Affirmed.

The facts are stated in the opinion.

mother alone, is such a benefit and advantage to the child as is capable of being estimated in money; for the loss of which as the result of a mother's death, surviving children may recover damages. *St. Lawrence & O. R. Co. v. Lett*, 11 Can. S. C. 422.

A charge to a jury in an action by young children to recover for their mother's death is not objectionable because it allows a consideration of the value to such children of a mother's nurture and care. *Eames v. Brattleboro*, 54 Vt. 471.

In an action by a husband and his children to recover for the loss of the wife and mother, where the court charged that the jury should find for the plaintiffs such a sum as would reasonably compensate them for all such damages as were the direct result to them by reason of the death, it was error to refuse to charge, in addition, for the defendant, that they should allow nothing as solace, or for grief, for the death of deceased. *International & G. N. R. Co. v. Boykin*, 32 Tex. Civ. App. 72, 74 S. W. 93.

A complaint showing that a deceased mother was survived by children so young as to be dependent upon her for support, nurture, and education sufficiently shows that they suffered a pecuniary loss by the mother's death, to state a cause of action for such loss; and the special pecuniary loss to two of the children because in poor health is also an element of damages. *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298.

In an action for the death of a wife and mother, it was held that an instruction which stated that plaintiffs were entitled to recover as damages all pecuniary loss suffered by them from the loss of society, protection, etc., of the deceased was properly given. *Green v. Southern California R. Co.* (Cal.) 67 Pac. 4.

Damages suffered by way of shock resulting from a mother's death may not be recovered, such damages being too problematical, indirect, and uncertain. *Filiatrault v. 19 L.R.A. (N.S.)*

Messrs. Gaskill & Gaskill, for plaintiff in error:

A nonsuit should have been granted, no pecuniary loss to the next of kin having been shown.

May v. West Jersey & S. R. Co. 62 N. J. L. 63, 42 Atl. 163; *Gottlieb v. North Jersey Street R. Co.* 71 N. J. L. 47, 58 Atl. 1088.

Messrs. Lewis Starr, James Gay Gordon, and Allen S. Morgan, for defendant in error:

The next of kin of a married woman may maintain an action for the pecuniary loss which they have sustained by her death.

Gottlieb v. North Jersey Street R. Co. 72 N. J. L. 481, 63 Atl. 339.

The next of kin sustained "pecuniary loss."

Tilley v. Hudson River R. Co. 24 N. Y. 472; *McIntyre v. New York C. R. Co.* 37 N. Y. 295; *Consolidated Traction Co. v. Hone*, 60 N. J. L. 446, 38 Atl. 759; *Paulmier*

Canadian P. R. Co. Rap. Jud. Quebec, 18 C. S. 491.

The right of action which a child has for the death of its mother is held, in *McCubbin v. Hastings*, 27 La. Ann. 713, to be that which is inherited from her, and which is for the suffering which she endured. No recovery may be had by a child for the loss and deprivation of the care, education, assistance, and love of his mother.

A statute which gives a jury the right to award "such damages as they may think proportioned to the injury resulting from such death" allows children to recover for the death of their mother the value of her services rendered to them and the amount expended for her funeral expenses. *Petrie v. Columbia & G. R. Co.* 29 S. C. 303, 7 S. E. 515.

Where a mother aided in the support and maintenance of her children, and cared for them in sickness; and there was a reasonable expectation that such aid and care would continue,—the loss thereof, in an action by the children to recover for their mother's death, is to be considered an element of damages. *San Antonio & A. P. R. Co. v. Long* (Tex. Civ. App.) 26 S. W. 114.

The damages recoverable by a daughter for the death of her mother are to be determined by the actual pecuniary injury sustained, and, in assessing the damages received, consideration should be had of all surrounding facts and circumstances to determine what aid the child would, in all probability, have received from the mother in the particular case if she had lived. *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 387, 38 S. W. 1121.

A child may not recover, in an action for his mother's death, damages resulting from the loss of the social relation between the two, nor for loss of the mother's advice and protection. *Nashville & C. R. Co. v. Smith*, 9 Lea, 474.

A son's loss of the society of his mother

v. Erie R. Co. 34 N. J. L. 151; Rafferty v. Erie R. Co. 66 N. J. L. 445, 49 Atl. 456; May v. West Jersey & S. R. Co. 62 N. J. L. 63, 42 Atl. 163; Pennsylvania R. Co. v. Goodman, 62 Pa. 339; Delaware L. & W. R. Co. v. Jones, 128 Pa. 309, 18 Atl. 330.

Pitney, C., delivered the opinion of the court:

This action was brought under the so-called "death act" (P. L. 1848, p. 151; Gen. Stat. 1895, p. 1188, § 10), and resulted in a verdict and judgment for substantial damages. It appears from the record and bill of exceptions that William L. Carter and Ida M. Carter, his wife, while traveling as passengers upon an electric railway car operated by the defendant com-

pany, lost their lives through the derailment of the car. The resulting actions against the company was tried together. The defendant's responsibility was admitted. The deaths occurred on October 28, 1906, when the husband was thirty-six years of age, and the wife two years younger. There was no direct evidence to show whether either survived the other. They left surviving two daughters, one fourteen and the other ten years of age, who, by the terms of the statute (amended act March 31, 1897 [P. L. p. 134]), are the beneficiaries of the resulting actions against the company. The present writ of error brings under review only the judgment in favor of the administrator of Ida M. Carter, the wife.

Motions were made for a nonsuit and for

is not an element of recovery in an action by him for her death, his recovery being limited to the pecuniary assistance which he might reasonably have expected to receive from his mother. In determining the question of pecuniary damages the court correctly charged that it was proper to take into consideration the relation of the mother in her life to her son, the way they lived together, her age, her physical and mental condition, the means which she had for her support, the probability as to her future life and condition, of what pecuniary value she would be likely to be to the son, and what he would be likely to do for her, and that the pecuniary damage to him would be the excess of the pecuniary benefit she was to him over what he had to do for her. *Lazelle v. Newfane*, 70 Vt. 440, 41 Atl. 511.

It is said in *Chicago & W. J. R. Co. v. Ptacek*, 62 Ill. App. 375, in upholding the amount of a verdict in an action for the benefit of children surviving their mother's death, that the question was one solely of pecuniary loss, and, although damages for the bereavement, for pain and suffering, were not recoverable, it was proper to refuse to direct a verdict for nominal damages only.

Where a deceased mother earned money and extended pecuniary assistance to her adult daughters, the cutting off of such assistance by the mother's death was an element to be considered in the assessment of damages, if there was a reasonable expectation of its continuance had she survived. *Omaha Water Co. v. Schamel*, 78 C. C. A. 68, 147 Fed. 502.

In *Countryman v. Fonda*, J. & G. R. Co. 166 N. Y. 201, 82 Am. St. Rep. 640, 59 N. E. 822, it was said that the jury, in addition to the question of the actual money damages as proved, were to consider in a reasonable way those prospective and indefinite damages arising from the death of a mother, as, for instance, whether the mother might not take her adult son and daughter home, in case of their failing health, to nurse and care for them indefinitely.

McIntyre v. New York C. R. Co. 47 Barb. 515, was an action for the death of a woman, brought for the benefit of the next of 19 L.R.A. (N.S.)

kin, her three children. The court, in reducing the amount of the verdict recovered, said: "There is no legitimate element of damages in the case, other than the pecuniary loss to her next of kin resulting from her death. They doubtless suffered mental anguish from her sudden and violent death, and it would be natural that their hearts were made to bleed over the mournful circumstances attending it. But none of these were pecuniary injuries for which the law affords a pecuniary compensation."

The damages recoverable by children for the death of their mother are limited to those of a pecuniary character; but such damages are not confined to the immediate loss of money or property. The recovery should look to the loss of prospective pecuniary advantages, such as nurture, intellectual, moral, and physical training, and such instruction as can proceed only from a mother. *Tilley v. Hudson River R. Co.* 24 N. Y. 471, S. C. 29 N. Y. 252, 86 Am. Dec. 297. This holding was followed in *McIntyre v. New York C. R. Co.* 37 N. Y. 287, affirming 47 Barb. 515.

But the value of the intellectual and moral training a mother might have given her children is not considered a proper element of damages in *Bradley v. Ohio River & C. R. Co.* 122 N. C. 972, 30 S. E. 8, where the measure of damages is held to be the pecuniary injury to the children in the loss of the value of the mother's labor or the amount of her earnings if she had lived.

In an action by a husband and his children to recover for the death of the wife and mother, the children may recover for their own peculiar loss in being deprived of their mother's services; and an instruction to the effect that children may recover the value of the mother's nurture and instruction, moral and physical, together with intellectual training, is not erroneous. *Johnson v. Southern P. R. Co.* (Cal.) 97 Pac. 520; *Redfield v. Oakland Consol. Street R. Co.* 110 Cal. 277, 42 Pac. 822, 1063.

The loss of financial aid from the income of property owned by a deceased mother is an element of damages in an action by her children to recover for her death, where such

the direction of a verdict for the defendant, upon the ground that there was nothing to show any pecuniary loss to the next of kin as a result of Mrs. Carter's death. We think these motions were properly overruled. There was evidence to show that the children lived with their parents in the city of Camden, in a home maintained with the earnings of the father, and that the wife performed the household duties, except that a woman was occasionally employed to do washing and cleaning. It was reasonably to be inferred that she took such care of her children as a mother usually takes. The statute provides that the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the next of

kin. As was long ago pointed out by Chief Justice Beasley, this means "a deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased." *Paulmier v. Erie R. Co.* 34 N. J. L. 151, 158. This definition has been consistently adhered to in subsequent cases. *Denarest v. Little*, 47 N. J. L. 28; *Consolidated Traction Co. v. Hone*, 60 N. J. L. 444, 446, 38 Atl. 759; *Cooper v. Shore Electric Co.* 63 N. J. L. 558, 567, 44 Atl. 633. Under circumstances such as are here presented, we think there is a reasonable inference that the continuance of the mother's life would have resulted in substantial pecuniary benefit to the children. The statute does not require the plaintiff to show that the

income was the result of the mother's business activity. *San Antonio & A. P. R. Co. v. Long*, supra.

Phalen v. Rochester R. Co. 31 App. Div. 448, 52 N. Y. Supp. 836, in affirming a verdict claimed to be excessive, said, in regard to children's rights to recover such a sum as the jury deemed "to be a fair and just compensation for the pecuniary injuries" resulting from the death of their mother: "In the case at bar the mother, having reared her children and seen them settled in life, was spending her declining years living around among them, some of her children affording her pecuniary assistance to make her life comfortable. The fact that they had dutifully done so does not detract from their right to recover damages in this action. It might well be that, when sickness or misfortune should render the care or assistance of this mother necessary, she would be in a condition to render it, and this would certainly be a pecuniary benefit. But we will not indulge in anticipations of the many ways in which the jury might see how the deceased could render pecuniary aid to her sons and daughters. They had the right to that aid, and to the preservation of her life as long as Providence should permit."

In *Tuteur v. Chicago & N. W. R. Co.* 77 Wis. 505, 46 N. W. 897, children were allowed to recover for their mother's death the actual pecuniary loss sustained, taking into consideration the number of years the mother would probably have lived, the reasonable expectation of her property increasing, and the reasonable expectation of pecuniary benefit to the children by way of support or otherwise had the deceased lived.

Where there was evidence from which a jury could find a reasonable expectation of pecuniary advantage from the continued life of the mother of children suing for her death, they might assess as damages the actual money loss to the children. In estimating such a loss occasional gifts and services should not be taken into consideration; but, where there was a persistent regularity in such contributions from year to year, so unvarying as to justify a reasonable expectation of continuance, and contributing appreciably to the comfort and health of her 19 L.R.A. (N.S.)

children, the loss to them is a pecuniary one for which they are entitled to compensation. *Schnatz v. Philadelphia & R. R. Co.* 160 Pa. 602, 28 Atl. 952.

A statute allowing such damages to be given as, "under all the circumstances of the case, may be just," does not warrant awarding a recovery for the grief of a son caused by his mother's death; but, in estimating the damages suffered, the jury should take into consideration the loss of the home afforded by his mother, and a prospective college education which she was able to give him. *Butte Electric R. Co. v. Jones*, 18 L.R.A. (N.S.) 1205, 164 Fed. 308.

In *Atlanta & W. P. R. Co. v. Venable*, 67 Ga. 697, the court, in determining from what date to allow damages to a child for its mother's death, made the statement that the measure of damages was the deprivation of the child of her mother's support.

The loss of a mother's care, nurture, training, and instruction is an element to be considered in determining the pecuniary injury to a child of tender years, suffered as a result of its mother's death. *Omaha Water Co. v. Schamel*, 78 C. C. A. 68, 147 Fed. 502.

The pecuniary benefit resulting to a child from services rendered by her mother, who lived with her and attended to the household, may be recovered as an element of damages in an action for the mother's death; but for occasional assistance rendered to other children in case of sickness, of the value of which there is no evidence, there may be no recovery. *Baltimore & O. R. Co. v. State*, 63 Md. 135.

The expectancy of children in the fruits of their mother's earnings in her business is not to be taken into consideration in estimating the damages suffered by the children upon their mother's death, where it is conceded that her earnings, immediately upon being realized, became her husband's property. *Tilley v. Hudson River R. Co.* supra.

Attention is called to the note to *Butte Electric R. Co. v. Jones*, 18 L.R.A. (N.S.) 1205, on the question of a minor's right to damages for the negligent killing of his parent, as limited to the period of minority.

next of kin would probably have received from the deceased contributions of money, or of things purchased with money.

In *Tilley v. Hudson River R. Co.* 24 N. Y. 471, 475, Denio, J., said: "The injury to the children of the deceased by the death of their mother was a legitimate ground of damages; and we do not agree with the defendants' counsel that they ought to have been nominal. The difficulty upon this point arises from the employment of the word 'pecuniary' in the statute; but it was not used in a sense so limited as to confine it to the immediate loss of money or property, for, if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature, which have been cut off by the premature death of the person from whom they would have proceeded; and the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. But infant children sustain a loss from the death of their parents, and especially of their mother, of a different kind. She owes them the duty of nurture, and of intellectual, moral, and physical training, and of such instruction as can only proceed from a mother.

. . . It is argued by the defendants' counsel that there should be no recovery on these grounds, because the father is obliged to provide what the children have been deprived of by the loss of their mother. But this is not an adequate answer. The children have been deprived of that which they were entitled to receive by the wrongful act of the defendants. Their loss may or may not be made up to them from another source; but in the meantime they are entitled to a fair and just compensation from the wrongdoers by the provisions of this statute." And see *S. C.* 29 N. Y. 252, 285, 86 Am. Dec. 297. In *Gottlieb v. North Jersey Street R. Co.* 72 N. J. L. 480, 63 Atl. 339, this court decided that, under the statute, an action may be maintained by the administrator of a deceased wife for the benefit of her next of kin, notwithstanding the husband be still living. In that case the husband was himself administrator.

In the present case it is argued that the services rendered by Mrs. Carter to her children were rendered in performance of the duty that she owed to her husband, and the suggestion is that the children's ex-

pectation of benefit in this behalf was, or ought to have been, included in the action brought by the administrator of their father. The record before us does not disclose what was the outcome of the latter action; nor, in our opinion, are we concerned with it. Each parent owes duties to the children, independent of the marital duties they owe to each other. The presumption is that the death of both parents is more detrimental to dependent children, from the pecuniary standpoint, than the death of a single parent only. What damages ought to be allowed for the death of either is to be regulated by instructions to the jury. *May v. West Jersey & S. R. Co.* 62 N. J. L. 63, 42 Atl. 163, is cited as sustaining the proposition that, pending the husband's life, the wife's services in the household are due to him, and are only incidentally beneficial to the children; and that the prospect that the wife would have survived the husband, whereupon her services would become a direct pecuniary benefit to the children, is too remote to be considered in fixing the pecuniary benefit of which the children are deprived by the mother's premature death. In the case referred to the only question for determination was whether the damages were excessive. The decision is not authoritative upon the question of the right of recovery, and in the discussion of that question the expressions in the opinion are not to be accepted without modification. Moreover, if we were to treat the mother's care of young children as bestowed, during the father's lifetime, in performance of a duty owing to him rather than to them, the assumption would have little, if any, bearing upon the present case. For here the father's life had already terminated before the issue was tried, and so his expectancy of life was no longer in the realm of speculation. Not only so, but his death was caused by the same act of the defendant that terminated the mother's life. There was no error in the refusal of the motions for nonsuit and for direction of a verdict in favor of the defendant.

The only other ground relied upon for reversal is the instruction of the trial judge to the jury respecting the damages to be allowed in the event of a verdict for the plaintiff. Taking the whole of the charge together, we think it not open to reasonable criticism upon this point.

The judgment under review should be affirmed.

Garrison, J., dissenting:

The beneficiaries in whose interest this judgment was recovered are the children of William L. and Ida M. Carter, both of whom were killed in the same railway accident.

The resulting actions against the company, in the cases of both the father and the mother of the beneficiaries, which, as stated in the opinion, were brought by the same administrator in the same court, were tried together, and submitted to the jury in a single charge, in which the rule for the admeasurement of damages in each case was laid down. In the father's case the jury was instructed that, in awarding the damages which were to be only of a pecuniary nature, they should take into consideration "the loss by these children of the maintenance and support of their father, the comforts and conveniences of home, the education of these children, and the provision at his death from the accumulated savings of his income."

In the case of the mother, which is the one before us on this writ of error, the jury was instructed: "As to the other suit, the suit brought by the administrator of the mother, Ida Carter, you may award such sum as you think these children have lost by being deprived of her services, care, and attention which, had she lived, she would have given to them, and which now must be procured by them in some other way."

This instruction, which was specifically excepted to, is, in my opinion, an erroneous one that permitted, if it did not necessitate, a reduplication of damages. The concrete vice of the instruction is that, if it is limited to damages of a pecuniary nature, it covers the same ground as the instruction given in the case of the father. If it is not so limited, it is on that account, erroneous. Assuming that in each case the damages were only such as were of a pecuniary nature, the "services, care, and attention" of a mother, which the jury were told to give in one case, are nominally directed chiefly, if not wholly, to securing and promoting the "comforts and conveniences of home and the education of the children," which the jury had been told to award in the father's case; so that, if the jury obeyed both instructions, as we must presume they did, they necessarily awarded in the case of the mother damages which, in so far as they were of a pecuniary nature, they also rewarded to the case of the father, and which, if not of a pecuniary nature, should not have been permitted in either case.

This result inevitably inheres in the instructions that were given to the jury, and does not depend upon any speculations as to matters *aliunde* respecting survivorship.

For this judgment in the case of the mother of the beneficiaries must stand either upon the theory that the father was living at the time of her death, or that he was not. If the former, then, under the instruction of the court, the children were awarded damages

which, in so far as they were susceptible of pecuniary assessment, they had not sustained. If the latter, they were awarded damages which, in so far as they were capable of pecuniary admeasurement, they recovered in the action for the father's death. Whichever theory be adopted, a verdict rendered in accordance with the instruction under review would be founded upon an erroneous rule of damages.

In my opinion the judgment should therefore be reversed.

Reed and Voorhees, JJ., concur.

NEW YORK COURT OF APPEALS.

VERYL PRESTON, Respt.,

v.

ÆTNA INSURANCE COMPANY, Appt.

(193 N. Y. 142, 85 N. E. 1006.)

Insurance — automobile — explosion — liability.

A fire burning an automobile originates within the vehicle, within the meaning of an exception of fires so originating in a policy of insurance on it, where, in consequence of the machine's running into a ditch, gasoline leaks from the tank, and the vapor penetrates the lamp forming the headlight and explodes, causing the fire.

(Vann and Chase, JJ., dissent.)

(October 13, 1908.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing a judgment entered in the office of the clerk of New York County on the report of a referee dismissing a complaint filed to recover the amount alleged to be due on a fire-insurance policy. Reversed.

The facts are stated in the opinion.

Mr. Edgar J. Nathan, for appellant:

The lamps attached to the dashboard were a part of the automobile.

2 Phillips, Ins. p. 38; Joyce, Ins. § 1765; Manila Prize Cases, 188 U. S. 254, 47 L. ed. 463, 23 Sup. Ct. Rep. 415.

The fire originated within the vehicle.

Nelson v. Traders' Ins. Co. 181 N. Y. 472, 74 N. E. 421; 30 Am. & Eng. Enc. Law, 2d

Note. — The above decision seems to be one of first impression upon the question of the applicability of a provision in a policy insuring an automobile, exempting the insurer from payment of loss caused by fire "originating within the vehicle," as an extensive search has failed to disclose any other case in which such provision was presented to the court for construction.

ed. p. 893; *Petti v. May*, 34 Wis. 666; *Baddeley v. Gingell*, 17 L. J. Exch. N. S. 63, 1 Exch. 319.

Messrs. Philip G. Bartlett and Graham Sumner, for respondent:

The fire which caused the plaintiff's loss was not a fire originating within the vehicle, within the meaning of the policy of insurance.

Schoonmaker v. Hoyt, 148 N. Y. 425, 42 N. E. 1059; *Dady v. O'Rourke*, 172 N. Y. 447, 65 N. E. 273; *Hustace v. Phoenix Ins. Co.* 175 N. Y. 292, 62 L.R.A. 651, 67 N. E. 592.

Cullen, Ch. J., delivered the opinion of the court:

This action is brought on a fire-insurance policy to recover for the damage caused to an automobile by fire. The policy contained this provision: "It is understood and agreed that this policy does not cover loss or damage caused by fire originating within the vehicle." On a dark night in July, 1902, the automobile insured, which was propelled by the explosion of gasoline vapor, while going from Pleasure Bay to Monmouth, New Jersey, ran off the road into a ditch filled with water to the depth of a man's knee. At the time of the occurrence there were in the vehicle a chauffeur and three other men. The automobile lay at an angle of 40 degrees with the bed of the road. Finding it impossible to extricate the machine from the ditch, the three men left for assistance, and almost immediately after heard the noise of an explosion, when, running to the place of the accident, they found the automobile in flames and the chauffeur lying on the ground across the ditch, with his clothes torn and his arms and hands bare. The chauffeur died before the trial of this action, so the origin of the fire can be determined only from the circumstances narrated by the other persons. At the time of the accident two kerosene lamps on the dashboard of the vehicle were lighted. It is assumed by both parties that, on account of the slanting position in which the vehicle stood, the gasoline ran out of the tank, covered the surface of the water, and its vapor coming in contact with the lighted lamps took fire and caused the explosion. This theory is in harmony with the statements made in plaintiff's proof of loss, to wit, "said fire originating as follows: On road from Pleasure Bay to Monmouth Beach. Caused by extinguishing lamp." The referee found as a fact that the loss and damage originated within the vehicle, and awarded judgment to the defendant. This judgment was reversed by the appellate division, the order of which is silent as to the grounds of the reversal. It is therefore presumed to have 19 L.R.A. (N.S.)

been on the law alone (Code of Civil Procedure, § 1338), the facts found by the referee not being disturbed, provided there was any evidence to support them. Therefore the question before this court is whether a fire occurring in the manner described falls within the exception of the policy as a "fire originating within the vehicle."

We cannot accept the view entertained by the majority of the appellate division. Doubtless the general rule is, as often stated, that, where an insurance policy is so drawn as to be ambiguous or require interpretation, that interpretation will be adopted which is most favorable to the insured. *Rickerson v. Hartford F. Ins. Co.* 149 N. Y. 307, 43 N. E. 856; *Michael v. Prussian Nat. Ins. Co.* 171 N. Y. 25, 63 N. E. 810. But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and proper sense. *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Nelson v. Traders' Ins. Co.* 181 N. Y. 472, 74 N. E. 421. That the lamps were part of the automobile so that the policy would have covered their loss had the fire been caused by other than the excepted risk seems reasonably clear. That the gasoline vapor must have penetrated within the lamp to have ignited is also clear. Therefore, within the letter of the policy, the fire in this case originated within the vehicle itself, and was an excepted risk. We do not care, however, to stand on the proposition that, construing the policy literally, this fire fell within the exceptions, but on the broader ground that, by a fair interpretation of the policy, it was intended to exclude risks of this character. The motive power used in the automobile, volatile, and inflammable in the highest degree, was a constant source of danger by fire. Fire might happen from many circumstances, some of which it was possible to foresee, others which it was not possible to foresee. It might be caused from some defect in the electric apparatus or in the valves controlling the flow from the tank into the motor, setting fire to the whole store of gasoline. If the vehicle was run at a high speed, the machinery might become so heated as to cause fire; and, as already suggested, the fire might be caused in many other ways which could not be anticipated. The fair and natural import of the policy was to exclude loss by fire, danger of which was inherent in the use or operation of the automobile itself without the intervention of any extrinsic cause or agency. If an incendiary, desiring to destroy the automobile,

should throw a lighted match into the tank, the fire would, under a literal reading of the policy and under the position assumed by the respondent's counsel, originate "within the vehicle;" but, in our judgment, such a loss would not fall within the spirit or fair interpretation of the exception, but, on the contrary, be covered by the policy. In such a case it would be the independent act of a third party that caused the fire. It is true that, by reason of the presence of the gasoline, an automobile would possibly at all times be more inflammable and subject to greater injury by fire than other vehicles. Such risk was doubtless paid for by the premium exacted and was covered by the policy. What the policy intended to except was fire developed by or originating in the use of the automobile as distinguished from fire occasioned by external causes. In other words, "within" in this policy is used as the antithesis of "extrinsic" or "without," not as the synonym of "interior." The question is one that does not admit of extended elaboration. We can only say that, in our judgment, the policy did not cover the loss in this case.

The order of the Appellate Division should be reversed and the judgment entered upon the report of the referee affirmed, with costs in both courts.

Gray, Haight, Werner, and Willard Bartlett, JJ., concur.

Vann, J., dissenting:

The decision of this appeal turns on the meaning of the words "fire originating within the vehicle," which form part of an exception that is claimed to release the defendant from the obligation of its general promise to insure "against all direct loss or damage by fire." The exception from the promise is not a part of the printed policy, but was written in and is peculiarly the language of the insurer. If the meaning of the exception is in doubt, the law holds the company responsible "because it prepared and executed the contract, and the language used is wholly its own." *Rickerson v. Hartford F. Ins. Co.* 149 N. Y. 307, 313, 43 N. E. 856. The learned appellate division gave the words in question one meaning, while the referee and one of the justices below gave them another. We also differ with no uncertain divergence of views as to what they mean; and can it be said under these circumstances, with propriety or truth, that the meaning of the company is expressed so clearly as to exempt it from the application of the rule that the author of a serious doubt in a written instrument must bear the burden thereof?

Where did the fire originate and what 19 L.R.A. (N.S.)

was the direct cause thereof? The gasoline was a mere potentiality, the same as a bundle of pine shavings or a can of gunpowder might have been. It did not cause the fire, for there is no claim of spontaneous combustion. It was highly inflammable, but it was not the first material that caught fire. The fire did not originate in the gasoline. It originated in an explosive vapor that came partly, but not wholly, from the gasoline, owing to rapid evaporation after it had escaped from the vehicle. The gasoline in the form of a liquid oil flowed out of the inverted tank on the ground or water beneath. It was then no longer within, but wholly without, the vehicle, and it was not then on fire. Contact with the air and combination therewith at once turned it into a vapor or gas; that is, "a compound or mixture capable of a rapid chemical reaction," known as an "explosion." It was not until after the gasoline was resting on the surface of the earth, wholly free from the vehicle, that the gas came into existence. As a gas it was never inside of the vehicle. It was a new substance, composed of gasoline and air. It was created by the action of the outside air upon the gasoline after it was also outside. That action took place without the vehicle and the product of evaporation sprang into existence without the vehicle. It was never within the vehicle, for it was not composed wholly of gasoline. A new element was added to the gasoline after its escape, and the oil and air compounded, not simply combined, was a new substance. This new substance thus brought into existence without the vehicle caught fire doubtless from contact with the flame of a kerosene lamp. Assuming that the lamp was part of the vehicle, that which first took fire was not a part of it, nor within it. The gas, floating in the air wholly outside of the vehicle, first caught fire, and that fire was communicated to the vehicle and destroyed it. The fire *me jure* did not originate within the vehicle, any more than if the vehicle had run into a hay stack, the lamp had set fire to the hay, and the burning hay had set the vehicle on fire or, to use another illustration, if the vehicle had overturned a storage tank and the gas arising from the oil as it flowed on the ground had been ignited by the lamp, and fire had thus been communicated to the vehicle itself.

The purpose of the exception from general liability imposed on the defendant by the policy, as I gather the meaning from the words used, was to exempt the insurer when the fire was caused by the operation of the machinery, or by defects in the vehicle itself, or by inherent agencies which were a part of the machine and operated wholly within it, with no aid from external causes.

Such a fire would owe its origin wholly to internal conditions, and hence could properly be said to have "originated within the vehicle." The fire in question originated without the vehicle, for it was kindled outside and was burning outside before the vehicle itself caught fire.

I vote for affirmance and judgment absolute against the appellant on its stipulation.

Chase, J., concurs with Vann, J.

NEW YORK COURT OF APPEALS.

HADDOCK, BLANCHARD, & COMPANY,
Incorporated, Resp't.,
v.

JOHN C. HADDOCK, Appt.

(192 N. Y. 499, 85 N. E. 682.)

Bills and notes — negotiable instruments act.

1. A complaint upon a bill or note, which does not allege a collateral agreement between the parties whose names are on the instrument, but which seeks to recover against a person otherwise than as provided by the negotiable instruments act, states no cause of action.

Bill of exchange — irregular indorsement — parol evidence.

2. Parol evidence is admissible in an action by the drawer of a bill of exchange payable to his own order, against a stranger who placed his name on the back of the instrument before delivery, and above which the drawer's indorsement was placed, to show that he intended to become surety for the acceptor, and assume liability to the drawer,

Case Note. — Admissibility of parol evidence to vary the liability of an irregular party to a bill or note from that declared by the negotiable instruments act.

Under the law as it existed prior to the adoption by the several states of the so-called uniform negotiable instruments act, there existed two doctrines in regard to the admissibility of parol evidence to show the true relation of an irregular indorser of a bill or note to the transaction. One doctrine was that parol evidence was admissible to show the true relationship of the parties, and, inasmuch as an irregular indorser was not a party to the contract, the admission of such evidence was not contrary to the doctrine that parol evidence is not admissible to vary the terms of a written contract. The other doctrine held that such evidence would vary the terms of a written contract, and was therefore inadmissible.

The purpose of this note is to show the effect upon this question of the negotiable instruments act. The cases are not at all

notwithstanding the negotiable instruments law provides that, if the instrument is payable to the order of the drawer, a person not otherwise a party to the instrument, who places thereon his signature in blank before delivery, is liable to all persons subsequent to the drawer, since, the drawer being in legal effect an indorser, the parties are within the provisions of the section of the statute which declares that, as between indorsers, parol evidence is admissible to show the order in which they agreed to be liable.

(September 29, 1908.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the Trial Term for Broome County in plaintiff's favor in an action brought to enforce the alleged liability of an indorser of a promissory note. Affirmed.

The facts are stated in the opinion.

Mr. M. Edward Kelley, for appellant:

Before the negotiable instruments law, the contracts created between the parties to negotiable paper were contracts in writing, and parol evidence was not admissible to vary, alter, or contradict their terms, which were deemed to be fully expressed on the face of the instrument.

Byles, Bills, 16th ed. p. 114; 1 Dan. Neg. Inst. §§ 707a, 707b, 717; Norton, Bills & Notes, §§ 67, 68; Martin v. Cole, 104 U. S. 30, 26 L. ed. 647; Hall v. Newcomb, 7 Hill, 416, 42 Am. Dec. 82; Spies v. Gilmore, 1 N. Y. 321; Cottrell v. Conklin, 4 Duer, 50; Bank of Albion v. Smith, 27 Barb. 489; Bird v. Kay, 40 App. Div. 538, 58 N. Y. Supp. 170; Johnson v. Ramsey, 43 N. J. L. 279, 39 Am. Rep. 580; Prescott Bank v. Caverly, 7 Gray,

numerous, and are not harmonious. Several cases sustain the principle enunciated in HADDOCK, B. & Co. v. HADDOCK, that parol evidence is admissible to show the true character of the transaction and the relationship and liability of the irregular party.

Thus, in Kohn v. Consolidated Butter & Egg Co. 30 Misc. 725, 63 N. Y. Supp. 265, the court, after discussing the provisions in the negotiable instruments act in regard to irregular indorsers, said: "The true intention of indorsers as between themselves can always be shown by oral evidence. . . . To go further and decide that the statute intended to create an incontestable liability against irregular indorsers would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interest of law reform."

So, in Morgan v. Thompson, 72 N. J. L. 244, 62 Atl. 410, it was held that parol evidence is admissible to show the true relation of the maker of the note to the transaction. The court said: "Since the passage

217, 66 Am. Dec. 473; *Essex Co. v. Edmands*, 12 Gray, 273, 71 Am. Dec. 758; *Wright v. Morse*, 9 Gray, 337, 69 Am. Dec. 291; *Woodbridge v. Spooner*, 3 Barn. & Ald. 233; *Foster v. Jolly*, 1 Crompt. M. & R. 703; *Moseley v. Hanford*, 10 Barn. & C. 729; *New London Credit Syndicate v. Neale* [1898] 2 Q. B. 487.

An exception to this rule has arisen in this country, in the case of irregular indorsements of instruments payable to the order of a person other than the maker or drawer, and the indorser might, accordingly, be held liable to the payee of such paper by the aid of parol evidence.

1 Dan. Neg. Inst. §§ 709, 711; *Norton, Bills & Notes*, § 68; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256; *Perkins v. Catlin*, 11 Conn. 213, 29 Am. Dec. 282; *Bigelow v. Colton*, 13 Gray, 309, 74 Am. Dec. 633; *Rey v. Simpson*, 22 How. 341, 16 L. ed. 260; *Barrows v. Lane*, 5 Vt. 161, 26 Am. Rep. 293; *Kingsland v. Koeppe*, 137 Ill. 344, 13 L.R.A. 649, 28 N. E. 48; *Seymour v. Mickey*, 15 Ohio St. 515; *Lake v. Stetson*, 13 Gray, 310, note; *Dubois v. Mason*, 127 Mass. 37, 34 Am. Rep. 335; *Coulter v. Richmond*, 59 N. Y. 481; *Phelps v. Vischer*, 50 N. Y. 72, 10 Am. Rep. 433; *Moore v. Cross*, 19 N. Y. 229, 75 Am. Dec. 326; *Hall v. Newcomb and Spies v. Gilmore*, supra.

But the exception had never, prior to the statute, been extended to irregular indorsements of instruments drawn payable to the order of the maker or drawer; and the indorser, therefore, could not be held liable to the payee of such paper.

Smalley v. Wight, 44 Me. 442, 69 Am. Dec. 112; *Smith v. Lusher*, 5 Cow. 711; *Hooper v. Williams*, 2 Exch. 13; 1 Dan. Neg.

of the negotiable instruments act evidence is admissible, even between indorsers, to show that, as between themselves, they have agreed as to the liability otherwise than appears from the order of their indorsement upon the note. The note is only prima facie evidence of the order of liability."

And in *Wilson v. Hendee*, 74 N. J. L. 640, 66 Atl. 413, it was held that the act admitted of the introduction of parol evidence to show the actual agreement made between several indorsers, notwithstanding the fact that it contradicted the prima facie inference appearing from their successive indorsements.

But, to the contrary was the decision in *Baumeister v. Kuntz*, 53 Fla. 430, 42 So. 886. In this case the court said that, prior to the enactment of the negotiable instruments law it had been held that, when a party who was neither the maker nor the payee of a promissory note, for the purpose of enabling the maker to raise money on it and before the note passed to the payee, had indorsed the note in blank, he became liable as one of the makers of the note. 19 L.R.A. (N.S.)

Inst. §§ 707a, 707b; *Norton, Bills & Notes*, § 68, p. 138; 2 *Parsons, Notes & Bills*, p. 122; *First Nat. Bank v. Payne*, 111 Mo. 291, 33 Am. St. Rep. 520, 20 S. W. 41; *Dubois v. Mason*; *Lake v. Stetson*; and *Bigelow v. Colton*,—supra; *Hately v. Pike*, 162 Ill. 248, 53 Am. St. Rep. 304, 44 N. E. 441; *Chicago Trust & Sav. Bank v. Nordgren*, 157 Ill. 663, 42 N. E. 148; *Clapp v. Rice*, 13 Gray, 403, 74 Am. Dec. 639; *Heidenheimer v. Blumenkron*, 56 Tex. 308.

The action at bar could not be maintained in England, either under the common law, or under the bills of exchange act.

Steele v. M'Kinlay, L. R. 5 App. Cas. 754; *Jenkins v. Coomber* [1898] 2 Q. B. 168, 67 L. J. Q. B. N. S. 780; *Chalmers, Bills of Exchange*, 6th ed. p. 192; *Byles, Bills*, 16th Eng. ed. p. 182; 2 *Ames, Cases on Bills & Notes*, p. 839.

The negotiable instruments law renders irregular indorsers of paper drawn payable to the order of the maker or drawer liable only to parties subsequent to the payee, in accordance with the prior law.

Eaton & G. Com. Paper, p. 653, § 84, Appx. A.; *Chaddock v. Vanness*, 35 N. J. L. 523, 10 Am. Rep. 256; *Perkins v. Catlin*; *Hall v. Newcomb*; *Essex Co. v. Edmands*; *Rey v. Simpson*; and *Steele v. M'Kinlay*,—supra; *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 216, 77 N. E. 1020; *National Citizens' Bank v. Toplitz*, 81 App. Div. 593, 81 N. Y. Supp. 422; *Coulter v. Richmond*, 59 N. Y. 478; *Davis v. Bly*, 164 N. Y. 527, 79 Am. St. Rep. 670, 58 N. E. 648; *Far Rockaway Bank v. Norton*, 186 N. Y. 484, 79 N. E. 709; *Corn v. Levy*, 97 App. Div. 48, 89 N. Y. Supp. 606; *Deyo v. Thompson*, 53 App. 25 App. Div. 11, 48 N. Y. Supp. 1000;

But, by the terms of the statute, when a person not otherwise a party to a negotiable instrument places thereon his signature in blank before delivery, his status is fixed as that of an indorser; and, where the statute fixes the status of a party to a negotiable instrument as being that of an indorser, parol evidence is not admissible to vary such status.

In *Kinsel v. Wieland*, 38 Colo. 296, 88 Pac. 153, it was held that parol proof was admissible to show the circumstances in which persons other than the payee, and apparently not connected with the promissory note, had indorsed the same. It does not appear, however, that this decision was affected in any way by the negotiable instruments act, although such a statute had been enacted in that state.

Upon, Character, under uniform negotiable instruments law, of one who places his name on the back of a note prior to, or at the time of, delivery, see case note to *Rockfield v. First Nat. Bank*, 14 L.R.A. (N.S.) 842.

Brewster v. Shrader, 26 Misc. 480, 57 N. Y. Supp. 606; Deyo v. Thompson, 53 App. Div. 9, 65 N. Y. Supp. 459; Kohn v. Consolidated Butter & Egg Co. 30 Misc. 725, 63 N. Y. Supp. 265; Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413; Gibbs v. Guaraglia (N. J. L.) 67 Atl. 81; Spencer v. Allerton, 60 Conn. 410, 13 L.R.A. 806, 22 Atl. 778; Thorpe v. White, 188 Mass. 333, 74 N. E. 592; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886; Deahy v. Choquet, 28 R. I. 338, 14 L.R.A. (N.S.) 847, 67 Atl. 422; Cellers v. Meachem, 49 Or. 186, 10 L.R.A. (N.S.) 133, 89 Pac. 426; Jenkins v. Coomber [1898] 2 Q. B. 168; National Citizens' Bank v. Toplitz, supra.

Mr. Israel T. Deyo, with Mr. A. J. McCrary, for respondent:

As between the original parties, the apparent rights of the indorser on the face of the note and the contract of indorsement may be "qualified and changed by parol evidence and the intentions of the parties."

Witherow v. Slayback, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681; Davis v. Bly, 164 N. Y. 527, 79 Am. St. Rep. 670, 58 N. E. 648; Dan. Neg. Inst. 5th ed. §§ 710, 711, 714, 1202, 1203; Eaton & G. Com. Paper, p. 413; Story, Promissory Notes, § 479; Randolph, Com. Paper, § 908; Robinson v. Lyle, 10 Barb. 512; Easterly v. Barber, 66 N. Y. 433; Good v. Martin, 95 U. S. 90, 24 L. ed. 341; Rey v. Simpson, 22 How. 341, 16 L. ed. 260; Clothier v. Adriance, 51 N. Y. 322; Morgan v. Thompson, 72 N. J. L. 244, 62 Atl. 410; Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413; Kohn v. Consolidated Butter & Egg Co. 30 Misc. 725, 63 N. Y. Supp. 265; Bank of Port Jefferson v. Darling, 91 Hun, 236, 36 N. Y. Supp. 153.

The enactment of the statute has changed the legal presumption as to the liability of the irregular indorser; and § 114 now makes him presumptively liable as first indorser.

McMoran v. Lange, 25 App. Div. 11, 48 N. Y. Supp. 1000; Metropolitan Bank v. Engel, 66 App. Div. 273, 72 N. Y. Supp. 691; 1 Am. & Eng. Enc. Law, 2d ed. pp. 351, 354, 356, 371, 373; Bendey v. Townsend, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482; Lewis v. Williams, 4 Bush, 678.

The drawer of a bill of exchange could maintain an action against an indorser, on the facts presented in this case, in the English courts, either under the common law prior to the passage of the bills of exchange act, or under the statute subsequent to the passage of that act.

Wilders v. Stevens, 15 Mees. & W. 208; Smith v. Marsack, 6 C. B. 486; Morris v. Walker, 14 Jur. 851; Reynolds v. Wheeler, 10 C. B. N. S. 561; Matthews v. Bloxsome, 33 L. J. Q. B. N. S. 209; Wilkinson v. Unwin, L. R. 7 Q. B. Div. 636; Glenie v. Tucker, 10 L.R.A. (N.S.)

23 Times L. R. 596; Chalmers, Bills of Exchange, 6th ed. § 37, p. 123; Byles, Bills, 16th ed. p. 184; Story, Promissory Notes, 7th ed. § 479; Randolph, Com. Paper, §§ 741, 744, 1671; Bigelow, Bills, Notes, & Cheques, p. 46; Tiedeman, Com. Paper, § 272; Dan. Neg. Inst. 5th ed. § 1202a.

Chase, J., delivered the opinion of the court:

The plaintiff is a foreign corporation authorized to do business in this state, and engaged as a wholesale dealer in coal at Binghamton. The Plymouth Coal Company, a corporation, was engaged in the operation of coal mines in Pennsylvania prior to March, 1902, at which time it went into the hands of a receiver. The defendant was the president and manager of said coal company, and the owner of substantially all of its stock. The defendant was, until May, 1902, the president of the plaintiff, and during all the times herein mentioned had charge of plaintiff's New York office. At the time when the note and bills hereinafter mentioned were given, the plaintiff was engaged in selling on commission at wholesale the coal mined by the Plymouth company or its receiver, under a contract made with said coal company. One B, the vice president of the plaintiff prior to May, 1902, and its president thereafter, passed upon the financial responsibility of persons seeking credit with the plaintiff, and he arranged with a trust company at Binghamton to discount commercial paper of the plaintiff's customers. The Lenape Coal Company, the Living Stone Coal Company, and the Montauk Coal Company were severally organized as corporations and engaged in the business of retailing coal in or near the city of New York, and the defendant was the owner of substantially all of the stock of each. Soon after the organization of such corporations to retail coal, they sought credit with the plaintiff, and their financial responsibility was investigated by B. The responsibility of each was found to be unsatisfactory, and B. so reported to the defendant, and the defendant replied that said companies were his companies and he would guarantee their credit by indorsing their paper.

On February 13, 1902, said Lenape Coal Company, for value received, executed and delivered to the plaintiff, as payee, its certain promissory note for \$880.96, dated on that day, payable four months after date at a bank in the city of New York. On and between January 27, 1902, and May 13, 1902, the plaintiff, for value received, made thirty several drafts each on either said Lenape Coal Company, said Living Stone Coal Company, or said Montauk Coal Com-

pany, payable to the order of itself as payee which drafts aggregated \$26,833.15, each of which drafts was, for value received, accepted by the coal company on which it was drawn, payable at a place and on a day in each respectively specified. The drafts or bills were all similar in form, and the following is a copy of one of said bills:

1327.41/100.

Coal Office of Haddock, Blanchard, & Co., Incorporated.

New York, April 28, 1902.

Four months after date pay to the order of ourselves thirteen hundred twenty-seven and 41/100 dollars, value received, and charge the same to account of Haddock, Blanchard, & Co., Incorporated.

C. N. Blanchard, Asst. Treas.

To Montauk Co., Brooklyn, N. Y.

Indorsed across the face:

Accepted. Payable at the Binghamton Trust Co., Binghamton, N. Y.

The Montauk Coal Co.,

Chas. B. Smith, Treas.

Indorsed on the back:

Haddock, Blanchard, & Co., Incorporated.

C. N. Blanchard, Assistant Treasurer,

John C. Haddock.

Said note, after it had been signed by said Lenape Coal Company, and each of said bills, after they had been accepted by the corporation on which they were severally drawn, were indorsed by the defendant before delivery; and thereafter each of them, so indorsed, was, before maturity, delivered to the plaintiff as payee, and the plaintiff thereafter and prior to their maturity severally indorsed and procured them to be discounted at a trust company at Binghamton. Said note and each of said bills were given and delivered to the plaintiff for the purchase price of coal sold and delivered by the plaintiff to the acceptors, respectively, of said bills and the maker of said note, or in renewal in whole or in part of prior notes or bills given or accepted for the purchase price of coal so sold and delivered. Said note and each of said bills were so indorsed by the defendant for the accommodation of the maker of said note and the acceptor of said bills, respectively, and for the purpose of giving such maker and acceptors credit with the plaintiff, and in pursuance of an agreement between the defendant and the plaintiff by which the plaintiff agreed to sell coal on credit to the acceptors of said bills, and to the maker of said note upon the defendant's guaranteeing the credit of said companies respectively; and the plaintiff was

induced to take said accepted bills and said note, and each of them, for such coal by reason of the indorsement of the said defendant and pursuant to said agreement that the defendant would be liable thereon to the plaintiff in case the respective corporations primarily liable thereon should make default in payment thereof. The proceeds of said bills and note were remitted to the defendant at the New York office of the plaintiff to provide funds to pay for coal and other current expenses. At the time when said note and bills respectively became due they were presented for payment at the place where they were respectively made payable, and payment duly demanded, which was refused, and thereupon each was duly protested for nonpayment, and notice thereof given to the plaintiff and to said defendant. Thereafter the plaintiff was compelled to take up said note and drafts and pay the amount due thereon, respectively, and became the owner and holder thereof and of each of them.

This action is brought to compel the defendant to pay to the plaintiff the amount of said note and bills pursuant to his said agreement with the plaintiff when they were severally indorsed by him; and the facts upon which the plaintiff's claim is based are stated in the complaint. The defendant denies that he indorsed the note and bills for the accommodation of and as surety for the retail coal companies, respectively; but the evidence is sufficient to sustain the findings of the court from which the statements of fact in this opinion have been taken. As the facts are found, if the intention of the parties is to prevail, the defendant should be required to pay to the plaintiff the amount of such note and bills as established by the judgment. The defendant contends that the position of his name upon the note and bills conclusively establishes that he indorsed the several instruments without liability to the plaintiff, and that parol evidence should not have been received to affect or overcome the alleged conclusive presumption arising from his indorsements as made.

In the early decisions by the courts in this state there was some confusion relating to the liability of a person who indorsed a note or bill prior to its delivery. *Labron v. Woram*, 1 Hill, 91; *Herrick v. Carman*, 12 Johns. 159; *Hall v. Newcomb*, 3 Hill, 233, S. C. 7 Hill, 416, 42 Am. Dec. 82; *Hahn v. Hull*, 2 Abb. Pr. 352. This court, in *Moore v. Cross*, 19 N. Y. 227, 75 Am. Dec. 326, referring to a case of a person who, for the accommodation of a maker, indorsed a note payable to a third person, says: "Some confusion has been thrown around this subject from what has been finally settled to have been an error, treating such an indorsement as a guaranty and charging the indorser as

a maker or guarantor. This doctrine was advanced in *Herrick v. Caraman*, 12 Johns. 160, and was adjudged in *Nelson v. Dubois*, 13 Johns. 175, and *Campbell v. Butler*, 14 Johns. 349. It was attacked in *Dean v. Hall*, 17 Wend. 214, and in *Seabury v. Hungerford*, 2 Hill, 80, and was finally overthrown in *Hall v. Newcomb*, 3 Hill, 233, and the same case in error, 7 Hill, 416, 42 Am. Dec. 82. The chancellor, in his opinion in the latter case, says: "If the object of the second indorser was to enable the drawer to obtain money from the payee of the note upon the credit of the accommodation indorser, he may indorse it without recourse, and, by such indorsement, may either make it payable to the second indorser or to the bearer; and such original payee may then, as legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him and subsequent indorsement of the note to him by the second indorser." The court further says: "If a note be made and indorsed for the accommodation of A, who indorses it to another person, and afterward in the course of trade again becomes the holder, he could maintain no action against the maker and indorser for his accommodation, notwithstanding their apparent liability to him on the face of the paper. The fact of the accommodation making and indorsing might be proved to defeat the action, and it would establish that the agreement of the parties, contrary to the legal inference from the face of the paper, did not impose a liability on the maker and indorser to pay the party suing."

There has always been conflict among the courts of the several states both in asserting the principles upon which irregular indorsers upon commercial paper are to be held and in the conclusion arrived at in particular cases litigated. The number of cases is so great, and the possibility of even a partial reconciliation of them so remote, that we will confine our citation of authorities wholly to those in this state. It was well settled in this state for many years prior to the enactment of the negotiable instruments law that a person who puts his name on the back of a bill or note before its delivery is presumably a second indorser and not liable to the payee; but the presumption could be rebutted by parol evidence to show that the intention of the indorser was to become surety for some prior party to the instrument. *Moore v. Cross*, supra; *Bacon v. Burnham*, 37 N. Y. 614; *Meyer v. Hibsher*, 47 N. Y. 265; *Phelps v. Vischer*, 50 N. Y. 69, 10 Am. Rep. 433; *Clothier v. Adriance*, 51 N. Y. 322; *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562; *Coulter v. Richmond*, 59 N. Y. 478; *Easterly v. Barber*, 66 N. Y. 433; *Jaff* 19 L.R.A. (N.S.)

fray v. Brown, 74 N. Y. 393; *Witherow v. Slayback*, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681; *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38; *Davis v. Bly*, 32 App. Div. 124, 52 N. Y. Supp. 599, affirmed in 164 N. Y. 527, 79 Am. St. Rep. 670, 58 N. E. 648; *Far Rockaway Bank v. Norton*, 186 N. Y. 484, 79 N. E. 709; *Lester v. Paine*, 39 Barb. 616; *Foerster v. Squier* (City Ct. N. Y.) 46 N. Y. S. R. 289, 19 N. Y. Supp. 367; *Reed v. Photo-Gravure Co.* (City Ct. N. Y.) 38 N. Y. S. R. 467, 13 N. Y. Supp. 798; *Wyckoff v. Wilson* (Com. Pl.) 36 N. Y. S. R. 35, 13 N. Y. Supp. 270; *Luft v. Graham*, 13 Abb. Pr. N. S. 175; *Draper v. Chase Mfg. Co.* 2 Abb. N. C. 79; *Holz v. Woodside Brewing Co.* 83 Hun, 192, 31 N. Y. Supp. 397; *Meise v. Doscher*, 68 Hun, 557, 23 N. Y. Supp. 49; *Bank of Port Jefferson v. Darling*, 91 Hun, 236, 36 N. Y. Supp. 153; *Hendrie v. Kinnear*, 84 Hun, 141, 32 N. Y. Supp. 417; *Montgomery v. Schenck*, 82 Hun, 24, 31 N. Y. Supp. 42; *McPhillips v. Jones*, 73 Hun, 516, 26 N. Y. Supp. 101; *Staiger v. Theiss*, 19 Misc. 170, 43 N. Y. Supp. 292; *Rose v. Packard*, 4 N. Y. Week. Dig. 427; *Cuming v. Roderick*, 16 App. Div. 339, 44 N. Y. Supp. 1033; *McMoran v. Lange*, 25 App. Div. 11, 48 N. Y. Supp. 1000; *Howard v. Van Gieson*, 46 App. Div. 77, 61 N. Y. Supp. 349; *Nagel v. Lutz*, 41 App. Div. 193, 58 N. Y. Supp. 816.

The negotiable instruments law was first enacted in this state in 1897. Laws 1897, chap. 612, p. 734. Section 113 of the said law provides: "A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." The defendant was, within this definition, an indorser of each of said instruments. Section 114 of the said law provides: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee." By this section of said law, the presumption as established by the courts in this state was changed, and an irregular indorser is now presumed to be liable in accordance with the express language of the statute. Questions relating to the sufficiency of the pleadings are settled by the statute. A complaint upon a note or bill, without alleging

a collateral agreement between the parties whose names are on the instrument, seeking to recover against a person except as provided by the statute, would clearly be demurrable.

The note of the Lenape Coal Company was payable to the plaintiff, a third person, and the defendant, according to the provisions of said § 114, is liable to the plaintiff, the payee therein. No serious contention has been made to the contrary. The serious question for consideration arises from the fact that the bills were payable to the maker and drawer thereof, respectively, and the defendant, as an indorser thereon before delivery, is not, under the statute, *prima facie* liable thereon to the plaintiff. Should parol evidence have been allowed to show the intent of the parties? We have not discovered any exception to the rule as established by the courts of this state, allowing parol evidence as between the parties whose names appear on the bill or note to determine their liability as between themselves. It is frequently stated that, where a note is payable to a person other than the maker, and is indorsed by a third person before delivery, the intention of the indorser is ambiguous and uncertain on the face of the paper; and such uncertainty justifies the receipt of parol evidence to determine the true intention of the parties. We do not see that any greater certainty exists upon the face of a bill as to the true intention of the parties, where it is drawn to bearer or to the order of the maker, and it is indorsed by a third person after acceptance by the acceptor and before delivery to the payee and maker. There is a certain rule of presumption determined by common law or by statute, but the alleged reason for the rule in either case is not very apparent. The long-established rule to allow parol evidence, that the intention of the parties may prevail, seems to have met with somewhat general approval, without discussing specifically the principles upon which such evidence is admitted.

It is said by Daniel in his work on Negotiable Instruments, 5th ed. § 710: "Whatever diversities of interpretation may be found in the authorities on the subject, they very generally concur, though not with entire unanimity, that, as between the immediate parties, the interpretation ought to be in every case such as will carry their intention into effect; and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction." Story, Promissory Notes, § 479. In *Good v. Martin*, 95 U. S. 90, 24 L. ed. 341, the court says: "Considerable diversity of decision, it must be admitted, is found in the reported cases, where the record presents the case of a blank indorsement

by a third party, made before the instrument is indorsed by the payee and before it is delivered to take effect, the question being whether the party is to be deemed an original promisor, guarantor, or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties; and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction is admissible to aid in the interpretation of the language employed. *Denton v. Peters*, L. R. 5 Q. B. 475. Facts and circumstances attendant at the time the contract was made are competent evidence for the purpose of placing the court in the same situation and giving the court the same advantages for construing the contract which were possessed by the actors. *Cavazos v. Trevino*, 6 Wall. 773, 18 L. ed. 813."

It must constantly be borne in mind that the acceptance of a bill makes the acceptor the principal debtor. A bill, when accepted, becomes similar to a promissory note; the acceptor being the promisor, and the drawer standing in the relation of an indorser. *Dan. Neg. Inst.* 5th ed. § 532. There is nothing in the negotiable instruments law to indicate an intention on the part of the legislature to change the rule as established in this state, relating to the receipt of parol evidence to determine the primary liability as between the persons whose names appear upon the instrument, or as between those secondarily liable thereon. By § 55 of the negotiable instruments law it is provided: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." Parol evidence is necessary to determine whether a party to an instrument, including an indorser thereon, is an accommodation party, and also to determine which other party to the instrument he had accommodated. The plaintiff was the holder of the note for value, and the evidence showed that the defendant was an accommodation indorser for the benefit of the acceptor. The last subdivision of § 114, as we have quoted, makes parol evidence necessary to establish whether the indorser signed the instrument for the accommodation of the payee. It is true that this section does not expressly state that, if the indorser signed for the accommodation of the acceptor, he is

liable to all parties subsequent to the acceptor; but the fact that such a provision is not included in § 114 does not prevent the admission of parol evidence to determine generally the questions relating to an accommodation party as provided by § 55. The negotiable instruments law, by § 7, provides: "In any case not provided for in this act the rules of the law merchant shall govern." By § 118 of the negotiable instruments law it is provided: "As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that, as between or among themselves, they have agreed otherwise." As we have seen, upon the acceptance of the bill the acceptor becomes the principal debtor and the one primarily liable to pay the amount of the bill, and all other parties to the instrument, including the maker and indorser, are secondarily liable. We are of the opinion that the maker of the bill is in legal effect and within the intention of this section an indorser, and that, as between the plaintiff and the defendant, parol evidence is authorized to determine the liability as between them.

The articles of the negotiable instruments law relating to the presentation of bills and notes for payment and notice of dishonor (articles 7 and 8) further show an intention by the legislature to leave the order of liability among those whose names are on the instrument subject to determination by any competent evidence. Section 130 provides: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument. . . . But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." Section 139 provides: "Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument." Section 140 provides: "Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented." Section 160 provides: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged." Section 186 provides: "Notice of dishonor is not required to be given to an indorser in either of the following cases: . . . (3) Where the instrument was made or accepted for his accommodation."

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There is no reason that we can conceive why the legislature should intend to change the rule in regard to the admission of parol evidence as it had existed in this state for many years. All of the quotations that we have made from the negotiable instruments law show that it has enlarged rather than restricted the rules allowing parol evidence to show the true liability and relation of the parties whose names appear upon the bill or note, in all actions between themselves. It is certainly very material to the drawer of a bill whether an indorser signs it at his request, or at the request and for the benefit of the acceptor. We do not think it was the intention of the legislature, by the enactment of § 114 of the negotiable instruments law, to establish a rule as to the liability of an irregular indorser conclusive on the parties to the instrument as between themselves in an action where the facts showing a different intention are fully alleged. All of the decisions of our courts since the enactment of the negotiable instruments law tend to sustain the views herein expressed. *Corn v. Levy*, 97 App. Div. 48, 89 N. Y. Supp. 658; *Kohn v. Consolidated Butter & Egg Co.* 30 Misc. 725, 63 N. Y. Supp. 265. In the case last mentioned *McAdam, J.*, said: "Prior to the statute of 1897, *supra*, the allegation referred to was a necessary one in such cases, and, if denied, the onus of proving the allegation was on the plaintiff, for the payee was presumably the first indorser. *Dan. Neg. Inst.* 4th ed. § 704; *Wood's Byles's Bills*, 151, note, and cases before cited. Since the statute the legal presumption is changed where the complaint alleges that the irregular indorsers indorsed the paper 'before delivery' to the payee; and, when this fact is established, the onus is cast upon such indorsers to allege and prove that, notwithstanding such delivery, the payee was to become first indorser according to the customary form of the contract, and that they did not indorse for the purpose of lending their credit to the maker or with the intention of becoming liable to the payee. That this is the proper interpretation of the act is obvious. The true intention of indorsers as between themselves can always be shown by oral evidence. *Dan. Neg. Inst. supra*; 4 *Am. & Eng. Enc. Law*. 2d ed. pp. 492 et seq.; *Guild v. Butler*, 127 *Mass.* 386; *Cady v. Shepard*, 12 *Wis.* 639; *Benjamin's Chambers' Bills*, 2d *Am. ed.* 250; *Witherow v. Slayback*, 158 *N. Y.* 649, 70 *Am. St. Rep.* 507, 58 *N. E.* 681. To go further, and decide that the statute intended to create an incontestable liability against irregular indorsers, would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especial-

ly in a provision enacted in the interest of law reform."

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Haight, Vann, Werner, Willard Bartlett, and Hiscock, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

CONTINENTAL WALL PAPER COMPANY, Plff. in Err.,

v.

LEWIS VOIGHT & SONS COMPANY.

(78 C. C. A. 567, 148 Fed. 939.)

Monopoly — wall-paper trust — validity.

1. A contract by all the manufacturers of a necessary household commodity, for the creation of a corporation to sell their entire product at fixed prices, in which they shall be sole stockholders in proportion to their output immediately before its formation, which prevents increase of output by any stockholder and requires makers of the machinery used by them, and the jobbers of their product, who are located in every state, to become parties to the agreement, so as to prevent all competition in the business, violates the anti-trust act of Congress.

Same — sale — purchase price — enforcement.

2. Jobbers who are compelled to become parties to a general undertaking between manufacturers of a household necessity for the creation of a corporation to act as

their sales agent for the purpose of stifling competition between them, which is void under the Federal anti-trust act, cannot be compelled by the sales agent to pay for goods purchased under and in accordance with the agreement.

(January 5, 1907.)

ERROR to the Circuit Court of the United States for the Southern District of Ohio to review a judgment in defendant's favor in an action brought to recover the contract price for goods sold and delivered. Affirmed.

Statement by Lurton, Circuit Judge:

This is an action to recover a balance of \$57,762.10, due on account for wall paper sold and delivered to defendants. The case turned upon the sufficiency of the third defense submitted by the answer to the petition of the plaintiff. To this defense the plaintiff demurred. This demurrer was overruled. The plaintiff declined to plead further, whereupon judgment was rendered for the defendants, dismissing the petition, and taxing the plaintiff with costs. The defense so held to be sufficient was in substance: First. That the plaintiff is a member of an illegal combination among the manufacturers of wall paper, formed for the purpose of enhancing prices, stifling competition, and restraining freedom of commerce between the states and with foreign nations, being such a combination or trust as is forbidden by the anti-trust act of 1890 (act July 2, 1890, chap. 647, 26 Stat. at L.

Note. — As to the validity of agreements collateral to contracts forming illegal combinations, see case note to *Freed v. American F. Ins. Co.* 11 L.R.A. (N.S.) 368; also note to *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689.

CONTINENTAL WALL PAPER Co. v. LEWIS VOIGHT & SONS Co. was affirmed on appeal to the Supreme Court of the United States. See 212 U. S. 227, 53 L. ed. —, 29 Sup. Ct. Rep. 280. In affirming the judgment of the circuit court of appeals, the court based its judgment of affirmance on the ground that the plaintiff, in legal effect, sought the aid of the court to enforce a contract for the sale and purchase of goods, which, as admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were the essential parts of an illegal scheme; that the account sued on was made up in execution of an agreement that constituted, or out of which came, the illegal combination formed for the purpose and with the effect of both restraining and monopolizing trade and commerce among the several states. The question considered by the court, as stated by it, was whether the plaintiff com-

pany could have judgment upon an account which, as admitted by demurrer, was made up, in the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Considering this matter, the court said: "The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay."

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209, U. S. Comp. Stat. 1901, p. 3200), and by the laws of Ohio. Second. That the defendants were compelled to become parties to the illegal combination, and that the contract upon which this suit depends, for price and terms of sale, constitutes one of the agreements which go to make up the illegal combination represented by the Continental Wall Paper Company. The answer, embodying the defense here involved, in substance avers: That the National Paper company, a corporation owning or controlling a large number of wall-paper factories situated within the states of New York, Pennsylvania, New Jersey, and Massachusetts, together with a large number of independent firms and corporations engaged in the same manufacture, combined or conspired together for the purpose of controlling the wall-paper production in this country by suppressing competition among themselves, and enhancing the price of that article to jobbers, wholesalers, retailers, and consumers. That, for this purpose and this end, and to better cover this scheme, they caused the organization under the laws of New York of a corporation known as the Continental Wall Paper Company, with a capital stock of \$200,000, divided into 16,000 shares, the shares to be divided among the conspiring firms and corporations in proportion to the production of each factory during the year preceding July, 1898. That the scheme and agreement was that the National Wall Paper Company, as representative of a large number of corporations dominated by it, should select three directors, the other firms and corporations three more, and that the six directors so selected should select a seventh, and the seven directors should direct the combination through the corporate name of the Continental Wall Paper Company. That the plan was that each of the combining concerns should enter into a contract, styling themselves "vendors," with the said company. These contracts to be signed by the several corporations and firms entering into this combination were identical in terms, and were in the following words and figures:

Exhibit 1.

This agreement, made this _____ day of _____, in the year one thousand eight hundred and ninety-eight, by and between _____, a corporation organized under the laws of the state of _____ (hereinafter called the "vendor"), party of the first part, and the Continental Wall Paper Company, a corporation organized under the laws of the state of New York (hereinafter called the "company"), party of the second part: Whereas, the vendor is engaged in the manufacture and sale of wall

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paper, borders, and other articles usually produced and handled in connection therewith, and the company is desirous of acting as its selling agent in handling the entire product of the vendor; and whereas, the company has an authorized capital of \$200,000 divided into 16,000 shares, of the par value of \$12.50 each; and whereas, the dealer is desirous of acquiring _____ shares of the stock of said company at par, and to that end has offered to enter into this agreement and to secure the performance thereof by the deposit of said shares: Now, therefore, in consideration of the foregoing recitals, and for other good and valuable consideration, it is agreed between the parties hereto as follows:

First. The vendor hereby sells unto the company, and the latter agrees to purchase, the entire product of wall paper that may be manufactured by the vendor for the period from July 20, 1898, to the first day of July, 1899. The prices at which the merchandise shall be sold to the company are set forth in a schedule hereto annexed marked "A," and hereby made a part of this agreement. The vendor further grants unto the company the right to two renewals of said contract of one year each, provided that, in the event of the election of the company to avail itself of either of said renewals, it shall so signify in writing to the vendor before the first day of June next preceding the renewal term, and provided, further, that such election to renew shall be accompanied by the written consents of all the registered stockholders of the company, including that of the vendor.

Second. The goods acquired by the company from the vendor hereunder, which are to be sold to jobbers, shall be sold by the company, and not by the vendor, for the account of the company. Such sale shall be made by the company at discounts from road prices fixed in the schedule hereto annexed marked "B," which is hereby made part of this agreement. The vendor will deliver such goods upon the direction of the company, at the risk and for the account of the latter, f. o. b. at the place of manufacture, provided, however, that in all cases in which the goods are manufactured at places other than the cities of New York or Philadelphia, the vendor will equalize the freights with either of said cities out of the proceeds receivable for such goods. Memorandum invoices shall be supplied to the customer and to the company immediately upon the shipment and delivery of such goods, said invoices specifying quantities and road prices.

Third. There shall be furnished by the vendor to the company on the 7th, 14th, 21st, and last days of each month (except when those days fall on Sundays, and then on the next succeeding day), a just and true state-

ment of all shipments and deliveries of merchandise included in this contract which the vendor may make for the account of the company, which statement shall contain the names of the purchasers, the character of the goods sold, and the prices at which they were sold, to the end that the company may make the proper charges, and in order to entitle the vendor to be credited with the agreed cost price for such goods. Each of such statements of shipments shall be accompanied by an affidavit of one of the officers of the vendor and of one of its bookkeepers and of one of its shipping clerks, to the effect that the information therein contained is true.

Fourth. The company shall permit the vendor to sell in its own name, and the latter hereby agrees to sell for the account of the company, such of the goods manufactured by the vendor as are to be disposed of to purchasers not classified as jobbers, which sales shall be made at the cost and expense of the vendor; said vendor hereby guaranteeing all credits and the collection of all accounts connected with such sales. The prices at which and the terms upon which such goods are to be sold are designated in this agreement as the "road prices," and are contained in a schedule hereto annexed marked "C," which is hereby made a part of this agreement. On the 7th, 14th, 21st, and last days of each month (except when those days fall on Sundays, and then on the next succeeding days), the vendor will furnish to the company a statement showing all the shipments made on account of such sales, which statements shall contain the names of the purchasers, the character of the goods, and the prices at which they were sold, and such sales shall be credited to the vendor by the company at the prices fixed in schedule A, and shall be charged against said vendor at the prices at which they were sold, which shall in no event be less than those designated in schedule C. The vendor is to receive for its services and expenses connected with such sales and allowances discounts equal to those who are designated in a classification made by the parties hereto as "second-class jobbers," less the discounts made on sales to purchasers designated in the accompanying schedules as "quantitative purchasers," on which the vendor has allowed the quantitative discount, except that where special and exclusive goods are sold there shall be an allowance of 30 per cent discount to the vendor. The prices of goods as fixed by schedules A and C may be altered from time to time, but the discounts allowed to jobbers shall not be altered at any time during the term of this agreement.

Fifth. The vendor will make collection of all accounts for goods sold by it for the ac-

count of the company under the provisions of this agreement, except for sales to jobbers (which accounts the company is to collect), and will, on the 10th day of each and every month during the term of this agreement, account to the company. Such account shall be accompanied by a payment by the vendor to the company of the difference between the prices at which the goods are agreed to be sold to the company as embodied in schedule A, and the prices at which the vendor has agreed to dispose of said goods as contained in schedule C. The purchases made by the company from the vendor hereunder shall be upon the same credit and terms as those accorded to other dealers, but the company shall have the right to anticipate the due date of all such purchases, and will pay, on the 10th day of each month, to the vendor, a sum on account of all shipments of the preceding month equal to not less than 30 per cent of the road prices of goods shipped to jobbers by the company.

Sixth. The vendor hereby grants unto the company the right, and it shall be the duty of the latter, through its officers selected for that purpose, to audit the books of account of the vendor as to production, sales, and shipments, at such times and in such manner as the company may, from time to time, deem necessary or proper. This provision is of the essence of the agreement, and a failure on the part of the vendor to faithfully perform the same shall operate as a breach of the contract, entitling the company to abrogate the agreement, and to such damages as it may be able to establish in addition to the absolute transfer and surrender to it of the stock to be pledged as hereinafter provided.

Seventh. There shall be a committee selected from the company, to be known as the "auditing committee," which shall be made up from among the directors. Said committee shall have power to establish such a system of bookkeeping as in its judgment may be advisable. In order to conform as nearly as may be to the laws of the various states in which the factories of the vendor are located, it is understood that the vendor shall not be at liberty to require from the company the acceptance of the product of more than ten hours per day of any one of said factories. The product intended to be sold to the company hereunder, and which the latter undertakes to acquire, does not contemplate the enlargement of the manufacturing facilities of the vendor; but nothing herein contained shall be construed as affecting the right of the vendor to substitute new machinery of the same capacity for any now in use which may become useless through wear or through destruction by fire or other casualty. The power to

designate the parties who are to be classed as jobbers, and the discounts to which they are entitled, is expressly reserved by the company, and such designation is to be made through its board of directors; but the vendor shall have the right to select the jobbers through whom the goods manufactured by it are to be distributed, and to designate the amount of its goods such jobbers may buy, subject to such credit limitations as the board of directors may impose. All orders placed with the vendor by jobbers on behalf of the company must be at once reported to the latter.

Eighth. The company hereby agrees to sell and the vendor agrees to purchase — shares of the common stock of the company, for which stock the vendor agrees to pay the sum of — in cash as soon after the execution and delivery of this agreement as the same may be demanded by the company; but only if and when the entire share capital of the company shall have been fully subscribed at not less than par. The vendor will, after paying for said shares of stock, indorse the certificates representing the same, and deliver the certificates so indorsed in blank to the company, upon the trust and agreement that the company shall hold said certificates as security for the performance by the vendor of each and all of the covenants and conditions of this agreement; and upon the refusal, neglect, or omission of the vendor, its successors or assigns, to perform this agreement, or any part thereof, the said shares of stock and the certificates represented thereby shall be immediately sold by the company at public or private sale, without notice, upon such terms and at such price as the company or its officers may deem reasonable and that the proceeds of sale be paid into the treasury of the company as the agreed and liquidated damages to the company for the breach of said agreement. The parties hereto have fixed upon the said stock and the proceeds thereof as liquidated damages, because of the difficulty in establishing, in a court of law, the actual damage that would be suffered by the company in the event of the refusal, neglect, or omission to perform this agreement, and in order to avoid the difficulty of such proof.

In witness whereof, the vendor and the company have respectively caused this agreement to be executed by their respective presidents, and their respective corporate seals to be hereto attached, pursuant to resolutions of their respective boards of directors, the day and year first above written.

It would unduly lengthen this statement to fully set out the schedules referred to in the above exhibit, and made a part of the 19 L.R.A.(N.S.)

contract between the so-called vendors and the company. The answer then avers that the prices to be charged the company for the product of each so-called vendor was the estimated cost of production and incidental expense to such manufacturer of carrying out his or its part of the contract. Schedule A of the contract sets out the "list price" of all qualities of paper, and in a parallel column the sale price to the company. Schedule B sets out the sale price by the company to the several classes of jobbers, which the company binds itself to exact, and the terms of sale. The gross sale price in this schedule is the list price of schedule A, with a discount, which depends upon the classification of jobbers provided for by the seventh clause of the contract. Schedule C sets out the sale price to purchasers "other than jobbers" and terms of sale, these prices being also designated as "road prices." These prices are the "list prices" of schedules A and B, with no discount. To purchasers described as "other than jobbers" certain discounts are provided, dependent upon quantity. Under clause 7 of the contract, set out above, "the company," acting through its directors selected in the manner heretofore mentioned, is given authority to classify jobbers, and prescribe the discount to each class; each "vendor" being allowed "to select the jobbers through whom the goods manufactured by it are to be distributed, and to designate the amount of its goods such jobbers may buy."

"The distribution of profit over cost to the company may be illustrated by taking two classes of wall paper, one a cheap kind and the other more expensive. Thus, the list price of wall paper styled "Brown" is 4 cents per bolt; the sale price to the company 2 cents. The price by the company to "jobbers" in the first class is 4 cents, with a discount of 20 per cent; to "jobbers" in the second class, 4 cents, with a discount of 17½ per cent; to "jobbers" in the third class, 4 cents, with a discount of 15 per cent. The selling price to all purchasers other than those classified as jobbers is fixed at 4 cents flat, unless a discount of small proportions is obtained as a result of a purchase bringing the buyer within the terms of those called "quantity purchasers." "Embossed bronzes" of one class are listed 18 cents per bolt; jobbers being allowed a discount of 45 per cent, 40 per cent, or 30 per cent, according to the class they have been placed in. All the schedules contain a provision for the equalization of freights with certain cities, thus eliminating advantages due to locality. It is further averred in said defense that the companies, corporations, and firms which organized said company, and which subsequently subscribed

for stock and signed one of the agreements like that heretofore set forth, constituted 98 per cent of all the manufacturers of wall paper in this country. It is further stated that, for better carrying out of said combination, agreements were made by the plaintiff with parties, companies, and corporations within the United States and Canada, "by which each agreed not to compete with the other nor cut prices, the Americans in Canada and the Canadians in the United States." It is also alleged that to further carry out the purpose to prevent competition and enhance prices, that a contract was made between plaintiff and John Waldron & Son and the Kaukauna Machine Company, the only two manufacturers of wall-paper machinery in the United States, one having a manufactory in New Brunswick, New Jersey, and the other a manufactory in Kaukauna, Wisconsin, by which said manufacturers agreed, during the existence of the plaintiff, to sell wall-paper machinery only to it and said combination, and not to any mills preparing to start. It is then averred that all wholesale dealers in the United States were arbitrarily divided into two classes,—jobbers and "road" or "quantity buyers,"—and that the jobbers were arbitrarily divided into the three classes heretofore mentioned, and the other wholesalers into "road" or "quantity buyers" and "special buyers," with the purpose that all should then be compelled to sign written agreements obligating themselves to buy their entire stock of merchandise from the plaintiff direct, or through members of the combination, and to this end identical printed agreements were presented to all jobbers and wholesalers throughout the United States and the territories, by which each obligated itself to buy their entire purchases of wall paper from said plaintiff at list prices of schedule A, heretofore set out, subject to discounts shown by schedule accompanying each such agreement; and binding each such jobber or wholesaler not to sell at prices lower or better than those shown by another schedule accompanying each such agreement. A copy of the agreement, so required to be signed by each jobber and wholesaler, is made a part of the answer as "Exhibit 2." Same is here set out below.

Exhibit 2.

An agreement made this ——— day of ———, in the year one thousand eight hundred and ninety-eight, between the Continental Wall Paper Company, a corporation organized under the laws of the state of New York (hereinafter called the "company"), party of the first part, and ——— 19 L.R.A. (N.S.)

of ——— (hereinafter called the "jobber"), party of the second part. In consideration of the sum of \$1, paid by the jobber unto the company for the granting of this agreement, the receipt whereof is hereby acknowledged, and other valuable considerations, it is agreed between the parties hereto as follows: First. That the company will sell, subject to such credit limitations as it may impose, and the jobber will purchase, the entire requirements of the jobber in his business of selling wall paper for the business year ending July 1, 1899, to the amount of a gross value, without discounts, of ———, the jobber reserving to himself the right to purchase such merchandise as he may need in excess of ——— from others. The company is to deliver the goods without additional charge f. o. b. at New York or Philadelphia, or to equalize freights from the places at which it makes deliveries to either of said cities. Second. The jobber shall be allowed discounts at the rates shown in the accompanying schedule marked "A," which is hereby embodied in this agreement as a part thereof. The terms of payment to be as follows: Four months from the date of invoice, with discount at the rate of 1 per cent per month for anticipated payment; provided settlement be made within thirty days from date of shipment either by cash or note. Invoices for all goods shipped between October 15th and March 1st to take the latter date. Third. Attached hereto marked "B" is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit and freight allowance to which such customers are entitled. It is an essential condition of this agreement that the jobber will not directly or indirectly sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in schedule B; the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company. The prompt performance by the jobber of the provisions of this agreement as to payment and otherwise is a condition precedent to exacting the continuous performance of said agreement by the company.

In witness whereof the company has caused this instrument to be executed, and the jobber has hereunto set his hand the day and year first above written.

Schedule A of the above agreement is identical with ———.

tical with schedule B of the agreement between "vendors and the company," heretofore set out, and schedule B, attached to and made a part of Exhibit 2, above set out in full, is same as schedule C attached to Exhibit 1, heretofore set out.

It is charged that "the immediate, intended, and direct effect of said combination and agreements was the stifling of competition between said manufacturers and vendors of wall paper and between jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one half more than the price which it would be if same had been left to free and unrestricted competition." It is further distinctly averred that by these agreements and contracts aforesaid the entire wall-paper trade throughout the United States passed into the hands of the plaintiff company, and that it "threatened defendant that, unless it signed said agreement (Exhibit 2, set out above), no wall paper would be sold to it; that said combination would make it impossible for it to buy wall paper or to continue its business, and would drive it out of its said business, and compel it to sacrifice the good will owned by it, as aforesaid, and the capital invested by it in said business." It is further averred that the defendant conducted for many years a large business in wall paper at Cincinnati, selling to retailers and consumers in Ohio and other states of the Union. That the defendant, finding it impossible to continue business without signing said agreement shown in Exhibit 2, did sign and become a member of said combination. The defendant charges that, under the contract so signed by him, he purchased more than \$200,000 worth of wall paper, and that the prices he was compelled to pay were extortionate and unreasonable, and more than 50 per cent greater than they would have been had competition between wall-paper makers not been completely suppressed by the agreements between such manufacturers and said corporation:

Argued before Lurton and Seveyens, Circuit Judges, and Cochran, District Judge.

Messrs. Louis Marshall and Joseph Wilby, for plaintiff in error:

Assuming that the organization of the plaintiff was for the purpose of restraining competition and enhancing prices, the defendant has no defense, under common-law considerations, to the action brought against it to recover for goods sold and delivered.

National Bank & L. Co. v. Petrie, 189 U. S. 425, 47 L. ed. 880, 23 Sup. Ct. Rep. 512; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Strait v. National Harrow Co. 51 Fed. 819; Edison Electric Light Co. v. Sawyer-Man 19 L.R.A. (N.S.)

Electric Co. 3 C. C. A. 605, 11 U. S. App. 712, 53 Fed. 598; American Soda-Fountain Co. v. Green, 69 Fed. 333; Brown Saddle Co. v. Troxel, 98 Fed. 620; National Folding Box & Paper Co. v. Robertson, 99 Fed. 985; Otis Elevator Co. v. Geiger, 107 Fed. 131; National Distilling Co. v. Cream City Importing Co. 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864; Ocean Ins. Co. v. Polleys, 13 Pet. 164, 10 L. ed. 108; Armstrong v. American Exch. Nat. Bank, 133 U. S. 434, 467, 33 L. ed. 747, 759, 10 Sup. Ct. Rep. 450; Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 6 U. S. App. 566, 55 Fed. 226; Morris v. Norton, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 926; Phalen v. Clark, 19 Conn. 432, 50 Am. Dec. 253; The Charles E. Wiswall, 42 L.R.A. 85, 30 C. C. A. 339, 57 U. S. App. 179, 86 Fed. 674; Phenix Ins. Co. v. Clay, 101 Ga. 332, 65 Am. St. Rep. 307, 28 S. E. 853; Erb v. German-American Ins. Co. 98 Iowa, 611, 40 L.R.A. 845, 67 N. W. 583; Niagara F. Ins. Co. v. De Graff, 12 Mich. 136; Tracy v. Talmage, 14 N. Y. 175, 67 Am. Dec. 132; Curtis v. Leavitt, 15 N. Y. 245; Mandlebaum v. Gregovich, 17 Nev. 95, 45 Am. Rep. 433, 28 Pac. 121; Planters' Bank v. Union Bank, 16 Wall. 500, 21 L. ed. 480; Yarbrough v. Avant, 66 Ala. 526; Ware v. Curry, 67 Ala. 274; Martin v. Hodge, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694; Minnesota Lumber Co. v. Whitebreast Coal Co. 56 Ill. App. 248; Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; Welch v. Wesson, 6 Gray, 506; Levin v. Chicago Gaslight & Coke Co. 64 Ill. App. 393; Ingraham v. National Salt Co. 65 C. C. A. 54, 130 Fed. 676; Dickerman v. Northern Trust Co. 176 U. S. 195, 44 L. ed. 431, 20 Sup. Ct. Rep. 311; Lafayette Bridge Co. v. Streater, 105 Fed. 729; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208.

The contract between the plaintiff and the defendant was not one in restraint of trade, and none of its provisions will debar the plaintiff from recovering for goods sold and delivered to the defendant.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; American Strawboard Co. v. Haldeman Paper Co. 27 C. C. A. 634, 54 U. S. App. 416, 83 Fed. 619; Hitchcock v. Anthony, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Dolph v. Troy Laun-

dry Machinery Co. 28 Fed. 553; Stines v. Dorman, 25 Ohio St. 580; New York Bank Note Co. v. Hamilton Bank Note Engraving & P. Co. 83 Hun, 595, 31 N. Y. Supp. 1060; Brett v. Ebel, 29 App. Div. 256, 51 N. Y. Supp. 573; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91; Lough v. Outerbridge, 143 N. Y. 283, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 54 App. Div. 223, 66 N. Y. Supp. 615, 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 310; Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; Newell v. Meyendorff, 9 Mont. 264, 8 L.R.A. 440, 18 Am. St. Rep. 738, 23 Pac. 333; Meyer v. Estes, 164 Mass. 457, 32 L.R.A. 283, 41 N. E. 683; Com. v. Grinstead, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; Crystal Ice Mfg. Co. v. San Antonio Brewing Asso. 8 Tex. Civ. App. 1, 27 S. W. 210; Clark v. Frank, 17 Mo. App. 602; Keith v. Herschberg Optical Co. 48 Ark. 138, 2 S. W. 777; Brown v. Rounsavell, 78 Ill. 589; Fuqua v. Pabst Brewing Co. (Tex. Civ. App.) 36 S. W. 479; Barber Asphalt Paving Co. v. Brand, 27 N. Y. S. R. 883, 7 N. Y. Supp. 744.

Assuming that the clause contained in the contract which prohibited the defendant from selling any of the merchandise purchased from the plaintiff, at lower prices than those specified in the schedule annexed, was illegal, the only effect of such illegality would be to nullify that provision, and not to prevent the plaintiff from recovering for merchandise actually received and kept by the defendant.

Pigot's Case, 11 Coke, 27b; Hammon, Contr. §§ 251 et seq.; Anson, Contr. 8th ed. p. 206; Pickering v. Ilfracombe R. Co. L. R. 3 C. P. 235; United States v. Bradley, 10 Pet. 343, 9 L. ed. 448; Hynds v. Hays, 25 Ind. 31; Kerrison v. Cole, 8 East, 231; Gelpcke v. Dubuque, 1 Wall. 221, 17 L. ed. 531; Gaskell v. King, 11 East, 165; Erie R. Co. v. Union Locomotive & Exp. Co. 35 N. J. L. 240; Baines v. Geary, L. R. 35 Ch. Div. 154; Wallis v. Day, 2 Mees. & W. 273; Haynes v. Doman [1899] 2 Ch. 13; Oregon Steam Nav. Co. v. Winsor, supra; Western U. Teleg. Co. v. Burlington & S. W. R. Co. 3 McCrary, 130, 11 Fed. 1; Presbury v. Fisher, 18 Mo. 50; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 19 L.R.A. (N.S.)

621; Hanauer v. Gray, 25 Ark. 350, 99 Am. Dec. 226; Wiley v. Baumgardner, 97 Ind. 66, 49 Am. Rep. 427; Dean v. Emerson, 102 Mass. 480; Peltz v. Eichele, 62 Mo. 171; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; Thomas v. Miles, 3 Ohio St. 274; Smith's Appeal, 113 Pa. 579, 6 Atl. 251; Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; Wald's Pollock, Contr. 321, note; King v. King, 63 Ohio St. 363, 52 L.R.A. 157, 81 Am. St. Rep. 635, 59 N. E. 111; Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Cincinnati, P. B. S. & P. Packet Co. v. Bay, supra; Mallan v. May, 11 Mees. & W. 653; Green v. Price, 13 Mees. & W. 695, 16 Mees. & W. 346; Hurley v. Donovan, 182 Mass. 68, 64 N. E. 685; Cook v. Sherman, 4 McCrary, 20, 20 Fed. 167; Lincoln Sav. Bank & S. D. Co. v. Allen, 27 C. C. A. 87, 49 U. S. App. 498, 82 Fed. 148; Stewart v. Lehigh Valley R. Co. 38 N. J. L. 505; Greenhood, Pub. Pol. p. 20.

Messrs. Morison R. Walte, Orris P. Cobb, and Harlan Cleveland, for defendant in error:

The combination is one in restraint of trade or commerce among the several states, and an attempt to monopolize the wall-paper trade or commerce among the states.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 179, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

The combination was an illegal trust and an unlawful combination, within the meaning of the statutes.

United States v. Jellico Mountain Coal & Coke Co. 12 L.R.A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432; American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 721; Oliver v. Gilmore, 52 Fed. 562; Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 4 Inters. Com. Rep. 578, 9 C. C. A. 659, 27 U. S. App. 1, 61 Fed. 993; National Harrow Co. v. Hench, 39 L.R.A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36, 84 Fed. 226; United States v. Addyston

Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; United States v. Coal Dealers' Asso. 85 Fed. 252; Cravens v. Carter-Crume Co. 34 C. C. A. 479, 92 Fed. 479; Lowry v. Tile, Mantel & Grate Asso. 98 Fed. 817, 106 Fed. 38, 63 L.R.A. 58, 52 C. C. A. 621, 115 Fed. 27, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; United States ex rel. Griggs v. Chesapeake & O. Fuel Co. 105 Fed. 93, 53 C. C. A. 256, 115 Fed. 610; Atlanta v. Chattanooga Foundry & Pipe Co. 101 Fed. 900; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Northern Securities Co. v. United States and Swift & Co. v. United States, supra; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379.

A contract in restraint of trade, though on its face not unreasonable, and hence not void at common law, may become such if it is simply a part of a general scheme, or one step towards the accomplishment of that purpose, to restrain competition and establish a monopoly.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 285; Cravens v. Carter-Crume Co. supra; Detroit Salt Co. v. National Salt Co. 134 Mich. 103, 96 N. W. 1; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; Finck v. Schneider Granite Co. 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213.

Honest intent and reasonableness of the restraint in forming the combination, under statutes forbidding such combination or agreement, are immaterial defenses.

United States v. Hopkins, 82 Fed. 529; United States v. Coal Dealers' Asso. supra; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; United States v. Joint Traffic Asso. and United States ex rel. Griggs v. Chesapeake & O. Fuel Co. supra; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Northern Securities Co. v. United States, supra; People v. North River Sugar Ref. Co. 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834, s. c. 54 Hun, 354, 5 L.R.A. 386, 27 N. Y. S. R. 282, 7 N. Y. Supp. 406; Finck v. Schneider Granite Co. supra; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; Phoenix Bridge Co. v. Keystone Bridge Co. 142 N. Y. 425, 37 N. E. 562; People v. Milk 19 L.R.A. (N.S.)

Exchange, 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1002; Ford v. Chicago Milk Shippers' Asso. 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651; Cummings v. Union Blue Stone Co. 164 N. Y. 401, 52 L.R.A. 262, 79 Am. St. Rep. 655, 58 N. E. 525, s. c. 15 App. Div. 602, 44 N. Y. Supp. 787; Cohen v. Berlin & J. Envelope Co. 166 N. Y. 292, 59 N. E. 906, reversing s. c. 38 App. Div. 499, 56 N. Y. Supp. 588; Straus v. American Publishers' Asso. 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107, 85 App. Div. 446, 83 N. Y. Supp. 271; National Harrow Co. v. E. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462; De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co. 16 Daly, 529, 14 N. Y. Supp. 277; Clancey v. Onondaga Fine Salt Mfg. Co. 62 Barb. 395; Detroit Salt Co. v. National Salt Co. supra; More v. Bennett, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888; Vulcan Powder Co. v. Hercules Powder Co. 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; State v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155; Bishop v. American Preservers' Co. 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; Hardin v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Chapin v. Brown Bros. 83 Iowa, 156, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428; State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595; Anderson v. Jett, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670; National Lead Co. v. S. E. Grote Paint Store Co. 80 Mo. App. 247; Nester v. Continental Brewing Co. 161 Pa. 473, 24 L.R.A. 247, 41 Am. St. Rep. 894, 29 Atl. 102; Houck v. Anheuser-Busch Brewing Asso. 88 Tex. 184, 30 S. W. 869; Bailey v. Master Plumbers' Asso. 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853; Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 15 L.R.A. 598, 29 Am. St. Rep. 690, 19 S. W. 274; Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288; Fuqua v. Pabst Brewing Co. 90 Tex. 298, 35 L.R.A. 241, 38 S. W. 29, 750; Texas Brewing Co. v. Templeman, 90 Tex. 277, 38 S. W. 27; Bingham v. Brands, 119 Mich. 255, 77 N. W. 940; Ertz v. Produce Exch. Co. 82 Minn. 173, 51 L.R.A. 825, 83 Am. St. Rep. 419, 84 N. W. 743; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Hartnett v. Plumbers' Supply Asso. 169 Mass. 229, 38

L.R.A. 194, 47 N. E. 1002; *Boutwell v. Marr*, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 48 L.R.A. 568, 75 Am. St. Rep. 184, 56 N. E. 822; *Hawarden v. Youghiogheny & L. Coal Co.* 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472; *Comer v. Burton-Lingo Co.* 24 Tex. Civ. App. 251, 58 S. W. 969; *American Handle Co. v. Standard Handle Co.* (Tenn. Ch. App.) 59 S. W. 709; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Emery v. Ohio Candle Co.* 47 Ohio St. 320, 21 Am. St. Rep. 819, 24 N. E. 660; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *McBirney & J. White Lead Co. v. Consolidated Lead Co.* 8 Ohio Dec. Reprint, 762; *Hoffman v. Brooks*, 6 Ohio Dec. Reprint, 1215.

The contract between plaintiff and defendant, under which arises the account sued on, is a part of and directly connected with the illegal combination, and hence unenforceable, and not merely a collateral or independent contract.

McBirney & J. White Lead Co. v. Consolidated Lead Co. supra; *Cravens v. Carter-Crume Co.* 34 C. C. A. 479, 92 Fed. 479; *Alexander v. Owen*, 1 T. R. 225; *Biggs v. Lawrence*, 3 T. R. 454; *Waymell v. Reed*, 5 T. R. 599; *Ribbans v. Crickett*, 1 Bos. & P. 264; *Bensley v. Bignold*, 5 Barn. & Ald. 335; *Marchant v. Evans*, 2 J. B. Moore, 14; *Law v. Hodson*, 11 East, 300; *Cope v. Rowlands*, 2 Mees. & W. 149; *Jennings v. Throgmorton*, *Ryan & M.* 251; *Pearce v. Brooks*, L. R. 1 Exch. 213; *Foster v. Taylor*, 3 Nev. & M. 244, 5 Barn. & Ad. 887; *Cundell v. Dawson*, 4 C. B. 376; *Little v. Poole*, 9 Barn. & C. 192; *McMullen v. Hoffman*, 174 U. S. 639, 655, 43 L. ed. 1117, 1123, 19 Sup. Ct. Rep. 839; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Irwin v. Williar*, 110 U. S. 490, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; *Miller v. Ammon*, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; *Kohn v. Milcher*, 10 L.R.A. 439, 43 Fed. 641; *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439; *Sprott v. United States*, 20 Wall. 459, 22 L. ed. 371; *Peck v. Burr*, 10 N. Y. 294; *Unckles v. Colgate*, 148 N. Y. 529, 43 N. E. 59; *Johnston v. Dahlgren*, 166 N. Y. 355, 59 N. E. 987; *Clancey v. Onondaga Fine Salt Mfg. Co.* supra; *Brinkman v. Eisler*, 40 N. Y. S. R. 865, 16 N. Y. Supp. 154; *Berka v. Woodward*, 125 Cal. 119, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777; *Smith v. Albany*, 61 N. Y. 444; *Finn v. 19 L.R.A.* (N.S.)

Donahue, 35 Conn. 216; *Bishop v. American Preservers' Co.* supra; *Pike v. King*, 16 Iowa, 49; *Meader v. White*, 66 Me. 90, 22 Am. Rep. 551; *Dobson v. Harris*, 10 Ala. 566; *Troewert v. Decker*, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; *Simpson v. Nicholls*, 3 Mees. & W. 240; *American Strawboard Co. v. Peoria Strawboard Co.* 65 Ill. App. 502; *Davis v. Leonard*, 69 Ind. 213; *Todd v. Caplinger*, 4 Bush, 139; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Richardson v. Brix*, 94 Iowa, 626, 63 N. W. 325; *Yount v. Demming*, 52 Kan. 629, 35 Pac. 207; *Dolson v. Hope*, 7 Kan. 161; *Griffith v. Wells*, 3 Denio, 226; *Bliss v. Brainard*, 41 N. H. 256; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Sullivan v. Horgan*, 17 R. I. 109, 9 L.R.A. 110, 20 Atl. 232; *Bixby v. Moor*, 51 N. H. 402; *Bowman v. Phillips*, 41 Kan. 364, 3 L.R.A. 631, 13 Am. St. Rep. 292, 21 Pac. 230; *Bull v. Harragan*, 17 B. Mon. 349; *Stewart v. Thayer*, 170 Mass. 560, 49 N. E. 1020; *Ashbrook v. Dale*, 27 Mo. App. 649; *Cook v. Forker*, 193 Pa. 461, 74 Am. St. Rep. 699, 44 Atl. 560; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593; *Houck v. Anheuser-Busch Brewing Asso.* 88 Tex. 184, 30 S. W. 869; *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232, 54 S. W. 804; *Spurgeon v. McElwain*, 6 Ohio, 442, 27 Am. Dec. 266; *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468.

The contract is in itself invalid, and no recovery can be had.

6 Pollock, Contr. 351; *Wald's Pollock*, Contr. *322; *Hammon*, Contr. § 251a; *Anson*, Contr. 8th ed. pp. 185, 208-210, 9th ed. pp. 190, 213-215; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *McMullen v. Hoffman* 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Embrey v. Jemison*, and *Miller v. Ammon*, supra; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *Atlanta v. Chattanooga Foundry & Pipe Co.* 101 Fed. 900; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651; *National Lead Co. v. S. E. Grote Paint Store Co.* 80 Mo. App. 247; *McBirney & J. White Lead Co. v. Consolidated Lead Co.* 8 Ohio Dec. Reprint, 762; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Beman v. Tugnot*, 5 Sandf. 153; *Martin v. Wade*, 37 Cal. 168.

The contract, even when considered separately from the agreements between the manufacturers and plaintiff, was one in restraint of trade, so as to debar the plain-

tiff from recovering for goods sold and delivered under it to the defendant.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *Cravens v. Carter-Crume Co.* 34 C. C. A. 479, 92 Fed. 479; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Straus v. American Publishers' Asso.* 85 App. Div. 446, 83 N. Y. Supp. 271, affirmed in 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; *Detroit Salt Co. v. National Salt Co.* 134 Mich. 103, 96 N. W. 1; *Finck v. Schneider Granite Co.* 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; *E. Bement & Sons v. National Harrow Co.* supra.

Even if the restrictions contained in the contracts were reasonable at common law yet, under the Federal and state statutes, whether reasonable or unreasonable, they were void and nonenforceable.

Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *United States v. Hopkins*, 82 Fed. 529; *United States v. Coal Dealers' Asso.* 85 Fed. 252; *United States ex rel. Griggs v. Chesapeake & O. Fuel Co.* 105 Fed. 93.

The illegality vitiates and invalidates the whole contract.

Santa Clara Valley Mill & Lumber Co. v. Hayes, supra; *Harriman v. Northern Securities Co.* 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; 4 Ohio L. Rep. 463; *Gelpcke v. Dubuque*, 1 Wall. 221, 17 L. ed. 520; *United States v. Bradley*, 10 Pet. 360, 9 L. ed. 455; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; *Loder v. Jayne*, 142 Fed. 1010; *Morris Run Coal Co. v. Barclay Coal Co.* supra.

Lurton, Circuit Judge, delivered the opinion of the court:

It has been urged that the defense to the claim in suit must fail upon either of two grounds: First, that the contract between the plaintiff corporation and the manufacturers of wall paper does not contain any stipulations beyond those admissible and essential to protect the contracting parties in securing reasonable prices and against unreasonable and demoralizing competition; second, that if it be conceded that the agreement does constitute an unlawful combina-

tion in restraint of interstate trade and commerce, that that fact affords no defense to a suit for the price of goods sold and delivered to the defendant. These in their order.

As to the first point, it need only be said that the legality of the contract between the combining companies at common law, as imposing only a reasonable restraint upon the freedom of competition, is not a defense if the dominant purpose of the agreement and the direct result of its operation is to directly, and not incidentally, restrain freedom of commerce between the states or with foreign nations. Until the Supreme Court shall otherwise hold, we feel concluded by the meaning placed upon the act by *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 610; and not departed from in *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. ed. 679, 697, 24 Sup. Ct. Rep. 436. But we think the combination and agreement shown by Exhibit 1 comes within the prohibition of the act of Congress, whether that act be aimed only at unreasonable restraints or not. That contract and agreement is one between 98 per cent of all the wall-paper makers in the United States, who co-operate through a corporation organized by them for the single purpose of selling their gross product. That there shall be no competition between the combined companies is insured by the agreement that each manufacturer shall sell his entire product at an agreed price to the plaintiff corporation, which is to nominally make all sales, either directly or indirectly, at a uniform price, subject to an agreed scale of discounts, varying only according to an arbitrary classification of buyers. The difference between the price at which the so-called "vendors" sell to the plaintiff company and the price exacted from those who buy from it will be profit, and the profits will constitute the dividends to be distributed to plaintiff's shareholders, and plaintiff's shareholders are exclusively composed of the combining companies, called "vendors;" its comparatively insignificant amount of stock being placed with these vendors in proportion to the product of the year before the combine took effect. To prevent the enlargement of the product of any one of the vendors, it is provided, in effect, that there shall be no enlargement of plant, though new machinery may be used to replace old or that destroyed.

To insure a monopoly of the business to themselves, and keep strangers out of it, it is alleged, and not denied, that the only two

manufacturers of wall-paper machinery in the United States became parties to the combination by agreeing to sell no machinery to strangers, and to confine their sales to the combine. To add to the protective force of the tariff duties tending to keep out foreign products, it is also averred that an agreement was made with Canadian paper makers to protect each other against any cutting of prices. To insure against any kicking out of the agreement or violations in any way, each member is required to indorse its shares in the Continental Wall Paper Company to that corporation, which is to hold and apply the same as liquidated damages in case of any breach. But that there should be no inducement to fly the contract, the scheme contemplated that every wholesale buyer should engage himself to buy his entire supply from the combine; and to secure the engagement of each such jobber or wholesaler to the scheme, no paper was to be sold to such as did not sign. This made the contract practically unbreakable, for if a factory should weary of the monopoly, it could find no jobbers or wholesalers free to buy its product, and it would be driven to rely upon such orders as it could get from retailers or consumers. That this union of former competitors—a union embracing substantially all of the wall-paper mills in the land (for the 2 per cent left out may be ignored as an active competition)—should result in an unreasonable enhancement of prices is precisely what we might anticipate. Wall paper is a product of universal necessity, and the consumers are found in every household. Every principle of economic law instructs us that under such conditions there will be an enhancement of price, limited only by the unknown boundary of human greed and corporate avarice. It is therefore not to be doubted that the averment confessed by the pleading, that prices have been advanced 50 per cent, is substantially true. The conspiring mills were situated in many states. The consumers embraced the whole citizenship of the United States. The jobbers and wholesalers who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company, or be driven out of business, were in every state.

Before the combination, each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement, and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete

scheme to accomplish the stifling of competition; but none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of a "restraint of trade," whether we confine ourselves to the common-law interpretation of that term, or apply that given to the term as used in the Federal act by the cases we have cited above.

This brings us to the vital question in the case, which is the bearing of the fact that the plaintiff is but the corporate hand of an illegal combination under the anti-trust law of 1890, upon the liability of the defendants in this action for the price of wall paper bought from the illegal combine. The contention is that the contract upon which the action is brought is wholly collateral to any contract between the plaintiff and the other members of the illegal combination. But if the contract to pay for the goods included in the account sued upon is only part of an entire agreement which includes stipulations which are illegal, the case of the plaintiff must fail. It is elementary law that the courts will not lend assistance in any way in carrying out an illegal agreement. *McMullen v. Hoffman*, 174 U. S. 639, 654, 43 L. ed. 1117, 1123, 19 Sup. Ct. Rep. 839; *Embrey v. Jemison*, 131 U. S. 336, 348, 33 L. ed. 172, 177, 9 Sup. Ct. Rep. 776. Nor can a plaintiff show only such part of an entire agreement as is legal, and sue upon that alone. The whole must come. See cases just cited. If the combination had stopped with the agreement between the manufacturers and the plaintiff, by which the competition between the makers of wall paper had been obviated and a uniform sale price settled, this fact would have been no defense for the price of goods sold by the illegal combination to a stranger. If the defendants had been injured in their business by such an illegal method of enhancing prices, their only remedy would have been a direct action for damages, under § 7 of the anti-trust act (26 Stat. at L. 210, U. S. Comp. Stat. 1901, p. 3202). *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; *Atlanta v. Chattanooga Foundry & Pipe Works Co.* 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23; and *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 551, 552, 46 L. ed. 679, 686, 687, 22 Sup. Ct. Rep. 431. If the illegal agreement in restraint of trade had included only a contract between the manufacturers themselves, the defendants and all other jobbers would at least have had the privilege

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Lee County overruling a demurrer to an answer setting up a counterclaim for breach of contract in an action brought to recover the purchase price of an engine and materials. Affirmed.

The facts are stated in the opinion.

Messrs. Lee & Molise, for appellant:

The damages sustained are remote, speculative, and contingent, and cannot be recovered.

Memphis v. Brown, 20 Wall. 289, 22 L. ed. 264; *United States v. McKee*, 97 U. S. 233, 24 L. ed. 911; *Western U. Teleg. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577; *Masteron v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; *Fox v. Harding*, 7 Cush. 516;

Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487; *Smith v. Coudry*, 1 How. 32, 11 L. ed. 36; *Parish v. United States*, 100 U. S. 500, 504, 25 L. ed. 763, 765; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *Callaway Min. & Mfg. Co. v. Clark*, 32 Mo. 305; *Blanchard v. Ely*, 21 Wend. 342, 34 Am. Dec. 250; 5 Am. & Eng. Enc. Law, p. 13; *Walrath v. Whittekind*, 26 Kan. 482; *Hurley v. Buchi*, 10 Lea, 346; *Taylor v. Bradley*, 4 Abb. App. Dec. 363; *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828; *Houston & T. C. R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642; 8 Am. & Eng. Enc. Law, p. 623; *Krom v. Levy*, 48 N. Y. 680; 13 Cyc. Law & Proc. pp. 34-36,

court, after reviewing the possibilities of failure in the manufacture of glass, and as especially applied to a new business, said: "Then there are the mishaps which usually attend the establishing of a new industry,—the delay or failure in obtaining suitable material, the breaking of machinery, accidents in the application of natural gas, which was an untried fuel, or resulting from the careless or unskilful acts of employees, a misfortune in the melt of the glass, which sometimes occurs, breaking utensils or appliances that would have caused both delay and expense. It will be conceded that only a small proportion of the industrial enterprises attempted are successful, and a much fewer number of them realize profits during the first ten months of their existence. If it had been an established business, or if other manufactories of a like kind existed in Kansas under similar conditions, there would be some basis of estimating profits; but we fail to find any safe guide in measuring the gains that would have been made by this factory if fuel had been supplied."

In *Thompson v. Corbin*, 41 N. S. 386, it was held that, for the delivering of defective machinery necessary to the making of laths, the damages recoverable were for the loss of use of the mill, but not for wages and board of the men, and, the business being a new one, anticipated profits could not be recovered.

In *Consumers' Pure Ice Co. v. Jenkins*, 58 Ill. App. 519, it was held that, for the delay in delivering an ice machine, the profits which a party about to embark in a new business would have made are too remote to be recovered, the proper measure of damages being the value of the use of the machinery.

Other cases holding that the prospective profits of a new business cannot be recovered as damages, but that the true measure of damages is the rental value of the business while idle, are *Benton v. Fay*, 64 Ill. 417 (failure to deliver planing mill); *Chicago City R. Co. v. Howison*, 86 Ill. 215 (injunction preventing extension of street railway); *Creamery Package Mfg. Co. v. Benton County Creamery Co.* 120 Iowa, 584, 95 N. W. 19 L.R.A. (N.S.)

188 (delay in putting ice plant in creamery); *Central Trust Co. v. Arctic Ice Mach. Mfg. Co.* 77 Md. 202, 26 Atl. 493 (delay in delivering ice machines); *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458 (failure of carrier to deliver machinery for sawmill); *Rogers v. Bemus*, 69 Pa. 432 (breach of contract to lay foundation for sawmill and furnish money for its erection); *Fraser v. Echo Min. & Smelting Co.* 9 Tex. Civ. App. 210, 28 S. W. 714 (delay in furnishing mining machinery).

An interesting case on this question is *State v. Durkin*, 65 Kan. 101, 68 Pac. 1091, where it was held that for the wrongful interference with plumbers who had not been in business any length of time a plumber's mutual-benefit association could not be held liable for lost profits.

In many cases involving a new business, or one in contemplation, the courts have applied the rule concerning prospective profits and the measure of damages above stated, without expressly recognizing any distinction between such a case and one where the business was already established and in operation.

Thus, in *Novelty Iron Works v. Capital City Oat-meal Co.* 88 Iowa, 524, 55 N. W. 518, it was held that, for the failure of a contractor to complete an oatmeal mill by the time agreed upon, the measure of damages is the rental value of the mill during the time of the delay, and not the profits which, under the particular circumstances, the owner might have realized from it during that time, such rental value to be determined, however, by the cost of the mill, wear and tear of the machinery, and profits which might be made from its use.

Without attempting to exhaust this class of cases, the following also hold that prospective profits cannot be recovered, but that the injured party may recover only the rental value: *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635 (failure to complete gristmill within stipulated time); *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828 (failure to furnish and connect boilers necessary to steam mill and salt block); *Taylor v. Maguire*, 12 Mo. 313, fol-

49, 53; *Newbrough v. Walker*, 8 Gratt. 16, 56 Am. Dec. 127.

The difference between the profits realized and the profits which might have been realized is not recoverable as damages.

Blagen v. Thompson, 23 Or. 239, 18 L.R.A. 315, 31 Pac. 647; *Sitton v. Macdonald*, 25 S. C. 68, 60 Am. Rep. 484; *Martin v. Seaboard Air Line R. Co.* 70 S. C. 8, 48 S. E. 616.

The contract must be made with reference to the damages which may arise.

Hadley v. Baxendale, 9 Exch. 341; *Bridger v. Asheville & S. R. Co.* 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860; *Gentry v. Richmond & D. R. Co.* 38 S. C. 284, 16 S. E. 893; *Hunt v. D'Orval*, *Dud. L.* 180.

lowed by 13 Mo. 517 (failure to deliver boat hull within stipulated time); *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718 (failure to deliver machinery necessary to sawmill); *Boyle v. Reeder*, 23 N. C. (1 Ired. L.) 607 (failure to deliver machinery for sawmill); *Critchler v. Porter-McNeal Co.* 135 N. C. 542, 47 S. E. 604 (failure to deliver proper machinery for sawmill); *Dixon-Woods Co. v. Phillips Glass Co.* 169 Pa. 167, 32 Atl. 432 (alleged failure to put in proper machinery for glassworks); *Finch v. Heermans*, 5 *Luzerne Leg. Reg.* 125 (delay in construction of sawmill); *Charles E. Dustin Co. v. St. Petersburg Invest. Co.* 126 Fed. 816 (delay in delivery of machinery for running electric railway and light plant).

Prospective profits as damages were also denied in *Blanchard v. Ely*, 21 *Wend.* 342, 34 Am. Dec. 250, where, because of the placing of defective machinery in a new boat, several trips were lost.

In *Hoskins v. Scott* (Or.) 96 Pac. 1112, it was held, in an action for breach of contract to furnish an engine and engineers to operate a threshing machine during the threshing season, no enforceable contracts for threshing having been made, that the prospective profits could not be recovered; but that plaintiff was entitled to show as general damages the rental value of the machine during the season, if idle by reason of lack of the power contracted for, provided plaintiff was unable to procure an engine elsewhere; but, if an engine was procured elsewhere, he would be entitled to show, in lieu of the rental value, the difference between what he was to pay defendant and what he was compelled to pay others, including expenses incidental to the change.

In *Davis v. Cincinnati, H. & D. R. Co.* 1 *Disney* (Ohio) 23, it was held that, for the failure to deliver within a reasonable time a boiler necessary for the running of a sawmill, the measure of damages would be the actual expenses incurred, both for traveling to ascertain what had become of the boiler and for preparations made for its reception, and the interest on the value of the property during the time of detention; the profits which might have been made as well as the 19 L.R.A. (N.S.)

Messrs. McLeod & Dennis also for appellant.

Messrs. McLendon & Tatum for respondents.

Woods, J., delivered the opinion of the court:

The complaint alleges an indebtedness of the defendants to the plaintiff of \$317.20, the price of a lot of roofing and a 12 by 14 Clarke engine. The answer, as a counterclaim, sets up damages to the amount of \$1,995 for breach of contract of sale. The appeal is from an order of the circuit judge overruling a demurrer to the answer.

Shortly stated, the substantial allegations of the answer on which the counterclaim rests are: The defendants, merchants do-

wages paid an engineer employed in anticipation of the completion of the mill, being too contingent to authorize a recovery therefor.

In *Curran v. Smith*, 81 C. C. A. 537, 149 Fed. 945, affirming 138 Fed. 150, it was held that, in an action for damages for breach of contract to construct a pipe line for water and irrigation purposes, the anticipated profits, which, under the evidence, were too uncertain, speculative, and doubtful, could not be recovered, nor the expenditures made by plaintiffs in connection with the project prior to the contract; but only those expenditures could be recovered which were made by them in reliance upon the contract after it was made.

In *British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499, it was held that for failure of a carrier to deliver machinery necessary to the erection of a sawmill it was liable only for the cost of replacing the lost articles at the place of delivery, with interest.

However, it was held in *Wade v. Haycock*, 25 Pa. 382, that for the negligent construction of a gristmill the measure of damages would be the expense of the new work and the profits of the mill for such time as it was necessarily stopped from running while the alterations were being made.

In *Priestly v. Northern Indiana & C. R. Co.* 26 Ill. 205, 79 Am. Dec. 369, it was held that, in an action against a common carrier for not delivering machinery necessary to the running of a new factory, transported by it, in proper time, the measure of damages, in the absence of allegations of special damages, is the value of the use of the machinery during the period of improper detention. The court, in this case, said: "As this is an action on the case for a wrong done, had the plaintiffs notified the defendants for what purpose they designed the machinery, and the circumstances of their necessities, they might have brought forward other topics and elements of damage, such as they attempted to show on the trial,—that a large number of hands were, of necessity, under pay and idle, loss of promised custom, out of which profits would have

ing a large credit business at Elliotts, South Carolina, installed a cotton ginny, so that they might not only make a direct profit from ginning cotton, but also facilitate their collections by having the first opportunity to purchase the cotton and cotton seed of their debtors. On April 12, 1906, the plaintiff, for, value, contracted to deliver to defendants one 12 by 14 Clarke engine on or before August 1, 1906, intended to furnish the power for defendants' ginny for the season of 1906. The ginning season begins about the middle of August. Though fully informed of the injury that would result to defendants' business from a delay in the delivery of the engine, yet plaintiff did not deliver it until about September 26, 1906. The specifications of damage are thus set out in the answer: "The defendants were unable to operate their said ginny for more than forty days of the best part of the cotton-ginning season of 1906, during which time a very large per cent of the cotton crop was ginned; that the money invested in their said cotton-ginning plant was idle and unproductive during said time; that, by reason of their inability to operate their said cotton ginny, they were caused

to lose all of the large patronage, and the profits of the same which was previously theirs, which was assured them, and which they would have gotten, during said time, part of which profits they have never recovered; that a considerable part of said patronage was persons who owed accounts to defendants, and they were deprived of the first opportunity, and in many cases of any opportunity, to buy the cotton of such debtors, which caused considerable injury to their collections; that, by being thus thrown out of the first contract with a quantity of cotton and cotton seed which would have come to their ginny, as the same was prepared for market, they lost the purchase of the same and profits thereof; and that the good will of defendants' cotton-ginning business was greatly damaged and injured by reason of said delay,—all to the hurt, damage, and injury of the defendants in the sum of \$1,995."

The circuit judge was undoubtedly right in holding the allegations of the counterclaim stated a cause of action for the rental value of the ginny plant, for the period that the plaintiff's delay in the delivery of the engine kept it idle. It is true, as plain-

been made. In the absence of notice, proof of this kind was properly rejected. If, also, the plaintiff had alleged in his declaration, that he had made valuable contracts, to be executed with this machinery, which would have yielded him profits, the jury, though they would not be bound to adopt any specific contract that may have been made, yet, if reasonable evidence is given that the amount of profit would have been made, as claimed, the damages might be assessed accordingly."

In *Stark v. Alford*, 49 Tex. 260, it was held that the measure of damages in an action for the breach of a contract to deliver specified machinery necessary to the erection of a saw and grist mill is the difference in value between the machinery as furnished and as contracted for.

In *Keystone Drilling Co. v. Stahl*, 17 Pa. Co. Ct. 498, it was held that the loss of future contracts for work as the result of a delay in the delivery of machinery wherewith to do such work is too speculative and remote to be recovered as damages.

In *Bridges v. Lanham*, 14 Neb. 369, 45 Am. Rep. 121, 15 N. W. 704, it was held that damages for the loss of the use of a corn-feed mill not in operation, but which was prevented from being built merely because of delay in the building of a stone flume, were too remote and uncertain, although the contractor for the construction of the flume knew of the intention to build.

In *Van Winkle v. Wilkins*, 81 Ga. 93, 12 Am. St. Rep. 299, 81 S. E. 644, it was held that the measure of damages for the failure to deliver the class of machinery contracted for, necessary to the opening of a cotton-

seed oil mill, and which resulted in the deterioration of a lot of cotton seed on hand, was the difference between the contract price and the actual value of the machinery supplied, also the difference between the value of the seed before it was damaged by the delay, and its value in its damaged condition; the court saying that the latter damages were not too remote and uncertain, and were within the contemplation of the parties.

In *Cincinnati Chronicle Co. v. White Line Central Transit Co.* 1 Cin. Sup. Ct. Rep. 300, it was held that, for the delay in delivery of machinery necessary for the publishing of a newspaper, a carrier having notice of the purposes for which it is wanted is liable for the wages of the men while idle, the cost of efforts made to recover the machinery, as well as the cost of replacing it, made necessary by the delay.

Cases in which it appears that a contract has been made for the sale of all or part of the output of the plant, and which therefore seek to recover profits which might have been made from such contract, have been expressly excluded from this note.

For loss of rents as damages for breach of contract to install elevator or other equipment incidental to use of building, see case note to *Winslow Elevator & Mach. Co. v. Hoffman*, 17 L.R.A. (N.S.) 1130.

For loss of profits on possible sales as measure of damages for breach of contract where no contingent sales have been effected, see case note to *Winston Cigarette Mach. Co. v. Wells-Whitehead Tobacco Co.* 8 L.R.A. (N.S.) 255.

tiff contends, defendants cannot recover remote, contingent, or speculative damages based on profits they hoped to make. *Harwood v. Tappan*, 2 Speers, L. 536; *Sitton v. Macdonald*, 25 S. C. 68, 60 Am. Rep. 484; *Mood v. Western U. Teleg. Co.* 40 S. C. 524, 19 S. E. 67; *Colvin v. McCormick Cotton Oil Co.* 66 S. C. 61, 44 S. E. 380; *Hayes v. Western U. Teleg. Co.* 70 S. C. 16, 67 L.R.A. 481, 106 Am. St. Rep. 731, 48 S. E. 608, 3 A. & E. Ann. Cas. 424; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500. But, if the defendants prove these allegations that the operation of the ginnery depended on plaintiff's delivery of the engine at the time agreed on, that this was fully explained to plaintiff when the contract was made, and that the failure of the plaintiff to comply with its contract prevented the operation of the ginnery, then there cannot be a doubt of the liability of the plaintiff for the direct damages which resulted from the ginnery plant being idle. These damages would be the value of the use of the plant for the period of inactivity due to plaintiff's delay in delivering the engine. The general rule, well supported by authority and the fairest that could be adopted, is that damages for the wrongful deprivation of the use of specific property are to be measured by its rental value. *Harwood v. Tappan*, supra; *Martin v. Seaboard Air Line R. Co.* 70 S. C. 8, 48 S. E. 616; *Cannon v. Hunt*, 113 Ga. 501, 38 S. E. 983; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Brownell v. Chapman*, 84 Iowa, 504, 35 Am. St. Rep. 326, 51 N. W. 249; *Boyle v. Reeder*, 23 N. C. (1 Ired. L.) 607; *Williams v. Island City Mill Co.* 25 Or. 573, 37 Pac. 49; *Brown v. Foster*, 51 Pa. 165; *Central Trust Co. v. Arctic Ice Mach. Mfg. Co.* 77 Md. 202, 26 Atl. 493; *Wing & B. Co. v. United States Fidelity & G. Co.* (C. C.) 150 Fed. 672; *John Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 30 Am. St. Rep. 463, 51 N. W. 930; *Korf v. Lull*, 70 Ill. 420; *Livermore Foundry & Mach. Co. v. Union Compress & Storage Co.* 105 Tenn. 187, 53 L.R.A. 482, 58 S. W. 270.

This rule rests on the same reason as the rule that the measure of the vendee's damage for complete breach of the contract for the delivery of goods is the difference between the contract price and the market price. That reason is that things are worth what they will bring in the market, not what the party concerned may think they ought to bring; but, when, in breach of contract for the sale of goods by a final refusal to deliver, there is no market value by which the damages may be definitely ascertained, it would be unjust and absurd to say the recovery must be limited to nominal damages. The damages then, from the ne-

cessity of the case, must be ascertained by inquiry into the value of the article to the injured party. A familiar application of this rule is the allowance to a passenger of the value to him of baggage lost by a carrier. *Turner v. Southern R. Co.* 75 S. C. 58, 7 L.R.A.(N.S.) 188, 54 S. E. 825. Many other conditions to which the rule is applicable appear in the cases cited in note to *Southern Exp. Co. v. Owens*, 9 A. & E. Ann. Cas. 1148, and *Todd v. Gamble*, 148 N. Y. 382, 52 L.R.A. 227, 42 N. E. 982. In *Hydraulic Engineering Co. v. McHaffie*, L. R. 4 Q. B. Div. 670, 13 Eng. Ruling Cases, 558, the plaintiffs were under contract to deliver a certain machine by a certain time, and the defendants contracted with them to make a certain part of the machine called a gun. Owing to the delay of the defendants in making the gun, the plaintiffs were unable to comply with their contract and the machine was left on their hands. It was held the plaintiffs were entitled to recover from defendants the loss of their profit on the machine and their expenditures uselessly incurred in making other parts of the machine. So, also, damages for the temporary deprivation of specific property of another, due to a breach of contract, cannot be restricted to its rental value, where from any cause it has no rental value. In such cases the damages must necessarily be ascertained by an inquiry into the value of the use of the property to the injured party for the time he was deprived of it. Many cases might be cited illustrating this exception to the rule of rental value. A traveling salesman's sample trunks have no rental value; and hence, in *Strange v. Atlantic Coast Line R. Co.* 77 S. C. 182, 57 S. E. 724, from necessity, the court laid down the rule that the measure of damages for breach of contract by delay in delivering such trunks, known to be essential to the salesman's business, was his fair average daily earnings. A like measure was adopted in *Weston v. Boston & M. R. Co.* 190 Mass. 298, 4 L.R.A.(N.S.) 569, 112 Am. St. Rep. 330, 76 N. E. 1050, 5 A. & E. Ann. Cas. 825, to the delay in delivery of theatrical properties. Yet it is to be borne in mind the end courts always seek to attain is to give substantial and fair reparation to the injured party, and, at the same time, keep out of the administration of justice speculation and uncertainty. These ends are best attained by adhering to the market sale and rental value as closely as possible, and adopting other measures of damages only when necessity compels because there is no substantial market value.

There is a manifest difference between the interruption of an established manufacturing plant or other business, such as a cotton mill or flour mill, in successful operation,

and the prevention of the establishment of a new business. It would, in most cases of the former kind, be exceedingly unjust to limit the award of damages to what the business would rent for, because there would ordinarily be no demand for the temporary use of the business which would express, even approximately, its value to the owner. The measure, then, must be the value of its use to the owner, to be ascertained by inquiry into its past results; and the most important factors in ascertaining such past results would be the usual profits earned. 3 Elliott, Ev. § 1904, and authorities there cited. "In Saluda Mfg. Co. v. Pennington, 2 Speers, L. 735, one of the questions was the measure of the damages for the interruption of a manufacturing business, due to defendant's failure to build a dam according to his contract. Plaintiff claimed large consequential damages. The proof was that the business, instead of being in successful operation, was a losing enterprise. For the interruption of the business the jury, in making up their verdict, allowed the company interest on the money invested in the plant, and the wages of the operatives for the time the mill was idle by reason of defendant's default. The plaintiff appealed, and the court held it had no reason to complain that the verdict was not larger. The defendant did not claim that the measure of damages should have been less than that allowed by the jury, but, on the contrary, acquiesced in the verdict. The case, therefore, is not authority for the proposition that, when a losing business is interrupted, the party responsible for the interruption must pay the interest on the investment and the wages of employees. It leaves undetermined the true measure of damages in such circumstances." When a business is in contemplation but not established, or not in actual operation, profit merely hoped for is too uncertain and conjectural to be considered. 1 Sedgw. Damages, 174. 189; note to *Sitton v. MacDonald*, 60 Am. Rep. 488; *Williams v. Island City Mill Co. and Central Trust Co. v. Arctic Ice Mach. Mfg. Co. supra*; *Paola Gas Co. v. Paola Glass Co.* 56 Kan. 614, 54 Am. St. Rep. 598, 44 Pac. 621; *Fraser v. Echo Min. & Smelting Co.* 9 Tex. Civ. App. 210, 28 S. W. 714; *Howard v. Stillwell & B. Mfg. Co. supra*; *Cleveland, C. C. & St. L. R. Co. v. Wood*, 189 Ill. 352, 59 N. E. 619; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Rigney v. Monette*, 47 La. Ann. 648, 17 So. 211.

A cotton ginnery is in operation during the harvest season only, and conditions are so liable to change from one season to another that the profit or loss of one season is only one of several factors in estimating the probable results of the next, and therefore 19 L.R.A. (N.S.)

profit which the defendants hoped to make in the season of 1906 is too uncertain and speculative as the measure of damages. The advantage the ginnery was expected to give them in the buying of cotton and cotton seed and collecting accounts was still more contingent and speculative. It is quite possible to arrive at the fair rental value of a cotton ginnery for a cotton season. The business is simple, requiring little, if any, skilled labor. In making proof of the rental value of a ginnery which had been operated in past seasons, evidence may be offered not only of the cost and physical condition of the property, but of all the conditions which surround it, including its patronage, and success and hazards in the past, and any change for better or worse in such conditions. All of these, and perhaps other matters, would be inquired into by those contemplating the renting of the property, and they are therefore factors entering into the determination of the market rental value; but neither the past success indicated by the profits, nor any other single factor, is to be taken as controlling. Evidence of all these factors, along with other competent evidence, is admitted in order to arrive at the fair rental value. *Lipscomb v. South Bound R. Co.* 65 S. C. 148, 43 S. E. 388; *Novelty Iron Works v. Capital City Oat-meal Co.* 88 Iowa, 524, 55 N. W. 518; *Leick v. Tritz*, 94 Iowa, 322, 62 N. W. 855; *Logemann v. Pauly*, 100 Wis. 671, 76 N. W. 604; *Nelson v. Minneapolis & St. L. R. Co.* 41 Minn. 131, 42 N. W. 788; *Mace v. Ramsey*, 74 N. C. 11; *Lavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901; *Williams v. Island City Mill Co.* 25 Or. 573, 37 Pac. 49.

The answer states a good counterclaim for damages to be measured by the rental value of the ginnery from August 15 to September 26, 1906, the period alleged to have been lost by the plaintiff's breach of contract.

The judgment of this court is that the judgment of the Circuit Court overruling the demurrer be affirmed.

WASHINGTON SUPREME COURT.

ISAAC BORG, Appt.,
v.

SPOKANE TOILET SUPPLY COMPANY,
Respnt.

(50 Wash. 204, 96 Pac. 1037.)

Injury — pedestrian — collision with team — negligence.

A pedestrian who, upon stepping from the curb into the street for the purpose of crossing it, sees a delivery wagon apparently traveling near the opposite curb, and

then proceeds on his way without paying any attention to his surroundings, is negligent, so that he cannot hold the owner of the wagon liable for injury caused by its collision with him through the horses crossing the street diagonally, because of inattention of the driver, whose view is obstructed by articles piled in front of him.

(August 6, 1908.)

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County in defendant's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Mr. Samuel R. Stern, for appellant:

The plaintiff was not guilty of contributory negligence.

Geiselman v. Schmidt, 106 Md. 580, 68 Atl. 202; Simons v. Gaynor, 89 Ind. 165; Bowser v. Wellington, 126 Mass. 391; Shapleigh v. Wyman, 134 Mass. 118; Reens v.

Mail & Exp. Pub. Co. 10 Misc. 122, 30 N. Y. Supp. 913; Lazell v. Kapp, 83 Mich. 36, 46 N. W. 1028; Undhejen v. Hastings, 38 Minn. 485, 38 N. W. 488; Fox v. Manchester, 183 N. Y. 141, 2 L.R.A.(N.S.) 474, 75 N. E. 1116.

Messrs. Graves, Klizer, & Graves, for respondent:

Plaintiff's negligence in failing to exercise his senses precludes recovery.

2 Thomp. Neg. § 1641; Barker v. Savage, 45 N. Y. 191, 6 Am. Rep. 66; Harris v. Commercial Ice Co. 153 Pa. 278, 25 Atl. 1133; West v. New York Transp. Co. 47 Misc. 603, 94 N. Y. Supp. 426; Kettle v. v. Turl, 13 Misc. 156, 34 N. Y. Supp. 75; Evans v. Adams Exp. Co. 122 Ind. 362, 7 L.R.A. 678, 23 N. E. 1039; Belton v. Baxter, 54 N. Y. 245, 13 Am. Rep. 578.

Rudkin, J., delivered the opinion of the court:

This was an action to recover damages for personal injuries resulting from a colli-

Case Note. — Duty of pedestrian when crossing or traveling public street to avoid passing teams.

This note is confined to the question of the duty of a pedestrian to exercise care and caution, when crossing or traveling that portion of a public thoroughfare devoted to the use of vehicles, to avoid collision with passing teams; and excludes cases where one laboring in a public thoroughfare, or children playing therein, have been injured by passing teams, as well as injuries occasioned by street cars and motor vehicles.

It may be said that no general rule can be drawn from the cases as to what will or will not ordinarily constitute due care upon the part of a pedestrian to avoid injury from passing teams and vehicles while crossing or walking upon that portion of a public thoroughfare devoted to vehicles, as each case usually turns upon its own peculiar facts; which, it is generally held, must be submitted to the jury.

It is the general rule that the rights of a pedestrian at a crossing over a public street and those of the driver of a vehicle are reciprocal and equal, each being under an obligation to exercise ordinary care for his own safety and that of others, and the degree of care to be exercised must depend upon the particular facts in each case. Stanfield v. Anderson, 5 Ariz. 1. 43 Pac. 221; Coombs v. Purrington, 42 Me. 332; Stroub v. Meyer, 132 Mich. 75, 92 N. W. 779; McManus v. Woolverton, 47 N. Y. S. R. 107, 19 N. Y. Supp. 545, affirmed in 138 N. Y. 649, 34 N. E. 513, without opinion; Young v. Herrmann, 119 App. Div. 445, 104 N. Y. Supp. 72; Schwartz v. London, 90 N. Y. Supp. 449; Brooks v. Schwerin, 54 N. Y. 343; Reens v. Mail & Exp. Pub. Co. 10 Misc. 122, 30 N. Y. Supp. 913; Eckenberger v. Amend, 10 Misc. 145, 30 N. Y. 10 L.R.A.(N.S.)

Supp. 915, reversing 7 Misc. 452, 27 N. Y. Supp. 941; Myers v. Dixon, 3 Jones & S. 390; Lane v. Crombie, 12 Pick. 177; Eaton v. Cripps, 94 Iowa, 176, 62 N. W. 687; Simons v. Gaynor, 89 Ind. 165; Hoagland v. Canfield, 160 Fed. 146; Williams v. Richards, 3 Car. & K. 81; Cotton v. Wood, 8 C. B. N. S. 571.

It is for the jury to determine under all the circumstances of a case whether a pedestrian, in attempting to cross a public street, exercised ordinary care to avoid injury from passing teams. Schoeller v. Metropolitan Exp. Co. 108 App. Div. 226, 95 N. Y. Supp. 744; Rattagliata v. Hubbell, 7 Misc. 103, 27 N. Y. Supp. 409; Williams v. O'Keefe, 24 How. Pr. 16.

And this doctrine was applied where a pedestrian, while in a street awaiting the approach of a street car, was struck and killed by a vehicle following the car close beside the track. Deegan v. Cappel, 1 Silv. Sup. Ct. 603, 6 N. Y. Supp. 166.

Children.

It is necessary, in order to recover for injury sustained by a child five years and five months of age, by being run over while crossing a street to purchase candy, that the evidence disclose that he was in the exercise of due care. Clinton v. Boston Beer Co. 164 Mass. 514, 41 N. E. 1070.

As a child of tender years is expected to exercise only that degree of care, prudence, and foresight reasonably to be expected from such, it is for the jury to determine whether a ten or twelve year-old child exercised due care to avoid injury from passing teams while attempting to cross a public street. Johnson v. Kelleher, 155 Mass. 125, 29 N. E. 200.

The question of contributory negligence has been held to be for the jury under the following circumstances: Where a child of

sion between the plaintiff and a laundry wagon driven by the defendant on one of the public streets of the city of Spokane. The answer denied the negligence charged in the complaint, and alleged contributory negligence on the part of the plaintiff. At the close of the trial the court submitted the following issues to the jury under instructions, to which no exceptions were taken: (1) Negligence on the part of the defendant; (2) contributory negligence on the part of the plaintiff; and (3), conceding contributory negligence on the part of the plaintiff, did the defendant discover his peril in sufficient time to avoid injuring him, by the exercise of ordinary care? In ad-

dition to the general forms of verdict the court of its own motion submitted the following special findings or interrogatories to the jury: "(1) Was the plaintiff hit or kicked down by the defendant's wagon? (2) If you answer the above interrogatory in the affirmative, then state whether the driver saw the plaintiff before the wagon hit him. (3) If you answer the last interrogatory in the affirmative, then state whether the driver had sufficient time, after seeing plaintiff was in danger, to prevent the collision, if the driver had exercised reasonable care." The jury returned a general verdict for the plaintiff, answered the first interrogatory in the affirmative, the second in the nega-

seven years was struck by a furiously driven team while she was crossing a public street. *Dealey v. Muller*, 149 Mass. 432, 21 N. E. 763.

Where a six-year-old child was returning home from school and, while "skipping" over a street crossing, was struck by a negligently driven team which she testified she did not see. *Brown v. Sherer*, 155 Mass. 83, 29 N. E. 50. The court said no high degree of care or caution could be expected of a child of that age.

Where a child six years and seven months of age, carrying two parcels, saw a vehicle 250 feet away when crossing a public street, and, while stooping to pick up one of the parcels she had dropped, was run over by it. *Mattey v. Whittier Mach. Co.* 140 Mass. 337, 4 N. E. 575.

Where a sixteen-year-old girl, before attempting to cross a street, looked both ways and saw a vehicle some distance away, and, when within 2 or 3 feet of the opposite curb, in response to a shout, turned and was struck by the horse which was beyond the driver's control and running at a high rate of speed, and, as she turned, it swerved from the middle of the street and struck her. *Rush v. Joseph H. Bauland Co.* 82 App. Div. 506, 81 N. Y. Supp. 830.

Whether a child of tender years should have looked both ways before venturing to cross a public street is a question for the jury. *Moebus v. Herrmann*, 108 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415; *Gerber v. Boorstein*, 113 App. Div. 808, 90 N. Y. Supp. 1091; *Rottenberg v. Segelke*, 6 Misc. 3, 25 N. Y. Supp. 997. affirmed without opinion in 148 N. Y. 734, 42 N. E. 725.

A child six years of age who, with many others who had just been dismissed from school, was struck by a rapidly driven vehicle while she was attempting to cross a street, is not guilty of contributory negligence where the driver thereof was looking backward at the time. *Wikberg v. Olson* Co. 138 Cal. 479, 71 Pac. 511. The court observed that it did not appear that the child saw the approaching vehicle, or, if she did, that she apprehended the danger; and, being of such a tender age, it could not be supposed she would use the caution exercised by an older person.
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So the question of due care is held to be for the jury where a six-year-old child attempted to cross a public street just as a truck was approaching on the opposite side, and as he stepped from the curb the team suddenly swerved toward him, and although he attempted to regain the sidewalk he was struck by it. *Elze v. Baumann*, 2 Misc. 72, 21 N. Y. Supp. 782.

Or where a twelve-year-old boy before crossing a street saw a team approaching slowly in the middle of the block, and, as he was in the street, the driver whipped up his horses, which began to run, and the boy in running from them was struck and injured. *Birnbaum v. Lord*, 7 Misc. 493, 28 N. Y. Supp. 17, affirming 6 Misc. 535, 27 N. Y. Supp. 135.

So that question is for the jury where a thirteen-year-old boy, before attempting to cross a street, looked both ways and saw a wagon some distance away, which was being driven at a rapid rate, and there was nothing to obstruct the driver's view of the crossing. *Streitfeld v. Shoemaker*, 185 Pa. 265, 39 Atl. 967.

An adult with a babe in her arms and accompanied by two small children is not guilty of negligence which will be imputed to one of the children, where, after looking both ways, she started to cross a city street, observing only a vehicle on the opposite side some distance away, and one of the children who was a few feet in advance of her was struck by such vehicle, which, when 10 or 15 feet away, suddenly turned toward the child; as the adult cannot be said to be guilty of negligence in failing to anticipate a change of direction in which the vehicle was traveling, and the driver thereof being either drunk or guilty of inattention. *Healey v. Ehret*, 42 App. Div. 27, 58 N. Y. Supp. 917.

It is negligence in a child 5½ years old to start to run across a public street at a point other than an intersecting street, as directed by his mother, in face of an approaching vehicle which was driven in a careful manner, there being nothing to prevent the child seeing it, as it was within a few feet of him when he started to cross the street; as, under such circumstances, in no view of the case would a finding be warranted that the child exercised ordinary

tive, and returned no answer to the third. The court thereafter gave judgment for the defendant notwithstanding the verdict for the plaintiff, and from this judgment the present appeal is prosecuted.

The facts in the case are very brief, and there is little or no conflict in the testimony. On the day of the accident an employee of the respondent was driving a laundry wagon to different points in the city of Spokane in the pursuit of his employer's business. He drove westerly along Sprague avenue to its intersection with Lincoln street, and turned northerly into Lincoln street along its westerly side. When he had proceeded about halfway across the block between Sprague

avenue and Riverside avenue, he turned diagonally across the street from the west side to the east side, for the purpose of delivering some laundry at a barber shop. As the respondent's wagon was passing along the west side of Lincoln street in a northerly direction, the appellant stepped from the curb on the east side of the street, and started diagonally across the street to his place of business on the west side of the street. At or near the center of the street the appellant and the respondent's wagon or team collided while going at substantially right angles to each other, and the appellant received the injuries for which a recovery is here sought. The

care. *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282.

As to the general question of the contributory negligence of parent or custodian as a bar to action by child for negligent injury, see note to *Chicago City R. Co. v. Wilcox*, 21 L.R.A. 76, and case note to *Neff v. Cameron*, 18 L.R.A.(N.S.) 320.

And as to the contributory negligence of parent as a bar to an action by parent or administrator for death of child *non sui juris*, see case note to *Vinnette v. Northern P. R. Co.* 18 L.R.A.(N.S.) 328.

Persons of impaired faculties.

A person seventy-three years of age who is hard of hearing is bound to exercise ordinary care in attempting to cross a city street, such as a reasonably prudent man of his age and condition of hearing would be expected to exercise; and the fact of his deafness imposes upon him the duty of being more vigilant and cautious in the use of his other senses. *Fennman v. Holden*, 75 Md. 1, 22 Atl. 1049.

As it is not negligence under all circumstances for a blind person seventy-three years of age to walk the public streets unattended, he is bound to use only ordinary care to avoid passing teams; but, in determining what constitutes ordinary care, the jury are called upon to consider his blindness and other infirmities, and all the circumstances bearing upon the question as to what care was reasonably necessary to insure his safety. *Neff v. Wellesley*, 148 Mass. 487, 2 L.R.A. 500, 20 N. E. 111.

Duty to look and listen.

It is not the duty of a pedestrian to look and listen for approaching vehicles or teams before attempting to cross a public street; whether a failure so to do is negligence being a question for the jury. *Murphy v. Armstrong Transfer Co.* 167 Mass. 199, 45 N. E. 93; *McDonald v. Bowditch* (Mass.) 87 N. E. 585; *Orr v. Garabold*, 85 Ga. 373, 11 S. E. 778; *Green v. Eden*, 24 Ind. App. 583, 56 N. E. 240; *Stringer v. Frost*, 116 Ind. 477, 2 L.R.A. 614, 9 Am. St. Rep. 875, 19 N. E. 331; *Sharpleigh v. Wyman*, *infra*.

So the failure of a pedestrian, before at- 19 L.R.A.(N.S.)

tempting to cross a street, to look both ways for approaching horses or vehicles, is not negligence as a matter of law; whether it is negligence being a question for the jury under all the circumstances of the case. *Reens v. Mail & Exp. Pub. Co.* 10 Misc. 122, 30 N. Y. Supp. 913, affirmed without opinion in 150 N. Y. 582, 44 N. E. 1128; *Eckensberger v. Amend*, 10 Misc. 145, 30 N. Y. Supp. 915, reversing 7 Misc. 452, 27 N. Y. Supp. 941; *Eaton v. Cripps*, 94 Iowa, 176, 62 N. W. 687; *Dorr v. Schenck*, 187 Mass. 542, 73 N. E. 532; *Hickman v. Wm. Schimper & Co.* 125 App. Div. 216, 109 N. Y. Supp. 325; *McManus v. Woolverton*, 47 N. Y. S. R. 107, 19 N. Y. Supp. 545, affirmed without opinion in 138 N. Y. 648, 34 N. E. 513.

But it was held in *Barker v. Savage*, 45 N. Y. 191, 6 Am. Rep. 66, that a nonsuit should be granted where a woman sixty-four years of age walking with a crutch attempted to cross a city street, looking straight ahead, and was struck by an approaching vehicle which she could have seen in time to avoid the danger had she looked. The court said it is not necessary to stop and listen before attempting to cross a city street where moving vehicles are numerous, but a failure to look in both directions is not an exercise of reasonable care.

So a pedestrian is guilty of contributory negligence, as a matter of law, where, on a rainy day, while carrying an umbrella in a position which prevented his seeing an approaching team, without looking, he attempted to cross a public street. *Dimuria v. Seattle Transfer Co.* 50 Wash. 633, 97 Pac. 657. Following *BORG v. SPOKANE TOILET SUPPLY CO.*

Failure to discover approaching vehicle.

It is not negligence for a pedestrian to attempt to cross a street behind a high-loaded wagon before it has passed far enough to enable him to see that no other team is coming from behind it upon the opposite side. *Purtell v. Jordan*, 156 Mass. 573, 31 N. E. 652.

So one is not guilty of contributory negligence, as a matter of law, in failing to look up or down a street before attempting to cross it, and while crossing was struck

street, but, upon hearing a noise which she thought was made by a street car, she started to run as fast as she could, and was struck by the vehicle which came up behind her.

It is not contributory negligence for a woman wearing a sunbonnet which obscured her vision, to cross diagonally a street intersection, where she was struck by a rapidly driven vehicle which approached from behind, and which, when she started to cross the street, was a considerable distance away. *Shea v. Reems*, 36 La. Ann. 966. The court said that there was no reason for her to anticipate that the vehicle would be driven so rapidly as to reach her, or so carelessly as to run over her, there being ample room for it to pass upon either side of her.

It is for the jury to determine whether one walking in the traveled portion of a street or highway is guilty of negligence in failing to look or listen for the approach of teams from behind. *Wiel v. Wright*, 29 N. Y. S. R. 763, 8 N. Y. Supp. 776.

So a pedestrian who left a sidewalk and walked in a street is not guilty of negligence *per se* which will defeat a recovery for being struck by a negligently driven vehicle which approached from behind, it being for the jury to determine whether under such circumstances he exercised ordinary care to avoid injury. *Coombs v. Purrington*, 42 Me. 332.

The fact that one traveling in a path in the snow near the beaten track did not turn out upon the approach from the rear of a sleigh driven at a great speed is not evidence of negligence as a matter of law, it being for the jury to determine whether the pedestrian was in the exercise of such care as an ordinarily prudent person would have exercised under similar circumstances. *Kendall v. Kendall*, 147 Mass. 482, 18 N. E. 233.

It was held error, in *Stanfield v. Anderson*, 5 Ariz. 1, 43 Pac. 221, to direct a verdict for the defendant where a pedestrian who was walking in the highway was struck by a rapidly driven horse which approached from behind over a soft piece of ground which was covered with straw to such an extent as to deaden the noise made by the horse.

So it is for the jury to determine whether one was negligent who, finding himself upon the wrong street car, jumped therefrom, dropping several bundles, and, while returning along the track to pick them up, did not look behind him, and was struck by a rapidly driven vehicle which came from his rear, although it was the only vehicle in sight. *Undlejem v. Hastings*, 38 Minn. 485, 38 N. W. 488.

Reliance upon presumption of exercise of due care by driver.

It is not negligence *per se* for a pedestrian who saw a rapidly driven vehicle approaching about 175 feet away upon an intersecting street, to cross a public street at a crossing, without again looking, where he

was struck by it, as it was driven around the corner; the pedestrian testifying he supposed, from the rapidity with which the vehicle was driven, that it would continue a straight course and not attempt to turn a sharp corner, which presumption he was entitled to rely upon. *Johnson v. Thomas (Cal.)* 43 Pac. 578.

And this doctrine has been applied where a woman, on a rainy evening, started from the curb to board a street car at a point in a busy city street where the stores and street were lighted, and was struck by a horse and wagon driven at a rate of 6 miles an hour, the approach of which she might have seen had she looked; as she was entitled to presume that a vehicle approaching such a place would do so at a reasonable rate of speed. *Stroub v. Meyer*, 132 Mich. 75, 92 N. W. 779. For a similar decision see *Thompson v. Keyes-Marshall Bros. Liv- erty Co.* 214 Mo. 487, 113 S. W. 1128.

So, one is not guilty of contributory negligence where, before attempting to cross a street, he saw a team approaching 100 or 200 feet away, and then, looking straight ahead, started across the street diagonally; as he might rightfully assume that the driver would exercise due care, and, when the vehicle was such a distance, he would be warranted in attempting to cross the street. *Cherbuliez v. Parsons*, 59 Misc. 613, 111 N. Y. Supp. 516.

So where the jury may infer that the driver of a vehicle might have controlled his team, which was driven at an immoderate rate of speed, if it had not been so driven, a pedestrian will not be negligent in attempting to cross a city street, where he was struck by the rearing horse, which became frightened at a passing elevated train and swerved and struck the pedestrian as he was near the opposite curb; as he might rightfully assume that the driver would approach with that degree of care which the law imposed upon him. *Van Houten v. Fleischman*, 1 Misc. 130, 20 N. Y. Supp. 643, affirmed without opinion in 142 N. Y. 624, 37 N. E. 565.

Subsequent negligence of driver.

It is not contributory negligence for a pedestrian to fail to observe an approaching vehicle, there being nothing to obstruct his view, where the driver of the vehicle did not check the speed thereof at a point where pedestrians were to be expected. *Mordente v. New York Cab Co.* 109 N. Y. Supp. 12.

So a pedestrian who was crossing a street at a point other than the usual crossing may recover damages, although guilty of some negligence, if the driver of the vehicle which struck him, by the exercise of reasonable care, could have seen and avoided the pedestrian. *Springett v. Ball*, 4 Fost. & F. 472.

So a case is properly submitted to the jury, where a pedestrian, without looking in either direction, attempted to cross a street and was struck by a negligently

driven vehicle, although he failed to exercise ordinary care, if the driver thereof could have discovered the peril of the pedestrian in time to avoid injuring him. *Dieter v. Zbaren*, 81 Mo. App. 612. *McDonald v. Bowditch* (Mass.) 87 N. E. 585.

It is not negligence *per se* for a woman, with a shawl over her head, on a rainy day, who looked both ways, to attempt to cross a street at a point other than a cross walk, where, when halfway across, she again looked and was knocked down by a vehicle, the driver of which might have avoided striking her by the exercise of ordinary care. *McManus v. Woolverton*, 47 N. Y. S. R. 107, 19 N. Y. Supp. 545, affirmed without opinion in 138 N. Y. 648, 34 N. E. 513.

So one seventy-two years of age is not negligent, as a matter of law, where, before attempting to cross a street, he looked both ways and saw only a sleigh some distance away, and thought he had time to cross, and was struck by it when close to the opposite curb, there being ample room for the driver of the sleigh to have avoided striking him. *McCrohan v. Davison*, 187 Mass. 466, 73 N. E. 553.

So a pedestrian is not guilty of negligence, as a matter of law, where he attempts to cross a street, seeing an approaching vehicle and constantly watching the same, and when almost across the street is struck by the vehicle which has been continuously driven toward him at a rapid rate; it being a question for the jury, as the driver of the vehicle might have seen the pedestrian in time to avoid injuring him. *Schwartz v. London*, 90 N. Y. Supp. 449.

So it is for the jury to determine whether due care was exercised by one who had been drinking in a saloon, and stepped into a street in the nighttime to take a street car, and was struck by a passing vehicle while he was standing where the light from the saloon windows and a street lamp made him plainly visible to the driver. *Meyer v. Lewis*, 43 Mo. App. 417.

As to the duty of pedestrians in a public street to look out for, and avoid, automobiles, see subject note to *Christy v. Elliott*, 1 L.R.A. (N.S.) 215, and case note *Hennessey v. Taylor*, 3 L.R.A. (N.S.) 345.

WISCONSIN SUPREME COURT.

FRANK MANTEUFEL, Respt.,

v.

GUSTAV WETZEL, Appt.

(133 Wis. 619, 114 N. W. 91.)

Surface water — gathering in ditch.

An upper landowner is not liable for collecting in a ditch following the course of the usual flow of surface water, the surface water which formerly spread over the surface, and hastening its flow onto the land of the lower proprietor.

(December 13, 1907.)

19 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Circuit Court for Waupaca County in plaintiff's favor in a suit to require defendant to close a drainage ditch and for damages. Reversed.

The facts are stated in the opinion. ,
Messrs. Eberlein & Eberlein for appellant.

Messrs. Olen & Olen for respondent.

Timlin, J., delivered the opinion of the court:

Only one question is necessary to be considered. It is established by the findings that the parties own adjoining lands. There is on the defendant's land and about 700 feet west of the plaintiff's land a sink hole, or depression, which in wet seasons and before the construction of the ancient ditch contained about 3 acres of water of the average depth of 1½ feet, and between this sink hole or depression and the land of the plaintiff there is upon the land of the defendant at a point distant from the common boundary an elevation of about 3

Case Note. — Right to hasten flow of surface water along natural drain ways.

This note does not cover the rights with respect to surface water in a diffused state having no outlet through natural drain ways or depressions; nor does it include cases which turn upon statutory or contractual rights, or rights acquired by prescription. The general subject as to the rights with respect to the flow of surface water is treated in the note to *Gray v. McWilliams*, 21 L.R.A. 593.

The principle very generally accepted by the courts, that the owner of higher land may not concentrate at one point surface water diffused over the surface, and discharge it in a mass upon the lower land, does not apply to natural depressions or drain ways through which the surface water on the higher land drains onto the lower land. On the contrary, it is established by the great weight of authority that the flow of surface water along such depressions or drain ways may be hastened and incidentally increased by artificial means so long as the water is not diverted from its natural flow. *Wilson v. Bondurant*, 142 Ill. 645, 32 N. E. 498; *Lambert v. Alcorn*, 144 Ill. 313, 21 L.R.A. 611, 33 N. E. 53; *Ribordy v. Murray*, 177 Ill. 134, 52 N. E. 325; *Broadwell Special Drainage Dist. No. 1 v. Lawrence*, 231 Ill. 86, 83 N. E. 104; *Throop v. Griffin*, 77 Ill. App. 505; *Lattimore v. Davis*, 14 La. 163, 33 Am. Dec. 581; *Sowers v. Shiff*, 15 La. Ann. 300; *Ludeling v. Stubbs*, 34 La. Ann. 935; *Guesnard v. Bird*, 33 La. Ann. 796; *Rhoads v. Davidheiser*, 133 Pa. 226, 19 Am. St. Rep. 630, 19 Atl. 400; *Shaw v. Ward*, 131 Wis. 648, 111 N. W. 671, 11 A. & E. Ann. Cas. 1139.

This rule with its limitations is well

feet. More than twenty years prior to the commencement of this action, the predecessor in title of the defendant cut through this elevation by a ditch, so that the surface water which formerly collected in such depression passed through said ditch and to a point upon defendant's land about 150 feet west of the common boundary, where it spread over defendant's land and escaped by the natural course of surface water onto the land of the plaintiff. The said sink hole or depression is a natural basin or reservoir without natural outlet, which is capable of holding, and which, in fact, did collect, receive, and hold, large quantities of surface water which fell and gathered upon lands of the defendant and adjacent land in the vicinity of said depression; and the

surface water so collected remained standing in said depression until the same disappeared by evaporation, absorption by the earth, or was removed therefrom by means of said ancient ditch or artificial outlet to the point aforesaid upon the defendant's land. In May, 1904, the defendant, following the natural course of the surface water, excavated on his own land a shallow ditch from the termination of said ancient ditch to the common boundary between plaintiff and defendant; and, as a direct result thereof, the surface water from said depression has passed through the ancient ditch and through the extension thereof just mentioned to the plaintiff's land, and has been deposited on the plaintiff's land in greater quantities and with much greater rapidity

stated in the following language from the opinion in *Dayton v. Drainage Comrs.* 128 Ill. 271, 21 N. E. 198 (and quoted with approval in *Lambert v. Alcorn*, supra): "The rule undoubtedly is that the owner of a higher tract of land has the right to have the surface water falling or naturally coming upon his premises by rains or melting snow pass off through the natural drains upon or over the lower or servient lands next adjoining; and the owner of the dominant heritage has the right, by ditches and drains, to drain his own land into the channels which nature has provided, even if the quantity of water in that way thrown upon the next adjoining lower lands is thereby increased. But the owner of the higher lands has no right to open or remove natural barriers, and let on to such lower lands waters which would not otherwise naturally flow in that direction."

This right of the owner of the higher land to hasten and incidentally increase the drainage through natural depressions or drain ways is most frequently applied where the purpose is the improvement of agriculture; but the right to hasten the drainage in this manner has also been upheld for the purpose of benefiting a railroad right of way. *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193; *Staton v. Norfolk & C. R. Co.* 111 N. C. 278, 17 L.R.A. 838, 16 S. E. 181; *Missouri, K. & T. R. Co. v. Bishop* (Tex. Civ. App.) 34 S. W. 323.

And the doctrine was applied in favor of a street railway company in *Whitney v. Willamette Bridge R. Co.* 23 Or. 188, 31 Pac. 472. But see *Frisbie v. Cowen*, infra.

So, the doctrine applies in favor of a municipal corporation for the purpose of carrying off surface water, but not for purposes of sewerage. *Robb v. LaGrange*, 158 Ill. 21, 42 N. E. 77. The latter branch of the proposition is supported by *Van Rensselaer v. Albany*, 15 Abb. N. C. 457.

As subsequently shown, there is some conflict as to whether this doctrine permits the drainage of ponds; but it is clear that the mere fact that, because of the drainage, some stagnant water disappears, will not 19 L.R.A. (N.S.)

render the drainage unlawful. *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Lambert v. Alcorn*, 144 Ill. 313, 21 L.R.A. 611, 33 N. E. 53.

In the exercise of this right to hasten the flow of surface water along natural depressions or drain ways, the owner of upper land may construct ditches and underground drains so long as he does not divert water from its natural flow. *Lambert v. Alcorn*; *Peck v. Herrington* and *Robb v. La Grange*, —supra; *Helm v. Richmond*, 72 Ill. App. 516; *Bickel v. Martin*, 115 Ill. App. 367; *Vannest v. Fleming*, 79 Iowa, 638, 8 L.R.A. 277, 18 Am. St. Rep. 387, 44 N. W. 906; *Sheker v. Machovec* (Iowa) 110 N. W. 1055; *Dorr v. Simmerson*, 127 Iowa, 551, 103 N. W. 806; *Hull v. Harker*, 130 Iowa, 190, 106 N. W. 629; *Meixell v. Morgan*, 149 Pa. 415, 34 Am. St. Rep. 614, 24 Atl. 216.

So the owner of the lower land cannot complain of the plowing of blind furrows on the higher land along the course of a natural depression or drain way, or of the leaving of an opening or culvert in a wall for the passage of the water, although the result is that the water is contracted to a smaller compass, and discharged with slightly increased velocity. *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350. The court in this case, however, commented on the fact that there was no substantial damage to the lower proprietor.

And in *Daum v. Cooper*, 103 Ill. App. 4, it was said, in effect, that the manner in which one conducts surface water over his land before it reaches another's land is a matter of no concern to the latter so long as it reaches his land in the same course in which in a state of nature, it was accustomed to flow.

But in *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150, it was held that the right of an owner of an upper field to make drains on his own land is restricted to such as are required by good husbandry and the proper improvement of the surface, and as may be discharged in the natural channels without, inflicting palpable and unnecessary injury on the lower field of an adjacent owner.

And the right thus to ditch higher lands

and force than before, and has thereby rendered about 4 or 5 acres of the plaintiff's land too wet for ordinary use as agricultural land, and of less value than formerly, and, in the year 1904, caused a washout upon the lands of the plaintiff of about 45 feet in length by 7 feet in width, and 3 feet in depth. Upon these facts, the court below held that the ancient ditch extending from the sink hole or depression on defendant's land to a point on defendant's land about 150 feet from the common boundary should be allowed to be and remain as it was, apparently upon the ground that this outlet had been maintained more than twenty years prior to the commencement of the action. That ruling is not excepted to, and is not before us for review. But the court

decreed on these facts that the plaintiff recover \$100, and that the defendant be ordered to close and fill up the extension of ditch above described, made by him in May, 1904, and thereafter to keep the same closed.

We have considered the cases (*Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Fryer v. Warne*, 29 Wis. 511; *O'Connor v. Fond du Lac, A. & P. R. Co.* 52 Wis. 526, 38 Am. Rep. 753, 9 N. W. 287; *Heth v. Fond du Lac*, 63 Wis. 228, 53 Am. Rep. 279, 23 N. W. 495; *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811; *Champion v. Crandon*, 84 Wis. 405, 19 L.R.A. 856, 54 N. W. 775; *Wendlandt v. Cavanaugh*, 85 Wis. 256, 55 N. W. 408; *Schuster v. Albrecht*, 98 Wis. 241, 67 Am. St. Rep. 804, 73 N. W. 990;

so as to drain them through natural depressions or drain ways is declared in *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147, to be subject to the condition that it is done with prudent regard to the welfare of the owner of the lower land, the question of the respective rights of the parties to be determined with proper reference to the value and necessity of the improvement to the superior heritage, contrasted with the injury to the inferior.

As shown in the above quotation from *Dayton v. Drainage Comrs.* supra, the rule under discussion which permits the hastening of the flow of water along natural channels does not permit the opening or removal of natural barriers so as to drain off surface water which would not otherwise naturally flow in that direction.

This limitation of the rule is also applied, or at least recognized, in the following cases: *Humphreys v. Moulton*, 1 Cal. App. 257, 81 Pac. 1085; *Mellor v. Pilgrim*, 7 Ill. App. 306; *Crossville v. Stuart*, 77 Ill. App. 513; *Stinson v. Fishel*, 93 Iowa, 656, 61 N. W. 1063; *Geneser v. Healy*, 124 Iowa, 310, 100 N. W. 66; *Dorr v. Simmerson*, 127 Iowa, 551, 103 N. W. 806; *Finkbinder v. Ernst*, 126 Mich. 565, 85 N. W. 1127; *Delahousaye v. Judice*, 13 La. Ann. 587, 71 Am. Dec. 521; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Jeffers v. Jeffers*, 107 N. Y. 650, 14 N. E. 316; *Dill v. Oglesbee*, 5 Ohio N. P. 271; *Martin v. Riddle*, 26 Pa. 415; *Rhoads v. Davidheiser*, 133 Pa. 226, 19 Am. St. Rep. 630, 19 Atl. 400; *Meixell v. Morgan*, 149 Pa. 415, 34 Am. St. Rep. 614, 24 Atl. 216.

So, a railroad company has no right to utilize a gully or depression for the purpose of carrying off surface water collected from points beyond the natural drainage district of such gully or depression. *Frisbie v. Cowen*, 18 App. D. C. 381.

Ponds and marshes.

The general rule, which obtains in the absence of statutory, contractual, or prescriptive rights, that water collecting in ponds, marshes, or sloughs, cannot be

drained upon the lower land of other owners to the substantial detriment of the latter, has been frequently applied to ponds, marshes, or sloughs fed from surface water. See *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Hicks v. Silliman*, 93 Ill. 255; *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. 90; *Yerex v. Eineder*, 86 Mich. 24, 24 Am. St. Rep. 113, 48 N. W. 875; *Cranson v. Snyder*, 137 Mich. 340, 100 N. W. 674; *Page v. Huckins*, 150 Mich. 103, 113 N. W. 577; *Jordan v. St. Paul, M. & M. R. Co.* 42 Minn. 172, 6 L.R.A. 573, 43 N. W. 849; *Davis v. Londgreen*, 8 Neb. 43; *Vernum v. Wheeler*, 35 Hun, 53; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Cain v. South Bound R. Co.* 62 S. C. 25, 39 S. E. 792; *Brandenberg v. Zeigler*, 62 S. C. 18, 55 L.R.A. 414, 89 Am. St. Rep. 887, 39 S. E. 790; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Wendlandt v. Cavanaugh*, 85 Wis. 256, 55 N. W. 408; *Schuster v. Albrecht*, 98 Wis. 241, 67 Am. St. Rep. 804, 73 N. W. 990; *Nicolai v. Wilkins*, 104 Wis. 580, 80 N. W. 939.

The foregoing cases, however, did not present the question as to the right to cut through natural barriers or construct artificial ditches for the purpose of drawing off the water from such ponds, marshes, or sloughs through natural depressions or ravines in the direction of the natural flow of the water.

It has been frequently held, however, that such ponds, marshes, or sloughs cannot, by cutting through natural barriers or digging artificial ditches, be drained into natural ravines or depressions where the drainage or flow of the water in a natural state is in another direction. *Anderson v. Henderson*, 124 Ill. 164, 16 N. E. 232; *Bischmann v. Bochl*, 30 Ill. App. 455; *Dayton v. Drainage Comrs.* 128 Ill. 271, 21 N. E. 198; *Nye v. Kahlow*, 98 Minn. 81, 107 N. W. 733; *Erhard v. Wagner*, 104 Minn. 258, 116 N. W. 577; *Foot v. Bronson*, 4 Lans. 47; *Jacobson v. Van Boening*, 48 Neb. 80, 32 L.R.A. 229, 58 Am. St. Rep. 684, 66 N. W. 993.

In *Ludeling v. Stubbs*, 34 La. Ann. 935, it was held that a pond having no natural

Nicolai v. Wilkins, 104 Wis. 580, 80 N. W. 939; *Wilkins v. Nicolai*, 99 Wis. 178, 74 N. W. 103; *Clauson v. Chicago & N. W. R. Co.* 106 Wis. 308, 82 N. W. 146; *Johnson v. Chicago, St. P. M. & O. R. Co.* 80 Wis. 641, 14 L.R.A. 495, 27 Am. St. Rep. 76, 50 N. W. 771; *Connell v. Stark*, 108 Wis. 92, 83 N. W. 1092; *Shaw v. Ward*, 131 Wis. 646, 111 N. W. 671), and do here determine that, where the upper proprietor does no more than collect in a ditch, which ditch follows the course of the usual flow of surface water, the surface water which formerly took the same course toward the land of the lower adjacent proprietor, and causes to pass through this ditch the surface water which formerly took the same course but spread out over the surface, he has committed no actionable legal wrong of which the lower proprietor can complain, or upon which such lower proprietor can maintain an action. In other words, causing surface water to

flow in its natural direction through a ditch on one's own land, instead of over the surface or by percolation as formerly, where no new watershed is tapped by said ditch and no addition to the former volume of surface water is caused thereby, except the mere carrying in a ditch what formerly reached the same point on defendant's land over a wider surface by percolation through the soil, or by flowing over such wider surface, is not, when not negligently done, a wrongful or unlawful act. It follows that, upon the findings of fact of the court below, the conclusion of law should have been that the defendant was entitled to judgment dismissing the complaint and judgment accordingly.

The judgment of the Circuit Court is reversed, and the cause remanded, with directions to enter judgment for the defendant dismissing the plaintiff's complaint.

outlet cannot be lawfully drained by artificial means into a natural slough or "bayou" through which it runs onto the lower land of an adjoining proprietor.

And in *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452, it was distinctly held that the owner of land having upon it a marshy sink or basin of water cannot lawfully pierce the rim so as to draw off water which otherwise would have no outlet, into a natural swale or depression through which it finds its way onto lower land; and that the result is not affected by the fact that in times of high water a portion of the waters of the basin would overflow its rim and find its way through the swale upon the lower land.

The tendency of the later cases, however, is to permit the piercing of a natural barrier so as to permit the water from such a pond, marsh, or slough to run off through a natural depression or ravine, or to suffer the deepening of the natural outlet, so long as the water is not diverted from its natural course.

Thus, it was held in *Sheehan v. Flynn*, 59 Minn. 436, 26 L.R.A. 632, 61 N. W. 462, that the owner of land upon which there was a depression covering about 20 acres, in which, during the wet season, water accumulated, and stood until it had evaporated or been absorbed by the soil, might drain the same by connecting it, by an artificial ditch 96 rods long, with the head of a ravine which crossed other ground and emptied into a lake, notwithstanding that at times the water in the lake was thereby raised so as to cover an acre or two of another person's land which would not otherwise be submerged. The court emphasized the fact that the method of drainage adopted was the only available one, and that the consequent injury to others as compared to the benefit to be derived from the improvement was not so great as to make it unreasonable.

In the last case the court called attention to the fact that the so-called pond or lake

was merely a large marsh in which surface water collected at certain seasons of the year and mostly disappeared at others, and intimated that the rule might not apply to all lakes or ponds fed by surface waters; and the case of *Krupke v. Stockard*, 103 Minn. 349, 115 N. W. 175, was taken out of the rule upon the express ground that, though the pond or slough in that case was maintained solely by the accumulation of surface water, it was of a permanent character, and, hence the water therein had lost its character as surface water.

The doctrine of *Sheehan v. Flynn* was applied in *Gilfillan v. Schmidt*, 64 Minn. 29, 31 L.R.A. 547, 58 Am. St. Rep. 515, 66 N. W. 126, by holding that the owner of land upon which there was a pond or marsh having a natural outlet, whence in wet seasons its waters flowed through a fairly well-defined channel or water way across another's land, was entitled to deepen the natural outlet on his own land, although the result was to drain off waters from the pond or marsh which otherwise would not escape, but remain stagnant until evaporated or absorbed; and that he was not liable for damages to the other party's land by the overflow of the water from such outlet at a time of a very heavy rainfall, even assuming that the overflow was caused by the deepening of the natural outlet, and the consequent increase of the drainage. *Start, Ch. J.*, and *Buck, J.*, concurred in the decision upon the ground that the evidence failed to show that the deepening of the ditch was the proximate cause of the overflow which injured the plaintiff's land, and dissented from so much of the opinion as approved of the doctrine of *Sheehan v. Flynn*.

So, the owner of land upon which there is a pond in which is collected the surface water from rains and melting snow may, when good husbandry requires, drain the same by an artificial drain constructed upon his own land, whereby the water is thrown

into the same outlet or natural drain it was accustomed to take before when the pond was full, notwithstanding that the flow of water over a servient tract of land may thereby be increased. *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Highway Comrs. v. Whitsitt*, 15 Ill. App. 318.

In *Graham v. Keene*, 143 Ill. 425, 32 N. E. 180, it was held the public, represented by the highway commissioners, had a right to have the surface water falling or coming naturally upon the highway pass off the same through the natural and usual channel or outlet, and to construct ditches or drains for the purpose of conducting the surface water, and the water in a pond on the highway, into such natural and usual channel or outlet, even if the water carried upon the lower lands was thereby increased; but that they had no right to cut through a natural ridge so as to drain the water of a pond into a channel which was not its natural outlet.

The owner of higher land has a legal right to rid his lands of surface water as it comes thereon from any source, by permitting or causing the same, by such means as may be reasonably necessary, to flow in the natural course of drainage to and onto adjoining lands, though the same may, by natural, or by artificial, means for which he is not responsible, reach and spread out over another's lands. *Shaw v. Ward*, 131 Wis. 646, 111 N. W. 671, 11 A. & E. Ann. Cas. 1139. The court said: "No reason is perceived why respondents could not rightfully have filled up the depression on their lands, preventing the water from accumulating thereon and causing it to pass on to the east and reach appellants' lands by way of the ditch, or to have at any time opened the basin into the draw, or a ditch if necessary, to the east, and emptied the reservoir, being responsible, if at all, for the damages thus caused to others, but not for damages caused by the improvement preventing surface water from subsequently being retained on their lands, or, at a time when the pond had disappeared by evaporation and absorption, have opened the basin towards the natural draw so as to prevent a future accumulation."

So, an owner of land has the right, in the interests of good husbandry, to drain ponds or basins thereon of a temporary character and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the lands of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate; provided this is done in a reasonable and careful manner and without negligence. *Aldritt v. Fleischauer*, 74 Neb. 66, 70 L.R.A. 301, 103 N. W. 1084; *Todd v. York County*, 72 Neb. 207, 66 L.R.A. 561, 100 N. W. 299; *Arthur v. Glover* (Neb.) 118 N. W. 111.

Upon the first appeal, in *Sheker v. Macho*, 19 L.R.A. (N.S.)

vec (Iowa) 110 N. W. 1055, the court declared that the owner of land upon which there is a pond or swale has the right to conduct the water therefrom into natural drainage channels, and through such channels to cast it upon the lower land; provided that the water so thrown upon the lower land is not materially and unduly increased to the injury of the owner thereof. But, upon a subsequent appeal in this case (116 N. W. 1042) the jury having found that the drain was not in the general course of natural drainage, the defendant was held liable. The court pointed out that the rule that, to sustain a recovery by the owner of the lower land, the flow must have been substantially increased, was confined to cases where the drainage was in the natural course of drainage.

The bed of a pond and sink hole may be filled up so as to prevent the water from accumulating in them, although the result is to hasten the flow along its natural course. *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. 90; *Yerex v. Eineder*, 86 Mich. 24, 24 Am. St. Rep. 113, 48 N. W. 875; *Osten v. Jerome*, 93 Mich. 196, 53 N. W. 7; *Launstein v. Launstein*, 150 Mich. 524, 121 Am. St. Rep. 635, 114 N. W. 383.

An upper owner will not be enjoined from cutting ditches to drain sloughs upon his land through a swale onto lower land, if, because of the ditches, the absorptive power of the land will be so much increased that the quantity of water flowing through the swale will not be greater than before. *Cooper v. Bartholomew* (Iowa) 75 N. W. 1134.

WISCONSIN SUPREME COURT.

JACOB DORNER et al., Appts.,

v.

SCHOOL DISTRICT NO. 5 IN LUXEMBURG TOWNSHIP et al., Respts.

(— Wis. —, 118 N. W. 353.)

School — misappropriation of funds — reimbursement.

1. Taxpayers of a school district who, for a long series of years, permit the school moneys to be expended in sectarian instruction in the schools, will not be permitted to maintain a suit to compel reimbursement to the district by the school officers and the recipients, of the money so expended.

Same — lease — injunction.

2. A school district having power to rent a building for school purposes will not be enjoined from maintaining a school in a

Case Note. — Right to recover back public money appropriated to sectarian institution.

A search of the authorities reveals but one other case. *Atchison, T. & S. F. R. Co. v. Atchison*, 47 Kan. 712, 28 Pac. 1000,

parochial school building, where a building owned by it is wholly inadequate to its needs.

(November 27, 1098.)

APPEAL by complainants from a judgment of the Circuit Court for Brown County in defendants' favor in a suit to enjoin the maintenance of a sectarian school and to compel a restoration of moneys expended for that purpose. Affirmed.

Statement by Dodge, J.:

The defendant school district, for a period of about twenty years, rented from the defendant congregation of the Immaculate Conception, a Roman Catholic church corporation, certain rooms in its school building, and expended the school moneys of the district in paying teachers to conduct schools therein, and also paid certain small amounts for fuel, cleaning, and the like. The building had been erected for the purposes of a parochial school by said church corporation, and the rest of the rooms therein not rented by the district were used to maintain the parochial school, and the public school conducted in the rooms rented by the school district was characterized by certain religious ceremonies, in that certain distinctive prayers of the Catholic Church were said at intervals throughout the school day, church hymns were sung, and the teachers were nuns specially designated to the service by the superior of a Catholic sisterhood to which they belonged. In addition, the scholars, prior to school hours, quite uniformly attended distinctively religious teaching in the adjoining church, and the school was suspended to enable their attendance upon weddings and funerals in the church. The pupils were all children of Catholic parents, members of the church congregation, with occasional exceptions of one or two at various times during said twenty years. The plaintiffs, members of the congregation, but also residents and taxpayers of the district, on behalf of themselves and others similarly situated, brought this action to enjoin the school board and district from persisting in maintaining the public school of the district in such manner and from paying out any moneys of the dis-

trict for such purposes, and also to recover in behalf of the district all sums paid for maintenance of such school from the said church corporation and from the members of the school board who had joined in paying it out. The trial court found that the school so conducted had at all times been pervaded and characterized by sectarian instruction contrary to law, and granted injunction against continued maintenance thereof, but held that it was within the power of the school district and board to rent rooms as they deemed wise for the maintenance of a distinctively public school and therefore refused to enjoin the maintenance thereof in the parochial school building. With regard to the moneys expended prior to the commencement of the suit, he held that the plaintiffs and all members of the school district had at all times had full knowledge, both before and immediately after the fact, of the manner in which the school was conducted, and of the expenditure of the school-district moneys for the purposes aforesaid, and that, having made no objection, they were guilty of laches such as to warrant the court in denying the prayer for the repayment of moneys expended for services rendered in good faith and with the tacit approval and acquiescence of all interested parties. The plaintiffs appeal from those parts of the judgment which deny injunction against maintenance of a public school in the parochial school building, and deny recovery from the church corporation and from the members of the school board of the moneys paid out for teachers' salaries and other expenses of the school maintained heretofore.

Messrs. Cady, Strehlow, & Jaseph, for appellants:

Taxpayers may maintain an action under proper circumstances to compel public officials and third parties to repay into the public treasury money paid out illegally.

Frederick v. Douglas County, 96 Wis. 411, 71 N. W. 798; Webster v. Douglas County, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. 885, 78 N. W. 451; Northern Trust Co. v. Snyder, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460; Chippewa Bridge

which at all resembles the foregoing case; but the facts clearly distinguish it. Here a recovery was allowed; but the action was brought by a taxpayer in his own behalf to recover back taxes paid for the support of a sectarian institution, while in *DORNER v. SCHOOL DIST. No. 5* the action was brought by taxpayers of a school district for the benefit of the district. In the former case the decision would turn generally upon the principles of recovery of erroneous

taxes, while in the *DORNER CASE* it would appear that other principles would apply.

Upon the general question of public aid to sectarian institutions, see note to *Dakota Synod v. State*, 14 L.R.A. 418.

Upon the question of religious exercises or instruction in public schools. see case note to *Church v. Bullock*, 16 L.R.A. (N.S.) 860.

Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603; Land, Log, & Lumber Co. v. McIntyre, 100 Wis. 245, 69 Am. St. Rep. 915, 75 N. W. 964; Quaw v. Paff, 98 Wis. 587, 74 N. W. 369; 1 Dill. Mun. Corp. 4th ed. § 548; Goshen Twp. v. Springfield, Mt. V. & P. R. Co. 12 Ohio St. 624, 80 Am. Dec. 386; 25 Am. & Eng. Enc. Law, p. 8; Collins v. Henderson, 11 Bush, 74; Nevil v. Clifford, 63 Wis. 435, 24 N. W. 65; Beach, Modern Law of Eq. Jur. § 19.

The school board should be restrained from holding a common public school in the parochial school building.

1 Dill. Mun. Corp. §§ 22-25; Frederick v. Douglas County, 96 Wis. 417, 71 N. W. 798; School Dist. No. 3 v. Macloon, 4 Wis. 79; Stroud v. Stevens Point, 37 Wis. 367; 28 Cyc. Law & Proc. pp. 128-132.

Messrs. Wigman, Martin, & Martin, for respondents:

The building belonging to the district could not accommodate the pupils of school age, and the board was free to provide and pay for the secular education required by law.

Millard v. Board of Education, 121 Ill. 297, 10 N. E. 669.

The use of the parochial building did not make the school a sectarian one.

Rogers v. School Dist. No. 2, 1 N. B. Eq. 266; Hackett v. Brooksville Graded School Dist. 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 A. & E. Ann. Cas. 36; Pfeiffer v. Board of Education, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250; Moore v. Monroe, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; Billard v. Board of Education, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 422, 2 A. & E. Ann. Cas. 521; O'Connor v. Hendrick, 184 N. Y. 421, 7 L.R.A.(N.S.) 402, 77 N. E. 612, 6 A. & E. Ann. Cas. 432; Hy-song v. School Dist. 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482.

Dodge, J., delivered the opinion of the court:

But two questions arise upon this appeal, and they rather narrow ones. The very important questions as to what acts may constitute the giving or allowing sectarian instruction such as is prohibited in public schools by article 10, § 3, Wis. Const. and whether the acts done in the instant case are within that inhibition, are treated in an able and exhaustive opinion by the trial court, but are not presented by the appeal. We are therefore to start with the fact that for nearly twenty years the school officers have annually paid school-district moneys for support of a school where sectarian instruction was permitted. The question whether such payments were so unlawful L.R.A.(N.S.)

ful that the school district, as a corporation, might maintain an action at law to recover them back from the recipients, or for damages against the district officers and their confederates for dissipating the school funds, was not decided, but affirmative answer was hypothetically assumed by the trial court, as also that the district will not bring any such action. The right of a member of a corporation to invoke the interference of a court of equity to practically coerce the reluctant corporation to enforce its legal rights against its officers and their confederates is abundantly established by our decisions. Frederick v. Douglas County, 96 Wis. 411, 71 N. W. 798; Webster v. Douglas County, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. 885, 78 N. W. 451; Northern Trust Co. v. Snyder, 113 Wis. 518, 90 Am. St. Rep. 867, 89 N. W. 460. But, since the application must be to a court of equity, equitable considerations will guide and control in granting or withholding relief. The court will not coerce the enforcement of a strict legal right, however clear, if thereby injustice and inequity will be done. In development of this rule it is well settled that a court of equity may and should refuse to upset consummated and completed transactions to the hurt of those who have acted in good faith at the suit of plaintiffs who, by laches or failure to protest upon opportunity before the acts were done, have induced or justified belief that they acquiesced in and approved such acts. Helms v. McFadden, 18 Wis. 192; Cross v. Bowker, 102 Wis. 497, 78 N. W. 564; Frederick v. Douglas County, 96 Wis. 425, 71 N. W. 798; McCann v. Welch, 106 Wis. 142, 151, 81 N. W. 996. This rule was applied by the circuit court, who found as facts that plaintiffs and all other taxpayers had been cognizant of the manner of conducting the school, and that the electors of the district each year had been informed that the money had been spent for such purpose, and, without protest from any, at each meeting directed like expenditures for the ensuing year. Such finding is not antagonized by any clear preponderance of evidence. On the faith of such acquiescence, believing that all taxpayers approved, the defendant officers have parted with the money, and, quite obviously, must lose it if compelled to reimburse the district. These plaintiffs at least cannot equitably ask that the defendants so suffer for acts induced and invited by plaintiffs' own conduct.

2. We find no error in the trial court's refusal to enjoin the district and board from maintaining a common school in the parochial school building. Incidentally, it may be noted that there is no prayer for such specific relief; but the court considered the

ARKANSAS SUPREME COURT.

CLARA BELL FRANK et al., Appts.,
v.

CHARLES F. FRANK et al.

(— Ark. —, 113 S. W. 640.)

Equity — construction of will — jurisdiction.

A court of chancery will refuse to entertain a bill merely to construe a will in which no trust is involved.

(October 26, 1908.)

APPEAL by defendants from a decree of the Chancery Court for St. Francis County in complainants' favor in a suit for the construction of a will. Reversed.

Statement by HILL, Ch. J.:

John H. Frank was a resident of Memphis, Tennessee, and died there on October 6, 1904, leaving a will containing six paragraphs. The first paragraph provides for the payment of his debts; the second is a devise of his residence to two of his daughters and one of his sons; the third provides a legacy of \$1,000 for a grandson. The fourth is as follows: "I hereby give, devise and bequeath to my seven children and legal heirs, to wit, Chas. F., Robt. B., John L., Walter A., Clara M., Elizabeth G. and Leonora F. Frank, now Mrs. S. A. Bowen, all my property, real, personal and mixed, wheresoever situated, not already disposed of, which I now own or may hereafter acquire and of which I may die seized and possessed, absolutely and in fee simple and in equal shares. The division shall be made by three commissioners to be appointed by my said children, and the lots and parcels of land so divided shall be drawn for by them and any difference in the valuation be settled among themselves. The property of my daughters, however, shall be held and owned by them for their sole and separate use and enjoyment, free from the debts and contracts of any husbands, for and during their natural lives with remainder in fee to their children, and in default of children surviving either of them, then to my children who shall then be living, their heirs and assigns forever; and should any of my sons die without issue, his or their shares shall also revert to my children then living, their heirs and assigns forever." The fifth paragraph is a provision that no lawyers' fees or court costs whatever be charged to his estate, and any heir desiring

to employ an attorney should do so at his own individual expense. The sixth appointed three executors, and made provision for choosing their successors. Mr. Frank owned large tracts of land in Lee, Crittenden, and St. Francis counties, Arkansas. He left seven children surviving him. The children were all adults, and there were eight grandchildren, all of whom were minors. His children filed suit in the chancery court of St. Francis county against the grandchildren and the executors, seeking a construction of the will. They set forth the ownership of the land in said county, and other counties in Arkansas, by Mr. Frank at his death, the execution of his will and its due probate in Shelby county, Tennessee, the names and residences of his children and grandchildren, and of the executors of the will, and that duly authenticated copies of the will had been filed with the clerk of each of said counties, and had been duly admitted to probate by the probate courts of Lee, Crittenden, and St. Francis counties; and set forth that the executors had duly qualified in the state of Tennessee, and are proceeding with the administration of said estate in the state of Tennessee, and have paid, or will pay, all of the debts and liabilities of every character, and have ample personal assets for that purpose, so that the said executors have not and will not qualify in the state of Arkansas, as there is no occasion for their doing so. And they further alleged that the legacy given by the said will to the grandson had been paid, or would be paid, by the executors in Tennessee, and there is no necessity or occasion for taking such legacy into account for the purposes of this suit. They further alleged that a suit had been brought and is now pending in the chancery court of Shelby county, Tennessee, for a construction of the will of said John F. Frank, and that such court has jurisdiction of the subject-matter and the executors named in said will, and that the children of said Frank are the plaintiffs, and his grandchildren are the defendants, therein, and that said suit will be finally settled and determined with reference to the real estate located in the state of Tennessee, and all the personal property wheresoever situated; but that said court has no jurisdiction to establish the title to the lands in Arkansas; and, for that reason, this suit was brought for the purpose of obtaining a construction and interpretation of the titles derived by the parties to the suit to the lands devised by the fourth paragraph of the will. The plaintiffs alleged that, by a proper construction and interpretation of the said fourth paragraph, the testator had attempted to limit a

Note. — Equity jurisdiction of bills for the construction of wills of real estate passing only legal estates, see case note to *Hart v. Darter*, 15 L.R.A. (N.S.) 599. 19 L.R.A. (N.S.)

remainder in the lands upon a previous gift or devise thereof to the plaintiffs, respectively, in fee simple and equally, and charged that, under the laws of Arkansas, it was not lawful to dispose of the fee in said lands, and then to create and limit a remainder upon such fee, and then to control and circumscribe the disposition of the fee, as was attempted in the will; and they allege that the plaintiffs take an absolute fee-simple title, and that the remainders and cross remainders to the children of the testator, or his grandchildren or descendants, as therein provided, are void and without effect. But they allege that, in consequence of the probate of the will, and because it disposes of all the said lands and contains provisions as above stated, it is necessary, in order that the titles of the plaintiffs may not be encumbered and embarrassed, and that they may be able to hold, use, enjoy, and dispose of their lands according to their title and rights under the laws, that the court should put a construction and an interpretation upon the fourth paragraph of said will, and ascertain and declare and decree the legal effect thereof, so that the titles and rights of the parties may be fixed and established, and that it may be known just what they are, and just what can be relied upon by all persons having occasion to deal with the same. It was prayed that the defendants be brought in under proper process, and guardians *ad litem* appointed for the minors, they having no regular guardians, and that the court put a proper construction and interpretation upon every part of the will, particularly the fourth paragraph; ascertain and fix the rights of the plaintiffs and defendants in the lands, which were described at length in the complaint, and their shares therein, and that the same be declared vested in the plaintiffs in fee equally, share and share alike, and not subject to the remainders and provisions of the said fourth clause of the will limiting their titles and rights, and restricting and circumscribing their powers of disposition, and that such provisions be declared and decreed to be of no force and effect. The minor defendants were all brought properly into court, and filed answer through their guardian *ad litem*, taking issue with the construction which the plaintiffs placed upon the will, and denying that the plaintiffs became seised in the fee simple of the real estate, and asserted that the proper construction of the fourth paragraph of the will was to devise the real estate to the plaintiffs for their natural lives, with a remainder in fee to the children of said plaintiffs; and they asked that the court place such construction upon the will. The defendants also

filed a demurrer to the complaint, on the ground that it did not state a cause of action. This demurrer does not appear to have been acted upon by the court. Testimony was taken, which only went to prove the children and grandchildren left by Mr. Frank at the time of his death, and the pendency of the suit in Tennessee, and other matters of fact alleged in the complaint. It was proved that all of the indebtedness of the estate had been discharged. The executors made no answer to the complaint, and accepted service of notice to take depositions. The case was heard on the complaint and its exhibits, and the answer of the infant defendants by their guardian *ad litem*, the evidence of service showing that the nonresident defendants were properly summoned, and the will and the depositions. The court construed the will as prayed in the complaint. The infant defendants, by their guardian *ad litem*, excepted to the same, and took an appeal.

Mr. John Gatling for appellants.

Messrs. W. M. Randolph, George Randolph, and Wassell Randolph for appellees.

Hill, Ch. J., delivered the opinion of the court: .

As will be seen by reference to the statement of facts, this is a bill brought by the children of John F. Frank to obtain a construction of the fourth paragraph of his will; the children maintaining that thereunder they obtained a fee-simple title to the lands devised in said paragraph, and the answer of the guardian *ad litem* of the grandchildren maintaining that the children obtained a life estate, with a vested remainder in the grandchildren. There is no trust involved, no trust estate is created, and the executors are not seeking aid or instruction in the discharge of their duties. The indebtedness of the estate has been paid. The sole question sought to be determined is the title conveyed to the respective parties to this suit under the fourth clause of the will. No controversy has arisen over it, the object of the suit appears to be to prevent, rather than to settle, a controversy. There are no equitable titles or trusts created by the will. The titles conferred by the fourth paragraph—whatever they may be—are purely legal and capable of assertion in a court of law. Has a chancery court jurisdiction to entertain this suit? Mr. Pomeroy says: "Although there is not an entire uniformity in the decisions by courts of different states upon this particular subject, yet the doctrine which seems to be both in harmony with principle and sustained by the weight of authority is that

the special equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will, without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated." 3 Pom. Eq. Jur. 3d ed. § 1156. This statement was quoted and followed in *Head v. Phillips*, 70 Ark. 432, 68 S. W. 878, and an examination of the authorities proves it to be sound: The same principle is thus stated in the *Encyclopædia of Pleading & Practice*: "In fact, by the great preponderance of authority, the power of courts of equity to construe wills is simply an incident of their general jurisdiction over trusts; and, while such power will be exercised liberally on behalf of executors, trustees, or other persons interested in trusts created by wills, suits brought solely for the construction of wills, where no trust is involved, will not be entertained." 22 Enc. Pl. & Pr. p. 1191. The court of appeals of New York said: "It is by reason of the jurisdiction of the court of chancery over trusts that courts having equity powers as an incident of that jurisdiction take cognizance of, and pass upon, the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, or when only legal rights are in controversy." *Chipman v. Montgomery*, 63 N. Y. 221. In *Bailey v. Briggs*, 56 N. Y. 407, it is thus expressed: "It is when the court is moved in behalf of an executor, trustee, or *cestui que trust*, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts." The Illinois court said: "Where no trust is created, the law, as we understand it, is that neither the executor nor the heir or the devisee who claims only a legal title in the estate will be permitted to come into a court of equity for the purpose of obtaining a judicial construction of the provisions of the will." *Strubher v. Belsey*, 79 Ill. 307. This case was followed and reiterated in *Harrison v. Owsley*, 172 Ill. 629, 50 N. E. 227. *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497, is strikingly similar to the case at bar. The lower court had given judgment on titles derived from a will at the instance of an heir, where no trust was involved, and the supreme court declined to pass upon the will, and dismissed the action for want of jurisdiction, 19 L.R.A. (N.S.)

although the jurisdiction had not been questioned. The following cases have also been examined, and found to contain the same principle, in many of which there are reviews of the authorities on the subject: *Woodlief v. Merritt*, 96 N. C. 226, 2 S. E. 350; *Dill v. Wisner*, 88 N. Y. 153; *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Fahy v. Fahy*, 58 N. J. Eq. 210, 42 Atl. 726; *Kelley v. Kelley*, 80 Wis. 486, 50 N. W. 334; *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497; *Miller v. Drane*, 100 Wis. 1, 75 N. W. 413. This court reached the same conclusion in *Head v. Phillips*, supra. A demurrer was interposed in the chancery court, which does not seem to have been passed upon; but it raised the question of jurisdiction. *Kelley v. Kelley*, supra. Even without the demurrer, however, the court should have declined to pass upon the issue tendered, as it is not the subject-matter of jurisdiction of the chancery court, and consent cannot give such jurisdiction. *Mansfield v. Mansfield*, supra; *Richards v. Lake Shore & M. S. R. Co.* 124 Ill. 517, 16 N. E. 909.

In view of these authorities and many more which may be found cited by the text writers and reviewed in the cases mentioned, it was unquestionably the duty of the chancery court to refuse to entertain the bill; and, for the error in entertaining it and rendering a decree construing the will, the decree is reversed, and the cause remanded, with instructions to dismiss the bill without prejudice to any future litigation which may arise between the parties.

CALIFORNIA SUPREME COURT.

BARBARA E. BROWN, Exrx., etc., of John A. Brown, Deceased, et al., Appts.,
v.

TOWN OF SEBASTOPOL, Resp't.

(153 Cal. 704, 96 Pac. 363.)

Executor — presentation of claim — conveyance of property.

1. Presentation of a claim as a creditor of the estate is not a condition to the main-

Case Note — Necessity in a complaint for specific performance of alleging facts showing adequacy of consideration for contract sought to be enforced.

Where a party is seeking to enforce in equity the specific performance of a contract, there must be an allegation of facts which affirmatively show the adequacy of consideration. A mere statement of the price agreed to be paid is not enough. There must be a showing of the value, so that the court can determine whether or

tenance of an action to compel a conveyance by the executor of one holding a legal title of land, the title to which, in equity and good conscience, should be conveyed to complainant.

Pleading — specific performance — sufficiency of allegations.

2. A complaint to compel specific performance of a contract to convey land is not demurrable for failure to present facts which will enable the court to say that the consideration is adequate, where it specifically alleges the adequacy of the consideration.

Specific performance — consideration — services.

3. Specific performance of a contract to convey land will not be denied because the consideration was services to be rendered by the grantees, if they have been fully performed.

Same — source of consideration.

4. The right of a town to specific per-

formance of a contract to convey land to it in consideration of its opening and constructing a road through other property of the grantor without expense to him is not affected by the fact that some of the money for the construction of the road was gathered by private subscription, and did not all come from the public treasury.

Contract — town — proceeds.

5. The right of a town to enforce specific performance of a contract to convey property to it in consideration of its opening a street is not affected by a finding that the agreement was made with members of the board of township trustees, if they were acting for the town.

Specific performance — town.

6. An incorporated town having charter authority to purchase real estate may compel specific performance of a parol agreement to convey to it real estate in consideration of its opening a road through remaining property of the grantor, after

not it is in reasonable proportion to the price to be paid, or of other facts which are sufficient to satisfy the court that the contract is just and reasonable to the buyer. *White v. Sage*, 149 Cal. 613, 87 Pac. 193; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148; *Waymire v. Waymire*, 141 Ind. 164, 40 N. E. 523; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333. See also *Bruck v. Tucker*, 42 Cal. 346.

In an action for the specific performance of a contract to convey land, where facts are set out which show that acts of the plaintiff in carrying out the contract are an adequate consideration, there need be no specific averment as to value of the land or the adequacy of the consideration. The court distinguishes *Windsor v. Miner*, supra, on the ground that the contract in that case was executory. *Fleishman v. Woods*, 135 Cal. 261, 67 Pac. 276.

In *Tumlinson v. York*, 20 Tex. 694, a complaint was held insufficient because there was "no allegation that a valuable consideration was paid." The necessity of such an allegation was deemed an "essential fact," although there was no question of what must be shown as to the adequacy of the consideration.

Where an agreement acknowledging a consideration is made a part of a complaint for specific performance, it is not necessary, as far as the consideration is concerned, to allege any additional fact in order to perfect the pleading. *Younger v. Welch*, 22 Tex. 418.

The consideration for the agreement is one of the things which "must be clearly and definitely alleged" to make a petition for specific performance a sufficient pleading. *Jones v. Jones*, 49 Tex. 683.

An allegation "that the consideration which the said plaintiff was to pay to the said defendant and which the said defend-

ant was to receive from the said plaintiff for the lands herein described was adequate in amount and not disproportionate to the value of said lands" was held sufficient in *Kerr v. Moore* (Cal. App.) 92 Pac. 107; the court taking the view that to allege that the consideration "was adequate in amount" would hardly meet the requirement, but that the additional "not disproportionate to the value" was but another way of saying "equal in value," and that this was sufficient to make the complaint good.

Where a contract containing a recitation that it was executed "for valuable consideration" is made a part of a petition for specific performance, there is a sufficient allegation of a consideration to support the petition. *Byars v. Thompson*, 80 Tex. 468, 15 S. W. 1087.

Treating an injunction bill as a suit for specific performance, *Gaskins v. Peebles*, 44 Tex. 390, refused to grant the relief sought, because "the facts relied upon, the consideration for the agreement, the time when it was entered into, its terms and stipulations, are all so vaguely and indefinitely presented in the petition."

It was held in *Davenport v. Plano Implement Co.* 70 Ill. App. 161, that, in an action to compel a corporation to issue a certificate for certain shares of its stock, it was not necessary to allege the actual cash value of the property transferred in payment for the stock, where the averments of the bill particularized what the property was, that it was inspected by a committee of the corporation and had been retained and used in the business of the corporation, and that the transfer was authorized by the directors.

A general allegation that a contract was founded on a valuable consideration is sufficient in an action for specific performance, to sustain the petition as against a general demurrer. *Pattillo v. Jones*, 113 Ga. 330, 38 S. E. 745.

it has fully performed its agreement and been let into possession, and the former owner has disclaimed further interest in the property and been relieved from taxation on it on that account.

Appeal — favorable ruling.

7. A person cannot complain of a favorable amendment, pending appeal, of a judgment which inadvertently failed to afford him relief to which he was entitled.

(June 6, 1908.)

APPEAL by plaintiffs from a judgment of the Superior Court for Sonoma County in defendant's favor and from an order denying a motion for new trial in an action brought to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. S. K. Dougherty, for appellants:

The facts alleged will not enable the court to say that the consideration is adequate, and do not present a case for the interposition of a court of equity.

Bruck v. Tucker, 42 Cal. 346; Windsor v. Miner, 124 Cal. 492, 57 Pac. 386; Stiles v. Cain, 134 Cal. 170, 66 Pac. 231; Raymond v. Laboudigue, 148 Cal. 691, 84 Pac. 189; Flood v. Templeton, 148 Cal. 378, 83 Pac. 148; Magee v. McManus, 70 Cal. 553, 12 Pac. 451; Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179; Los Angeles Immigration & Land Co-op. Asso. v. Phillips, 56 Cal. 546; Smith v. Taylor, 82 Cal. 541, 23 Pac. 217; Burnett v. Kullak, 76 Cal. 535, 18 Pac. 401; Stanton v. Singleton, 126 Cal. 657, 47 L.R.A. 334, 59 Pac. 146; Morrill v. Everson, 77 Cal. 116, 19 Pac. 190; Nicholson v. Tarpey, 70 Cal. 608, 12 Pac. 778; Prince v. Lamb, 128 Cal. 128, 60 Pac. 689.

The order amending the conclusions of law was erroneous.

Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590.

The order modifying the judgment is erroneous.

Egan v. Egan, 90 Cal. 21, 27 Pac. 22; First Nat. Bank v. Dusy, 110 Cal. 69, 42 Pac. 476; Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775; O'Brien v. O'Brien, 124 Cal. 426, 57 Pac. 225; Re Cook, 77 Cal. 227, 1 L.R.A. 567, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431.

Messrs. L. G. Scott and T. J. Butts, for respondent:

One who claims, as his own, specific property held and claimed by an estate, is not a creditor of the estate within the meaning of the probate law.

Re Dutard, 147 Cal. 256, 81 Pac. 519; Byrne v. McGrath, 130 Cal. 316, 80 Am. St. Rep. 127, 62 Pac. 559; Elizalde v. Elizalde, 137 Cal. 634, 70 Pac. 861; Whittier v. Stege, 61 Cal. 238; Byran v. Tormey, 84 Cal. 126, 19 L.R.A. (N.S.)

24 Pac. 319; Civil Code, § 1605; Fleishman v. Woods, 135 Cal. 259, 67 Pac. 276; Windor v. Miner, 124 Cal. 492, 57 Pac. 386; Ullsperger v. Meyer, 217 Ill. 262, 2 L.R.A. (N.S.) 221, 75 N. E. 482, 3 A. & E. Ann. Cas. 1032; Warner v. Marshall, 166 Ind. 88, 75 N. E. 582.

The agreement was not enforceable in its inception, but was *intra vires* and was ratified by all parties afterwards, and respondent has performed his part.

Findlay v. Pertz, 29 L.R.A. 188, 13 C. C. A. 559, 31 U. S. App. 340, 66 Fed. 427; San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co. 112 Cal. 62, 33 L.R.A. 788, 44 Pac. 333; Underhill v. Santa Barbara Land, Bldg. & Improv. Co. 93 Cal. 312, 28 Pac. 1049; Sherber v. Lancaster, 6 Lanc. Bar, 201; People ex rel. Alexander v. Swift, 31 Cal. 28; McCracken v. San Francisco, 16 Cal. 591; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865; Creighton v. San Francisco, 42 Cal. 452; Jordan v. School Dist. No. 3, 38 Me. 168; Fisher v. School Dist. No. 17, 4 Cush. 496; Dubuque Female College v. Dubuque, 13 Iowa, 555; Campbell v. Kenosha, 5 Wall. 194, 18 L. ed. 610; Delafield v. Illinois, 26 Wend. 192; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Hampshire County v. Franklin County, 16 Mass. 76; Hasbrouck v. Milwaukee, 13 Wis. 38, 80 Am. Dec. 718; School Dist. No. 6 v. Aetna Ins. Co. 62 Me. 330; State v. Bank of Missouri, 45 Mo. 528; Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; Dickinson v. Conway, 12 Allen, 487; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Marshall County v. Schenck, 5 Wall. 772, 18 L. ed. 556; Bissell v. Jeffersonville, 24 How. 287, 16 L. ed. 604; 9 Ballard, Real Prop. § 87; Fergus Falls v. Fergus Falls Hotel Co. 80 Minn. 165, 50 L.R.A. 170, 81 Am. St. Rep. 249, 83 N. W. 54; Kennedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039; Brown v. New York, 63 N. Y. 239; Richardson v. Crandall, 47 Barb. 335.

Title passed by estoppel.

Des Moines & Ft. D. R. Co. v. Lynd, 94 Iowa, 368, 62 N. W. 806; Lane v. Pacific & I. N. R. Co. 8 Idaho, 230, 67 Pac. 656; Church v. Johnson Bros. 93 Iowa, 544, 61 N. W. 916; Cochran v. Thomas, 131 Mo. 258, 33 S. W. 6; Pentz v. Kuester, 41 Mo. 447; McClanahan v. West, 100 Mo. 309, 13 S. W. 674; Southern L. Ins. & T. Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; Chesser v. De Prater, 20 Fla. 691; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; Stewart v. Wyandotte County, 45 Kan. 708, 23 Am. St. Rep. 746, 26 Pac. 683; Ferguson v. Landram, 5 Bush, 230, 96 Am. Dec. 350; McCarthy v. Lavasche, 89 Ill. 270, 31 Am.

Rep. 83; *Counterman v. Dublin Twp.* 38 Ohio St. 515; *Rankin v. Newman* (Philbrook v. Newman) 114 Cal. 635, 34 L.R.A. 265, 46 Pac. 742; *Hawley v. Gray Bros. Artificial Stone Pav. Co.* 106 Cal. 337, 39 Pac. 609; *Blood v. La Serena Land & Water Co.* 134 Cal. 361, 66 Pac. 317; *Pope v. J. K. Armaby Co.* 111 Cal. 159, 43 Pac. 589; *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695; 1 *Abbot, Mun. Corp.* § 259; *Helena v. Turner*, 36 Ark. 577; *Monticello v. Cohn*, 48 Ark. 254, 3 S. W. 30; *St. Louis v. Davidson*, 102 Mo. 149, 22 Am. St. Rep. 764, 14 S. W. 825; *New York v. Sonneborn*, 113 N. Y. 423, 21 N. E. 121; *Buffalo v. Balcom*, 134 N. Y. 532, 32 N. E. 7; *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 32 L.R.A. 740, 34 Atl. 359; *Scheussler v. Mason* (Tex. Civ. App.) 28 S. W. 42; *Los Angeles v. Cohn*, 101 Cal. 373, 35 Pac. 1002; *Douglass v. Scott*, 5 Ohio, 198; *Morris v. Wheat*, 8 App. D. C. 387; *Tefft v. Munson*, 57 N. Y. 99; *Philly v. Sanders*, 11 Ohio St. 496, 78 Am. Dec. 316; *Carver v. Jackson*, 4 Pet. 1, 7 L. ed. 761; *Sacramento County v. Southern P. Co.* 127 Cal. 222, 59 Pac. 568, 825.

Henshaw, J., delivered the opinion of the court:

Plaintiff sued to quiet title (with other lands) to a triangular piece of land situate within the corporate limits of the defendant town of Sebastopol, alleging title and right of possession in her testator. Defendant pleaded by way of answer and cross complaint, in the cross complaint alleging that during his lifetime John A. Brown, plaintiff's testator, entered into a contract whereby he agreed to sell and convey to the defendant town the real property in controversy, upon consideration expressed as follows: "That defendant would remove from said premises certain houses, buildings, and structures then located thereon belonging to said John A. Brown, and place said houses, buildings, and structures upon other lands belonging to said John A. Brown, and would lay out, make, and put in condition for use a street along and across the lands of said John A. Brown, . . . and would lay out, open up, make, and put in condition for use Depot street in front of and adjacent to the premises hereinbefore described, and would grade and put oil on that portion of said Depot street in front of and adjacent to the said premises hereinbefore described, and in front of other lands and premises belonging to said John A. Brown, and that defendant would pay to said John A. Brown the sum of \$50 when the said Depot street had been oiled as hereinbefore alleged." The complaint further alleged the performance, by defendant, of all the acts to be by it done, that defendant entered into possession of the 19 L.R.A. (N.S.)

disputed land with the acquiescence of Brown, and ever since has continued in such possession, and that, upon the death of Brown, \$50 was tendered to the executrix of his will, with the request that a deed be executed in conformity with the agreement; that the tender was refused, and the right to a deed denied. It is then alleged that the services rendered and the sum agreed to be paid for the premises was and is a just, fair, and adequate consideration and price for the land therein described. Issue was joined upon this cross complaint, and a trial resulted in findings and judgment for the defendant. From this judgment, and from the order of the court denying plaintiffs' motion for a new trial, plaintiffs appeal.

A demurrer to the cross complaint was interposed, upon the ground that it failed to state sufficient facts, in this, that there was an absence of an allegation of a presentation of a claim against the estate. But it is apparent from the cross complaint that it is an action in equity, to enforce a trust as to specific real property; that plaintiffs hold legal title to a piece of land, which legal title, in equity and good conscience, they should be compelled to convey to defendant. It is well settled that, where recovery is sought of specific property alleged to have been held in trust by the decedent at the time of his death, a party seeking such recovery is not asking payment of the claim from the assets of the estate, and is therefore not required to present his claim as a creditor of the estate. *Byrne v. McGrath*, 130 Cal. 316, 80 Am. St. Rep. 127, 62 Pac. 559; *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861; *Re Dutard*, 147 Cal. 256, 81 Pac. 519. Appellants further contend that the complaint fails to present facts that will enable the court to say that the consideration is adequate, and that the contract is just and reasonable as to the plaintiffs. But the complaint specifically alleges the fairness of the contract and the adequacy of the consideration, and is not obnoxious to demurrer upon this ground. It is again urged that there is no mutuality of remedy, because the contract could not be enforced against the town. Civil Code, § 3386. While it is true that a part of the consideration moving from the defendant was in the nature of personal service, and therefore not specifically enforceable, yet the situation here pleaded is that expressly contemplated by § 3386, where the defendant has fully performed, in which case it is well settled that the obligation, if in other respects specifically enforceable, may be enforced *in specie* against the party in default. It is so held in that class of cases where the consideration is, upon the one side, purely personal and in the nature of personal services.

poration. Where particular powers are expressly conferred, and there is also a general grant of power, such general grant by intendment includes all powers that are fairly within the terms of the grant, and are essential to the purposes of the municipality, and not in conflict with the particular powers conferred. The law does not expressly grant powers and impliedly grant other powers to conflict therewith.

Same — particular powers.

5. If reasonable doubt exists as to a particular power of a municipality, it should be resolved against the city; but, when the particular power is clearly conferred, or is fairly included in or inferable from other powers expressly conferred, and is consistent with the purposes of the municipality and the powers expressly conferred, the existence of the power should be resolved in favor of the city, so as to enable it to perform its proper functions of government.

Same — implied power — water supply.

6. Authority to make provisions within lawful limitations, for securing or furnishing to a city and its inhabitants an abundant supply of good water for all purposes, is a usual and necessary power of a municipality, and such power may be included in powers given in general terms; where there is nothing in the enumeration of particular powers conferred to limit in this particular the operation of the general powers conferred.

Same — powers — exercise — discretion.

7. Unless expressly or impliedly restrained by statute, a municipal corporation has a discretion in the choice of means and methods for exercising the powers given it for governmental or public purposes, and the usual limitations upon the actions of municipalities within their legal powers are good faith and reasonableness, not wisdom or perfection.

acquire by purchase an existing system of waterworks constructed by private parties.

So, in *Austin v. Bartholomew*, 46 C. C. A. 327, 107 Fed. 349 (writ of certiorari denied in 183 U. S. 698, 46 L. ed. 395, 22 Sup. Ct. Rep. 934), it was held that a city could rent hydrants of a water company for municipal purposes, where its charter authorized it to construct waterworks, to provide the city with water, to erect hydrants, etc.

So, in *Springville v. Fullmer*, 7 Utah, 450, 27 Pac. 577, it was held that a city could take possession and control of the waters of a certain stream, with the express consent of the original locators and owners thereof, and continue to hold possession of the same and distribute its waters, where its charter granted it the right to furnish water, lay pipes, etc., for the extinguishment of fires and the convenience of the inhabitants.

And in the following cases it was held that a municipality had the right to provide for a supply of water by contract with third persons, under charter provi-

Same — court interference.

8. When action is taken by a municipality in the exercise of its powers, the methods used will not be controlled by the courts, where there is no abuse of power or discretion. All doubts as to the propriety of means used in the exercise of an undoubted municipal power will be resolved in favor of the municipality.

Same — powers — general — particular — limitation.

9. The authority given a municipality in the general law "to make and sink wells, erect pumps, dig drains," etc., is distinct from, and does not limit or qualify, the express particular authority "to pass all laws necessary to guard against fire," or the charter power "to provide for the establishment of waterworks," nor limit the powers given by the general clauses conferring powers upon the municipality.

Same — taxing power — limitation — water contract.

10. The limitations upon the taxing and bonding powers of the city of Tampa, contained in the charter act and the General Statutes of the state, do not preclude the city from granting privileges in its streets, or from making valid contracts by ordinance to carry out a lawful purpose of the municipality in procuring for the city and its inhabitants an adequate supply of good water for all purposes.

Same — water supply — method — discretion.

11. Where a city is authorized to provide for the establishment of waterworks, and to do and regulate any other matter or thing that may tend to promote the peace, health, welfare, prosperity, and morals of the city, and to do and perform all acts necessary and best adapted to the improvement and general interest of the city, the method used by the city in providing waterworks

sions empowering the city to enact such laws and ordinances as it might deem expedient for the peace, good government, health, and welfare of its inhabitants: *Greenville v. Greenville Waterworks Co.* 125 Ala. 625, 27 So. 764; *Dyer v. Newport*, 123 Ky. 203, 94 S. W. 25; *Webb City & C. Waterworks Co. v. Webb City*, 78 Mo. App. 422.

On the other hand, in *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 29, it was held that such general-welfare clause of a city charter gave the city no power to confer a franchise for owning and operating waterworks, where the city had never adopted the general law authorizing municipalities to legislate in regard to the construction and operation of waterworks. But this decision was reversed in 10 C. C. A. 60, 18 U. S. App. 458, 24 U. S. App. 81, 61 Fed. 782, because the city's charter gave it the express power to provide for the erection of waterworks, which provision it was said was "apparently not brought to the attention of the court below."

for the city is within the lawful discretion of the city, if no particular method is indicated by the law.

Same — private plant.

12. The powers of the city of Tampa in providing waterworks for the city and its inhabitants are not limited to the establishment of a municipal plant, and the city has authority to confer upon a corporation proper privileges and franchises in the use of the streets of the city to enable the corporation to furnish an adequate supply of good water for all purposes to the city and its inhabitants.

Same — ordinances — illegal provisions.

13. An ordinance of a city containing provisions sufficient of themselves to accomplish an expressed lawful purpose, the fact that the ordinance also contains separable illegal or improper provisions will not necessarily render the ordinance void *in toto*, when the elimination of the illegal portions will not cause results not intended, or affect the integrity of the remaining portions for the purposes expressed.

Contracts — statutory provisions.

14. Provisions of law applicable to the subject-matter of contracts are parts of the contracts, whether so expressed or referred to in the contracts, or not.

Same — public service — regulation.

15. Where the law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service.

Same — unenforceable provisions.

16. Where a municipal contract for the rendering of public service contains provisions that would be unenforceable because unreasonable, and the law provides for the regulation of the service rendered under the contract, such right to regulate may relieve the apparent unreasonable features of the contract.

Same — provisions sustained.

17. Municipal contracts for the rendering of public service will be sustained where the power is given to make the contract, and the terms of it, taken with the law controlling them, are not clearly violative of some provision or principle of law.

Municipal corporation — water supply — streets — exclusive use.

18. The powers conferred upon the city of Tampa by its charter and the general law do not authorize the city to grant an exclusive privilege to use the streets of the city for the purpose of furnishing water to the city and its inhabitants.

Same — capacity — rates.

19. Provisions contained in an ordinance of the city of Tampa relating to rates to be charged and to the capacity of a waterworks plant authorized in the streets should be construed as having reference to the expressed design to furnish an adequate supply of good water for all purposes, and to the governmental authority to regulate such matters as they affect the rights of the public.

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Ordinances — partial validity.

20. As the expressed purpose of the Tampa municipal-ordinance contract for the furnishing of water to the city and its inhabitants can be accomplished by its valid portions, and the elimination of invalid or improper portions does not injure the city, it cannot be said that it appears the ordinance would not have been passed without the invalid portions, or that an elimination of the invalid portions would cause results not intended by the ordinance.

(July 7, 1908.)

APPPLICATION for a writ of quo warranto to test the right of the respondent to exercise the privileges and franchises of using the public streets of the city of Tampa for the maintenance of a system of waterworks. Demurrer to the return overruled.

The facts are stated in the opinion.

Messrs. E. R. Gunby and Glen & Himes for relator.

Mr. P. O. Knight, for respondent:

The city of Tampa had power to enter into a contract for the establishment of a waterworks system.

Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Atlantic City Waterworks Co. v. Atlantic City, 39 N. J. Eq. 367; Southwest Missouri Light Co. v. Joplin, 101 Fed. 23, 113 Fed. 817; Austin v. Bartholomew, 46 C. C. A. 327, 107 Fed. 349; Los Angeles City Water Co. v. Los Angeles, 88 Fed. 721, affirmed in 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; Andrews v. National Foundry & Pipe Works, 10 C. C. A. 60, 18 U. S. App. 458, 24 U. S. App. 81, 61 Fed. 782; Anoka Waterworks, Electric Light & P. Co. v. Anoka, 109 Fed. 580; State ex rel. Jacksonville v. Jacksonville Street R. Co. 29 Fla. 591, 10 So. 590; Atlantic City Waterworks Co. v. Atlantic City, 48 N. J. L. 378, 6 Atl. 24; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Ludington Water-Supply Co. v. Ludington, 119 Mich. 489, 78 N. W. 558; Cartersville Improv. Gas & Water Co. v. Cartersville, 89 Ga. 683, 16 S. E. 25; Grant v. Davenport, 36 Iowa, 396; Saleno v. Neosho, 127 Mo. 627, 27 L.R.A. 769, 48 Am. St. Rep. 653, 30 S. W. 190; State ex rel. Kaiser Water Co. v. Phillipsburg, 23

Mont. 16, 57 Pac. 405; Crosby v. Montgomery, 108 Ala. 498, 18 So. 723; Greenville v. Greenville Waterworks Co. 125 Ala. 625, 27 So. 764; Connersville v. Connersville Hydraulic Co. 86 Ind. 184; Valparaiso v. Gardner, 97 Ind. 2, 49 Am. Rep. 416; Vincennes v. Citizens' Gaslight Co. 132 Ind. 114, 16 L.R.A. 485, 31 N. E. 573; Crowder v. Sullivan, 128 Ind. 486, 13 L.R.A. 647, 28 N. E. 94; Indianapolis v. Indianapolis Gaslight & Coke Co. 66 Ind. 396; Newport v. Newport Light Co. 84 Ky. 168; New Orleans Gaslight Co. v. New Orleans, 42 La. Ann. 188, 7 So. 559; Memphis v. Memphis Water Co. 5 Heisk. 529; Blood v. Manchester Electric Light Co. 68 N. H. 340, 39 Atl. 335; 1 Dill. Mun. Corp. pp. 27-39; Fergus Falls Water Co. v. Fergus Falls, 65 Fed. 591; Westerly Waterworks v. Westerly, 75 Fed. 181; Defiance Water Co. v. Defiance, 90 Fed. 753; State ex rel. Smith v. Burbridge, 24 Fla. 112, 3 So. 869.

Even if the franchise is invalid because by ordinance the city undertook to invest the company with exclusive rights in the city for a period of years, it would in no wise affect the validity of the contract.

Bartholomew v. Austin, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359; Illinois Trust & Sav. Bank v. Arkansas City, supra; 2 Abbott, Mun. Corp. p. 1152; Canova v. Williams, 41 Fla. 509, 27 So. 30; Tampa v. Salomonson, 35 Fla. 446, 17 So. 581; Little Falls Electric & Water Co. v. Little Falls, 74 Minn. 197, 77 N. W. 40.

The provision of the agreement as to levying taxes might be void, and still the contract, so far as the right of the company to do business here is concerned, be enforceable.

Bartholomew v. Austin and Little Falls Electric & Water Co. v. Little Falls, supra; 2 Abbott, Mun. Corp. pp. 1152-1154.

Messrs. Sparkman & Carter also for respondent.

Whitfield, J., delivered the opinion of the court:

In quo warranto proceedings instituted here by the attorney general against the Tampa Waterworks Company, a corporation, it is alleged that the company is exercising, without any warrant or authority of law, the privileges and franchises of using the public streets of the city of Tampa for stated purposes of a system of waterworks. A writ was issued by this court requiring the Tampa Waterworks Company "to show by what warrant or authority it has used and does use the privileges and franchises aforesaid, to wit, that of using the public streets of the city of Tampa by maintaining and operating a system of pipes, mains, and hydrants therein for the distribution and

supply of water to the city of Tampa and the inhabitants thereof for public and private uses, and that of having an exclusive right to furnish water within the city of Tampa to the said city and the inhabitants thereof."

The return of the respondent sets up facts to show its claim of right to use the franchises and privileges alleged, and avers that while, under its charter and articles of incorporation, it was granted by the state of Florida the exclusive right for twenty years from the date on which it commenced successful operation of its waterworks in the streets of Tampa, yet the respondent expressly denies that it has ever exercised, claimed, asserted, or usurped any exclusive right to furnish water within the city of Tampa to said city and the inhabitants thereof. The cause is considered upon a demurrer to the return.

The writ is issued against the Tampa Waterworks Company as a corporation, and it does not directly question the right of the respondent to exist as a corporate entity. The mandate does not call for a showing as to the right to exist as a corporation, but it requires the respondent only to show by what warrant or authority it has used and does use the privilege and franchise in the public streets as alleged. This being so, it is not necessary to consider the questions raised by the relator as to the constitutionality of the general incorporation acts of 1868 (chapter 1639, p. 118, Laws of Florida), under which the respondent claims to have obtained its charter to exist and do business as a corporation.

Articles of incorporation obtained under the general law authorizing the corporation to engage in the business of rendering public service in a municipality do not *ipso facto* authorize the corporation to use privileges and franchises that may be conferred by the municipality to render the public service therein.

As the right to exist as a corporation and to do the kind of business alleged are not questioned, the existence of proper authority from the city of Tampa to the corporation to exercise the privilege and franchise of using the streets as alleged is to be determined. The question is the existence of authority, not the proper exercise of it.

Municipalities are established by law for purposes of government. Their functions are performed through appropriate officers and agents, and they can exercise only such powers as are legally conferred by express provisions of law, or such as are by fair implication and intentment properly incident to or included in the powers expressly conferred for the purpose of carrying out and accomplishing the object of the mu-

nicipality. Powers that are indispensable to the declared objects and purposes of a municipality may be inferred or implied from powers expressly given that are fairly subject to such construction. The difficulty of making specific enumeration of all such powers as the legislature may intend to delegate to municipal corporations renders it necessary to confer some power in general terms. The general powers given are intended to confer other powers than those specifically enumerated. General powers given to a municipality should be interpreted and construed with reference to the purposes of the incorporation. Where particular powers are expressly conferred, and there is also a general grant of power, such general grant by intentment includes all powers that are fairly within the terms of the grant, and are essential to the purposes of the municipality, and not in conflict with the particular powers expressly conferred. The law does not expressly grant powers and impliedly grant others in conflict therewith. If reasonable doubt exists as to a particular power of a municipality; it should be resolved against the city; but, where the particular power is clearly conferred, or is fairly included in or inferable from other powers expressly conferred, and is consistent with the purposes of the municipality and the powers expressly conferred, the existence of the power should be resolved in favor of the city, so as to enable it to perform its proper functions of government.

Among the usual functions of a municipal government are those of granting privileges in the use of its streets for the purpose of rendering services of a public nature, such as furnishing the municipality and its inhabitants service necessary or useful for the common welfare of all. The furnishing of water for use and for free protection is a service necessary or useful for the individual and collective well-being of a city and its inhabitants. Authority to make provisions within lawful limitations for securing or furnishing to a city and its inhabitants an abundant supply of good water for all purposes is a usual and necessary power of a municipality; and such power may be included in powers given in general terms, where there is nothing in the enumeration of particular powers conferred to limit in this particular the operation of the general powers conferred. *Porter v. Vinzant*, 49 Fla. 213, 111 Am. St. Rep. 93, 38 So. 607; *Mernaugh v. Orlando*, 41 Fla. 433, 27 So. 34.

Unless expressly or impliedly restrained by statute, a municipal corporation has a discretion in the choice of means and meth-

ods for exercising the powers given to it for governmental or public purposes, and the usual limitations upon the actions of municipalities within their legal powers are good faith and reasonableness, not wisdom or perfection: *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229, text, 271, 30 L.R.A. 540, 51 Am. St. Rep. 24, 18 So. 677.

Where action is taken by a municipality in the exercise of its powers, the methods used will not be controlled by the courts, where there is no abuse of power or discretion. All doubts as to the propriety of means used in the exercise of an undoubted municipal power will be resolved in favor of the municipality.

In its return the respondent exhibits an ordinance contract, approved September 29, 1887, between the city of Tampa and the Tampa Waterworks Company, containing provisions "that, in view of the urgent necessity for the better protection against fire, and also to obtain for the use of the inhabitants of said city an abundant supply of good water for all purposes, . . . the exclusive right and privileges to construct, maintain, and operate waterworks for public and private supply of water within said city for a term of thirty years is hereby granted, . . . together with the right to lay pipes, erect hydrants, fountains, and such other structures and appurtenances in any and all the streets or other public ways in the said city as may be required for the distribution of water;" that, in consideration of \$4,950 per annum, the company agreed to erect waterworks with a reservoir capable of holding 100,000 gallons of water of sufficient height to give a stated pressure at a given point in the city, to supply with water for fire purposes, mains, etc., as designated, to supply with water, for the payment of city taxes and license for the first ten years of the contract, the city hall, guardhouse, and market house, with designated accommodations at such places on the mains as designated by the city council; that a sufficient tax shall be levied and collected annually upon all taxable property of the city to meet the payments due under the contract as they respectively mature; that the main or pipe system shall be laid in such streets as shall give the greatest amount of fire protection and the distribution of an adequate amount of water to the consumers; that the company shall, in accordance with the contract set out in the ordinance, extend the water mains to any part of the said city, when ordered to do so by the proper authorities of the city of Tampa: that there shall be annually levied and collected a tax of five mills on the property in the city for the payment of the obligations of the con-

tract. Other provisions of the ordinance contract need not be stated here.

Chapter 3779, which became effective June 2, 1887, and established the city of Tampa, provides, in § 7 (Laws 1887, p. 193), that the "city council shall have power to make, ordain, establish, and execute for the government of said city such ordinances . . . as they shall deem necessary, . . . to provide for the establishment of waterworks, . . . and to do and regulate any other matter or thing that may tend to promote the peace, health, welfare, prosperity, and morals of the said city; and . . . said city council shall have all the powers and perform all the duties imposed upon them by the laws of Florida . . . providing for the creation and government of cities and towns."

Under the general laws of the state, the city council had the power "to levy and collect a special tax annually for waterworks and fire protection" (Acts 1885, p. 46, chap. 3605, § 1); "to pass all laws and ordinances which may be necessary for the preservation of the public health; to make and sink wells, erect pumps, dig drains; to pass all necessary laws to guard against fire; . . . and to do and perform all such other act or acts as shall seem necessary and best adapted to the improvement and general interest of the city" (McClellan's Dig. 1881, chap. 37, §§ 20, 21, p. 249).

It is contended that these provisions of law did not authorize the city of Tampa to make the contract with the respondent. The argument is that the furnishing of water by a municipal plant was contemplated, because the general law authorized the city council "to make and sink wells, erect pumps, dig drains," issue bonds for building or repairing the public works of the city, and levy a special tax for waterworks and fire protection; because the city charter empowered the city council, by ordinance, "to provide for the establishment of waterworks" and to impose fines and penalties for breaches of ordinances; because limitations were placed upon the power to borrow money and issue bonds, and to make appropriations, and enabling legislation was enacted; and because of the provisions as to the related powers given by the charter and by the general law, and the limitations contained in § 8 of article 8 of the Constitution.

The authority contained in the general law "to make and sink wells, erect pumps, dig drains," etc., is distinct from, and does not limit or qualify, the express particular authority "to pass all laws necessary to guard against fire," or the charter power "to provide for the establishment of waterworks." Nor does the express specific au-

thority as to wells, pumps, and drains limit the powers given under the general-welfare clauses. No such purpose can be discovered in a careful consideration of all the provisions of law on the subject of the municipal powers. Any provision made by the city must be by ordinance, and cities are authorized to contract by ordinance, as well as to erect their own plants by ordinance and to perform other duties by ordinance.

The limitations upon the taxing powers of the city, contained in the charter act or in the General Statutes of the state, do not preclude the city from granting privileges in its streets or from making valid contracts by ordinance to carry out any lawful purpose of the municipality.

The powers given as to taxation and appropriations are as applicable to the obligations of lawful contracts as to municipal plants. Powers and limitations as to bonds for public works of the city do not forbid the making of valid contracts for lawful purposes. The method by which waterworks are to be provided is not indicated in the law, and the city may exercise a lawful discretion in using the charter powers "to provide for the establishment of waterworks . . . and to do and regulate any other matter or thing that may tend to promote the peace, health, welfare, prosperity, and morals of the said city," and the powers given by the general law to do and perform all acts necessary and best adapted to the improvement and general interest of the city.

The powers given the city council are not expressly or by fair implication limited to the establishment of a municipal plant for the purpose of conserving the public health, safety, and general welfare, by providing water for the city and its inhabitants. It was clearly within the power of the city, under the provisions of law herein referred to, to make a valid contract with a private corporation "to obtain for the use of the inhabitants of said city an abundant supply of good water for all purposes," and to confer upon the corporation proper privileges and franchises in the use of the streets of the city to enable the company to properly render the public service provided for.

Under the express authority given the city council of the city of Tampa by the charter act "to provide for the establishing of waterworks," and to "have all the powers and perform all the duties imposed upon them by the laws of Florida . . . providing for the creation and government of cities," taken in connection with the powers given by the general law on the subject "to levy and collect a special tax annually for

waterworks and fire protection, . . . to pass all laws and ordinances which may be necessary for the preservation of the public health. . . . to make and sink wells, erect pumps, and dig drains, to pass all necessary laws to guard against fire, . . . and to do and perform all such other act or acts as shall seem necessary and best adapted to the improvement and general interest of the city," and construed with reference to the principle that, while municipalities can exercise only such powers as are given expressly or by necessary or fair implication from those expressly given, yet such municipalities are given all the powers that are incident to and by implication are fairly included in powers expressly given and that are necessary to the purposes of their creation, it is clear that the usual and essential authority to make provision for an adequate supply of good water for the use of the city and its inhabitants is included in the powers conferred upon and the duties imposed upon the city of Tampa when the contract was made. It is also clear that the city had the choice of means for securing such supply of water, since nothing in the charter act or general law can be fairly held to limit the bona fide discretion necessarily vested in the city for the public welfare.

It is contended that, even if the city had the power to make the contract with the respondent, the particular contract is void, because it undertakes to confer an exclusive privilege to fix rates, to limit the capacity of the plant, to exempt the property from taxation for ten years, to provide an unlawful levy of taxes and appropriation of funds, to divide municipal fines, to guarantee interest on respondent's bonds, and to regulate subscriptions to the stocks and bonds of the respondent.

Where a municipality, in the exercise of an undoubted power, confers by ordinance privileges and franchises for a proper purpose clearly expressed in the ordinance, which contains provisions sufficient of themselves to accomplish the expressed purpose, the fact that the ordinance contains separable illegal or improper provisions will not necessarily render the ordinance void *in toto*, when the elimination of the illegal portions will not cause results not intended, or affect the integrity of the remaining portions for the purposes designated by the ordinance.

Provisions of law applicable to the subject-matter of contracts are parts of the contracts, whether so expressed or referred to in the contracts or not.

Where the law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts

providing for the public service. State ex rel. Ellis v. Atlantic Coast Line R. Co. 52 Fla. 646, 12 L.R.A.(N.S.) 506, 41 So. 705.

Where a municipal contract for the rendering of public service contains provisions that would be unenforceable, because unreasonable, and the law provides for the regulation of the service rendered under the contract, such right to regulate may relieve the apparent unreasonable features of the contract.

Municipal contracts for the rendering of public service will be sustained, where the power is given to make the contract, and the terms of the contract, taken with the law controlling them, are not clearly violative of some provision or principle of law.

The powers conferred upon the city of Tampa by its charter and by general law do not give to the city authority to grant an exclusive privilege to use the streets of the city for the purpose of furnishing water to the city and its inhabitants (Florida C. & P. R. Co. v. Ocala Street & Suburban R. Co. 39 Fla. 306, 22 So. 692; Capital City Light & Fuel Co. v. Tallahassee, 42 Fla. 402, 28 So. 810); but the respondent expressly disclaims any such exclusive right.

The provision contained in the contract as to rates to be charged for the water is not void under the law; but it is subject to and is controlled by the right of the legislature to provide for regulating the rates under the provisions of § 30, art. 16, of the Constitution. Tampa v. Tampa Waterworks Co. 45 Fla. 600, 34 So. 631.

The provision for reservoirs, pipes, mains, etc., of specified dimensions, clearly has reference to the necessities of the city when the contract was made; and such provision is to be taken in connection with other provisions, and with the declared purpose of the contract "to obtain for the use of the inhabitants of said city an abundant supply of good water for all purposes." The provisions that the respondent should furnish "a first-class fire protection;" and that, "as the city grows and . . . should desire new hydrants, the party of the second part should erect them, and the city shall pay for them," and to "extend the water mains to any part of the said city, when ordered to do so;" and "that the main or pipe system shall be laid in such streets as shall give the greatest amount of fire protection and the distribution of an adequate amount of water to the consumers;" and other provisions of the ordinance contract,—must be considered as having reference to the necessities of the future as to increased capacity, and to the governmental authority to regulate and control such matters as they affect the rights of the public. See § 8 of article 8

and the declaration fails to allege that the injury to the live stock was occasioned by the fraud or gross negligence of the company or its employees." The plaintiff not desiring to amend his declaration, judgment was entered for the defendant, and the plaintiff sued out a writ of error.

In *Clyde S. S. Co. v. Burrows*, 36 Fla. 121, 18 So. 349, we pointed out that common carriers, by the common-law rule, are held to a very strict accountability for the loss of goods and chattels received for carriage; such accountability being independent of contract and imposed by law on grounds of public policy and commercial necessity for the protection of the owner of the property. The court said: "In the absence of a special contract restricting or modifying a common carrier's common-law liability in some particular which the courts may not consider unreasonable or subversive of public policy, such carrier is an insurer against all risks of loss or injury, except those resulting directly from the act of God or the public enemy and without the intervention of human agency while the carrier is in line of duty." Where the happening of the injury has been contributed to by the carrier, or would not have resulted from the act of God but for the carrier's negligence or departure from the line of his duty, he is not protected. The liability of a common carrier as an insurer does not extend to any damage resulting from any intrinsic cause against which care and foresight could not provide, for such cause is within the principle which excuses common carriers from loss or damage resulting from the act of God. *Norris v. Savannah, F. & W. R. Co.* 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475. Under this rule, the liability of the carrier, undertaking to transport live stock for those who choose to employ him, does not extend to any damage resulting from the nature, disposition, or viciousness of the animal. *East Tennessee, V. & G. R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489; *Cooper v. Raleigh & G. R. Co.* 110 Ga. 659, 36 S. E. 240.

The doctrine of the common law, which holds the carrier to the liability of an insurer, does not deny to the parties to the shipment the right to enter into contracts with reference to this liability; and it is well settled that the owner and the carrier may by contract provide for a limitation of the carrier's liability that is not illegal or unreasonable. *Atlantic Coast Line R. Co. v. Dexter*, 50 Fla. 180, 111 Am. St. Rep. 116, 39 So. 634; 1 *Hutchinson, Carr.* § 419, and cases cited; *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb. 275, 29 Am. St. Rep. 436, 49 19 L.R.A. (N.S.)

N. W. 183. Whenever a railroad company, therefore, receives cattle or live stock, and undertakes to transport the same for hire, such company assumes the relation of a common carrier, and becomes chargeable with the duties and obligations which are incident to that relation, except so far as such duties and responsibilities may legally be modified by special contract. *Hutchinson, Carr.* § 221; *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497.

A common carrier of goods, however, cannot legally stipulate for exemption from liability for losses and injuries occasioned by its own negligence or that of its agents or servants. Such a stipulation is, in this country, regarded as contrary to a public policy which recognizes the inequality of the parties to the contract of shipment at the time of its execution, and the exercise and enjoyment by the common carrier of franchises granted for a public purpose and for the public benefit. It is not simply a question between the carrier and the single individual with whom the contract is made. It is a question of public interest on the one hand and public duty on the other. In discussing the question of the public concern with reference to these stipulations, Mr. Justice Bradley, speaking for the court in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, says: "If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do in fact control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the

persons with whom they contract, must rest upon their fairness and reasonableness." See *Thomp. Neg.* § 6507, and cases cited; 1 *Hutchinson, Carr.* § 453; *Clark, Contr.* § 203; 6 *Cyc. Law & Proc.* p. 391; 5 *Am. & Eng. Enc. Law.* p. 458; *Western U. Telegr. Co. v. Milton*, 53 Fla. 484, 11 L.R.A. (N.S.) 560, 43 So. 495.

Some courts which have been inclined to recognize the validity of contracts relieving carriers from liability for negligence have drawn a distinction between ordinary negligence and gross negligence, as has been attempted to be done by the contract in the instant case. In Illinois the cases indicate a leaning in favor of allowing the exemption from liability for ordinary negligence of servants; but they deny the right to an exemption from liability for damage resulting from gross negligence of the carrier or his employees. This is also the view of the courts of Georgia (see *Cooper v. Raleigh & G. R. Co.* 110 Ga. 659, 36 S. E. 240) and *South Dakota* (see *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 568, 25 L.R.A. 81, 49 *Am. St. Rep.* 898, 59 N. W. 945), where it is claimed that the statute allowing the carrier to limit his liability by express contract permits stipulations against liability for ordinary negligence.

This assumed distinction is repudiated by other courts, and, in the absence of a statute controlling us, we will adhere to the rule, supported by reason and authority, that denies the carrier the right to contract for an exemption of any degree of negligence, and hold to be ineffectual all stipulations for exemption from liability on account of negligence whether gross or ordinary. *Thomp. Neg.* § 6511; 6 *Cyc. Law & Proc.* p. 391; *Michigan S. & N. I. R. Co. v. Heaton*, 37 Ind. 448, 10 *Am. Rep.* 89; *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 506, 31 *Am. Rep.* 353; *Moulton v. St. Paul M. & M. R. Co.* supra; *Baltimore & O. S. W. R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106.

A failure to exercise the care and diligence due from railroad companies as common carriers is negligence, without any legal distinction as being gross or ordinary. *Chicago, R. I. & P. R. Co. v. Witty*, supra.

The contract in question here, seeking to exonerate the defendant company from liability for all except gross negligence, is obnoxious to the rule here announced. The court erred in overruling the demurrer to the plea, and the cause is reversed.

Taylor and Hocker, JJ., concur.

Shackleford, Ch. J., and Cockrell and Whitfield, JJ., concur in the opinion.
19 L.R.A. (N.S.)

GEORGIA SUPREME COURT.

SALLIE HOOD
v.
FRANK E. HOOD.

ROSA HOOD, Admr., etc., of James Hood,
Deceased, Garnishee, Plff. in Err.

(130 Ga. 610, 61 S. E. 471.)

Divorce — alimony — judgment in personam — constructive service.

A judgment *in personam* for temporary alimony and attorneys' fees cannot be lawfully rendered in a divorce suit brought against a nonresident husband, who is not served with process within this state and does not appear in the case, but is only constructively served by publication.

(May 13, 1908.)

ERROR to the Superior Court for Pike County to review a judgment in plaintiff's favor in a garnishment proceeding to enforce a judgment for alimony which had been rendered in a divorce proceeding. Reversed.

Statement by Fish, Ch. J.:

Mrs. Sallie Hood brought, in the superior court of Pike county, Georgia, a petition for divorce against her husband, Frank E. Hood, who, the petition alleged, formerly resided in that county, but was then "a resident citizen of the state of Texas." It was also alleged in the petition that the defendant was a son of James Hood, deceased, who, plaintiff was informed, died intestate, leaving an estate of realty and personalty in Pike county; that Mrs. Rosa Hood was the duly qualified administratrix upon such estate, and that the defendant, as an heir at law of James Hood, would be entitled to a distributive share of such estate, when the same should be duly administered and ready for distribution. The petition prayed that the defendant be enjoined from disposing of or encumbering his interest in his father's estate, that the administratrix be enjoined from paying to him, or to anyone for him, any portion of his distributive share in that estate, and "that a reasonable provision for permanent alimony be made for the support of plaintiff out of the interest and distributive share of said defendant in . . . the estate of James Hood." No process, however, was prayed against the administratrix,

Headnote by FISH, Ch. J.

Note. — Power to grant alimony in a divorce proceeding without personal service of process, see case note to Stallings v. Stallings, 9 L.R.A. (N.S.) 593.

nor was she in any way made a party to the case. An order was passed by the judge that service be perfected upon the defendant, as a nonresident, by publication. This order was dated October 2, 1905. On April 2, 1906, at the April term of the court, the petition was amended by asking for \$100 as counsel fees and "a reasonable amount as temporary alimony during the pendency of said suit." There was no appearance by the defendant in the case, but, upon the same date that the amendment to the petition was allowed, the judge, upon *ex parte* hearing of the application for temporary alimony and attorneys' fees, "adjudged that the plaintiff have judgment against the defendant . . . for \$20 per month, from this date, as temporary alimony," to continue while the case should be pending in court, and for \$100 as attorneys' fees.

On September 20, 1906, the plaintiff procured the issuance of summons of garnishment, based upon this judgment and directed to the administratrix upon the estate of James Hood. The administratrix answered, admitting that she was indebted to Frank E. Hood, the defendant in the divorce proceeding, in a stated amount. This answer was traversed by the plaintiff, and, at the April term, 1907, the issues in the garnishment case were, by agreement of counsel, submitted to the court without the intervention of a jury. The plaintiff introduced the record in the divorce proceeding, including the judgment for temporary alimony and attorneys' fees, and other evidence. The court found that the administratrix had in her hands \$409.29, as the defendant's distributive share in the estate of J. W. Hood, deceased, and ordered and decreed that the plaintiff recover from the garnishee \$220. To this judgment the garnishee excepted, on the grounds that "Frank E. Hood was a resident of the state of Texas, as set out in the petition of plaintiff, that service was perfected on him by publication, that he made no answer and that the judgment against him was not a valid, binding judgment, that his property could not be taken under it, as it would be doing so without due process of law," and that, for these reasons, the garnishee "would not be protected in paying over the money in her hands as administratrix, belonging to said Frank E. Hood."

Mr. E. F. Dupree for plaintiff in error.

Messrs. John F. Methvin and E. M. Owen for defendant in error.

Fish, Ch. J., delivered the opinion of the court:

The question as to the validity of a judg-
19 L.R.A. (N.S.)

ment in *personam* rendered by a court of this state against a resident of another state, without personal service upon or appearance by the defendant came up for consideration and decision at an early date in the history of this court in the case of *Dearing v. Bank of Charleston*, 5 Ga. 497, 48 Am. Dec. 300, in which there is a luminous and able discussion of the subject by Nisbet, J., who delivered the opinion of the court. It was there held: "The courts of this state have no extraterritorial jurisdiction, and cannot make the citizens of foreign states amenable to their process, or conclude them by a judgment in *personam*, without their consent. A judgment in *personam*, rendered against an inhabitant of a foreign state, in a cause wherein he did not appear, although notice was served upon him by publication, under the second rule in equity," was "held to be a nullity as to him." The question was again before the court in *Adams v. Lamar*, 8 Ga. 83, wherein the same learned judge delivered the opinion, and in which the principles announced in the *Dearing Case* were restated and followed. There are subsequent decisions of this court to the same effect, among them being *King v. Sullivan*, 93 Ga. 621, 20 S. E. 76, wherein the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, which is, perhaps, the leading case upon the subject in this country, was cited and followed, "in which it was held that a personal judgment rendered by a state court against a nonresident of the state in an action upon a money demand was without validity where the defendant was served by publication, but upon whom no personal service of process within that state was made, and who did not appear." See also *Reynolds & H. Estate Mortg. Co. v. Martin*, 116 Ga. 495, 42 S. E. 796.

Although this court has never positively decided that this principle is applicable to a judgment for alimony, rendered in a divorce suit against a nonresident defendant in which there was neither personal service upon, nor appearance by, the defendant, it strongly intimated as much in *Fleming v. West*, 98 Ga. 778, 27 S. E. 157, where the question was presented and discussed; but the decision was finally based upon the proposition that a decree for divorce and permanent alimony could not be granted at the first term after service by publication upon a nonresident defendant. In the opinion delivered by Chief Justice Simmons, it was said: "If he [defendant] was a nonresident of the state, service could be made by publication; . . . but, while service of a nonresident of the state by publication, if made conformably to the statute, would be sufficient to give the court jurisdiction of the defendant so far as to authorize a decree

for divorce, it has been held that it would not give jurisdiction so far as to authorize also a decree for alimony; that, while the decree in such a case is *in rem* in so far as it adjudicates as to the marital status, yet, if it undertakes as an incident of the divorce proceeding to deal with property rights of the defendant, it becomes in that respect a proceeding *in personam*, and, although it is competent for the legislature to authorize the courts to render a judgment for alimony upon constructive notice as against citizens of the state, it is not competent to do so as against nonresidents of the state. See. 2 Bishop, Marr. Div. & Sep. §§ 35 et seq.; Id. §§ 78, 79; Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. Rep. 703, and cases cited in notes." This is in accordance with the well-established general rule, which uniformly obtains in other jurisdictions, and which is laid down by text writers who have discussed the subject. In Stallings v. Stallings, 127 Ga. 464, 9 L.R.A. (N.S.) 593 (8), 56 S. E. 469, it was held that "service of an application for temporary alimony pending a suit for divorce and permanent alimony must be personal;" but in that case the petition in the divorce proceeding alleged that the legal residence of the defendant was within this state, but that he was without this state and would remain so for an indefinite period of time, and it was accordingly held that service could not be perfected upon him as a nonresident. It was held, though, that "a judgment for alimony is a personal judgment;" citing Fleming v. West, supra, and other authorities. It seems, however, to have been uniformly held in other jurisdictions where the question with which we are dealing has arisen that a purely personal judgment or decree for alimony, rendered in a divorce proceeding in favor of a wife against her nonresident husband, who has not been served with process within the state where the suit is instituted, but has been constructively served by publication only, and who has not appeared in the case, is void even in the state where rendered. Smith v. Smith, 74 Vt. 20, 93 Am. St. Rep. 882, 51 Atl. 1060; Ellison v. Martin, 53 Mo. 575; Anderson v. Anderson, 55 Mo. App. 268; Beard v. Beard, 21 Ind. 321; Lytle v. Lytle, 48 Ind. 200; Sowders v. Edmunds, 76 Ind. 123; Elmendorf v. Elmendorf, 58 N. J. Eq. 113, 44 Atl. 164; Rea v. Rea, 123 Iowa, 241, 98 N. W. 787; Johnson v. Matthews, 124 Iowa, 255, 99 N. W. 1064; Baker v. Jewell, 114 La. 726, 38 So. 532; Dillon v. Starin, 44 Neb. 881, 63 N. W. 12; Bunnell v. Bunnell (C. C.) 25 Fed. 214. In Cooley's Constitutional Limitations, 7th ed. pp. 584, 585, the learned author says: "But in divorce cases, no more than in any other, can the court make a decree for the payment of

money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. If the defendant had property within the state, it would be competent to provide by law for the seizure and appropriation of such property, under the decree of the court, to the use of the complainant; but the legal tribunals elsewhere would not recognize a decree for alimony or for costs not based on personal service or appearance. The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, if within the state."

It has been held, however, in some cases, that a decree or judgment for alimony, based upon constructive service only, is valid as against property of the defendant husband which is within the territorial jurisdiction of the court, and is specifically proceeded against in the divorce proceeding and described in the petition for divorce and alimony, and from which the alimony is set apart, or upon which the judgment therefor is decreed to be a lien; it being held that as to such property such a proceeding is *in rem*. Harshberger v. Harshberger, 26 Iowa, 503; Twing v. O'Meara, 59 Iowa, 326, 13 N. W. 321; Wesner v. O'Brien, 56 Kan. 724, 32 L.R.A. 289, 54 Am. St. Rep. 604, 44 Pac. 1090. See also Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. 779. The ruling in Twing v. O'Meara, supra, went even further; for it was there held that, if there was property of the nonresident husband within the territorial jurisdiction of the court, it was sufficient if the petition prayed for alimony in the husband's property, without specifically describing it. But in a later case the supreme court of the same state held that a mere personal judgment for alimony, rendered against a nonresident defendant in a divorce proceeding upon mere constructive notice by publication, was void, and could not be subsequently validated or rendered effective by granting a judgment on a petition by the original plaintiff asking that it be confirmed and decreed to be a lien on the defendant's share in the deceased father's real estate, situate within the territorial jurisdiction of the court. Johnson v. Matthews, supra. In Ellison v. Martin, supra, the Missouri court held that a general judgment for alimony could not be rendered against a defendant upon mere order of publication, not followed by appearance of the defendant, and that the interest of the defendant in certain land in the state of Missouri could not be lawfully sold under an ex-

ecution issued upon such judgment. There, as in the Iowa case last cited, the mere fact that the defendant had property within the state where the general judgment for alimony was rendered did not make such judgment valid as to such property. In *Smith v. Smith*, supra, the supreme court of Vermont not only held that a personal judgment for alimony, rendered against a nonresident husband upon mere constructive service by publication, was void, but also held that the fact that a resident of the state had in his hands money due to the nonresident defendant in the divorce proceeding did not give the court jurisdiction to order such money to be paid to the plaintiff as alimony. And in *Bunnell v. Bunnell*, supra, where the wife's bill for divorce had alleged the ownership by her nonresident husband of described property within the territorial jurisdiction of the court, and had prayed for an injunction restraining its transfer and for alimony "out of the real and personal estate of the defendant," it was held by the United States circuit court for the eastern district of Michigan that a statute of that state which permitted its courts, in suits for divorce, to award alimony and sequester the property of the defendant within the jurisdiction, and appropriate the same to the payment of alimony, did not apply where the defendant was called into court by publication; and that a decree for alimony rendered against him was void for want of jurisdiction. In *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017, it was held that a wife could maintain in the state of her domicile an action for alimony, to be awarded to her out of the property of her husband in that state, and could make any person having possession of the husband's property, or holding title to the same in trust for him, a party to such action, for the purpose of applying the same to the payment of the alimony awarded her, and this would be a sufficient seizure of the property to enable her to proceed by constructive service against her husband.

In the case with which we are dealing, however, it is perfectly clear that the judgment for temporary alimony and attorneys' fees is not in any sense a judgment *in rem*, but is purely a judgment *in personam*. The court did not have in its grasp any property belonging to the nonresident husband, and did not even attempt to render a judgment in the nature of a judgment *in rem* against any property of the defendant within its territorial jurisdiction. While the petition alleged that the defendant had an interest in the estate of his deceased father, which estate, according to the allegations of the petition, was in the county where the suit was brought, and prayed that the administratrix upon his estate should be made

a party to the proceeding, and that permanent alimony should be awarded the plaintiff out of such interest, no effort was actually made to bring this interest of the defendant in such estate before the court. The administratrix was not made a party to the case, and process was not even prayed against her. Whether she could, under the laws of this state, have been made a party to the proceeding for the purpose indicated in the petition; and whether, if she had been, the distributive share of the nonresident husband in the estate of his deceased father, in her hands as administratrix, could have been reached by a judgment for temporary alimony,—it is useless to inquire. It appears from the opinion in *Smith v. Smith*, supra, that this could not have been done under the law in the state of Vermont when that case was decided. What could have been done by the plaintiff in the divorce proceeding which is before us, or what might have been done therein by the court, under a different set of circumstances, are not questions before us. The question for our determination is: What was the effect of that which was done? We have seen that the judgment for temporary alimony and attorneys' fees was a mere general judgment against the defendant, and that this judgment was absolutely void for want of jurisdiction of the person of the defendant. It follows, therefore, that this judgment could not be the basis for a judgment against the garnishee, as there has to be a valid judgment against the principal defendant before there can be a lawful judgment against a garnishee.

We have not overlooked the contention of counsel for the defendant in error that the garnishee cannot, in her bill of exceptions, attack the validity of the judgment for temporary alimony and attorneys' fees, for the reason that the record does not show that the question as to the validity of this judgment was raised in the court below. It is true that the record does not show that this question was raised upon the trial by an objection to the admission of this judgment in evidence, or by a motion to rule out the record of the divorce proceeding, including this judgment, or otherwise. Nor does it show what the contentions of counsel for the garnishee were, in the argument upon the question of the sufficiency of the evidence to authorize a judgment against her. But, if the evidence offered by the plaintiff for the purpose of proving she had obtained a judgment against the principal defendant clearly showed, as we have seen it did, that that which she relied upon as being such a judgment was a mere nullity, then the evidence before the court did not authorize a judgment against the garnishee, and counsel for

the garnishee could so contend in the oral argument before the trial judge; and, when the judgment against the garnishee had been rendered, she could present this contention in her bill of exceptions. It was not incumbent upon the garnishee to object to the introduction of the record in the divorce proceeding, upon the ground that it appeared therefrom that no valid judgment for alimony and attorneys' fees could be rendered therein, and it was not to her interest to do so. It certainly was to her interest that the record of the divorce suit leading up to the alimony judgment should be introduced, if that judgment was to be offered in evidence, as it was this record which showed such judgment to be absolutely void. While she might, perhaps, have objected to the introduction of the judgment itself, because, from the record of the case in which it was rendered, it appeared to be void, or, after it was introduced, have moved to rule out, for a like reason, the whole of the record of the divorce case, including this judgment, her failure to do so did not amount to an admission that this judgment was valid. If evidence offered for the purpose of proving something to be a fact which it is necessary for the party offering the evidence to establish is subject to objection, but is of no probative value for such purpose, it does not matter whether any objection is interposed to the introduction of such evidence or not. Mere failure to object to it does not raise it to the level of proof of the fact sought to be established. It simply goes in for what it is worth; and, if it is worth nothing to the party introducing it, no finding in his favor can be based thereon. This court has held that, although hearsay evidence is introduced without objection, it is of no probative value; and the same principle applies here.

In reaching our conclusion that the judgment of the lower court should be reversed, we have not dealt with one feature of the case, because it was not reached by any assignment of error in the bill of exceptions. It clearly appears from the record of the divorce case that the nonresident defendant therein was never served, even constructively by publication, with the application for temporary alimony and attorneys' fees, as such application was not embraced in the original petition, and the judgment granting the application was rendered on the same day that the petition was so amended as to pray for such alimony and fees. It has been held that, even where a resident defendant in a divorce suit has been regularly served, he is entitled to notice of a subsequent application for temporary alimony; and the same 19 L.R.A. (N.S.)

principle would seem to apply in a suit for divorce against a nonresident defendant.

Judgment reversed.

All the Justices concur.

GEORGIA SUPREME COURT.

DEADWYLER & COMPANY, Plffs. in Err.,

v.

KAROW & FORRER.

(— Ga. —, 62 S. E. 172.)

Sale — consideration — determination — impossibility.

1. A valuable consideration is essential to a sale, and, if its ascertainment becomes impossible, there is no sale. Where a contract is made for the sale, at a specified price per pound, of certain bales of cotton, even though there be a constructive delivery to the buyer, if the weights of the cotton be thus unknown, and such weights, by which the amount of the purchase price is to be determined, are, by such contract, to be ascertained by subsequent weighing by the buyer when actual delivery to him is made, and the cotton is destroyed by fire before being so delivered and weighed, and it becomes impossible to ascertain such weights, there is no sale.

Custom — statute — conflict.

2. A custom which contravenes a positive statute is invalid, and does not become a part of a contract.

Same — partial invalidity.

3. If a part of a custom would be valid if it stood alone as a separate and independent custom, such part would be invalid when another part of the entire custom of which it forms a part was invalid, unless it is reasonably certain that, to enforce the former as a separate and independent custom, would correspond with the intent and purpose with which the custom, as a whole, was established and used.

August 11, 1908.)

Headnotes by HOLDEN, J.

Case Note. — Effect on sale of destruction of property after actual or constructive delivery, preventing the ascertainment of the price according to the terms of the contract.

This note is confined to those cases in which it appears that the contract of sale sued upon concerned identified, specific chattels, the purchase price of which was to be fixed by ascertaining their quantity after they had been either actually or constructively delivered to the purchaser, and which were destroyed through the negligence of neither party, before the operation of weighing, measuring, counting, or the like, could be performed, so as to fix their

ERROR to the Superior Court for Chat-ham County to review a judgment in defendants' favor in an action brought to recover the purchase price of goods alleged to have been sold but which were destroyed before delivery. Affirmed.

The facts are stated in the opinion.

Messrs. A. O. King and Samuel H. Sibbey for plaintiffs in error.

Messrs. Adams & Adams, for defendants in error:

Even if § 3543, Civ. Code 1895, could be ignored, the risk was the seller's because the contract of sale was, in any event, executory, and there had been no actual delivery.

Lloyd v. Wright, 25 Ga. 215; Butler v. Lawshe, 74 Ga. 353; Winn v. Morris, 94 Ga. 452, 20 S. E. 339; Mountain City Mill Co. v. Butler, 109 Ga. 469, 34 S. E. 565; Daniel v. Hannah, 106 Ga. 91, 31 S. E. 734; Randle v. Stone, 77 Ga. 501; Sparrow v. Pate, 67 Ga. 352; Charleston & W. C. R. Co. v. Pope,

122 Ga. 577, 50 S. E. 374; Pate v. Wyly, 118 Ga. 268, 45 S. E. 217; Brown v. Dickerson, 2 Marv. (Del.) 119, 42 Atl. 422; 1 Mechern, Sales, 384.

No custom can take away a legal right of a party, or vary or change the law in any way. A custom always yields to the statute.

Hatcher v. Comer, 73 Ga. 418; Fleming v. King, 100 Ga. 449, 28 S. E. 239; 2 Greenl. Ev. § 251; Barnard v. Kellogg, 10 Wall. 391, 19 L. ed. 990; First Nat. Bank v. Burkhardt, 100 U. S. 692, 25 L. ed. 769; Thompson v. Ashton, 14 Johns. 316; Cox v. O'Riley, 4 Ind. 368, 58 Am. Dec. 637.

Holden, J., delivered the opinion of the court:

The plaintiffs brought suit against the defendants for the contract price of 100 bales of cotton alleged to have been sold by them to the defendants. Fifty-eight bales of

purchase price in strict accordance with the terms of the contract. It therefore excludes those cases involving sales of goods not possible of identification because not separated from the mass of which they are a part; nor does it include those cases where it appeared that the goods were seized on legal process as the property of one or the other of the parties; nor cases where it appeared that the goods were destroyed before delivery.

In the cases to which this discussion is thus confined, the courts have not, as a general rule, paid much attention to the impossibility of ascertaining the purchase price with precision. And in those few cases in which this question is considered recovery was never denied to the seller merely because of the impossibility of determining the exact price of the goods sold, by reason of their destruction. Indeed, it is evident from these cases that the seller is at liberty to show the quantity of the goods by the best evidence at his command.

Thus, in Upson v. Holmes, 61 Conn. 500, in which it was held that the title to the goods had passed to the purchaser, and that the seller could recover their value on proper proof of their quantity, even though they had been destroyed, the court said that the circumstance that the goods were to be measured and paid for after delivery was unimportant, since that related to the time and place of payment, and not to the change of title. To quote from the opinion: "Where goods are sold and delivered to be paid for on the happening of a certain event, the vendor will not be deprived of his right to recover merely because the event on which payment is to be made has, by accident, become impossible. Upon the same principle, when the quantity is to be ascertained by measurement at a particular time or place, or in a particular manner, if such measurement becomes impossible, nevertheless the 19 L.R.A. (N.S.)

quantity may be ascertained in some other manner."

And in Allen v. Elmore, 121 Iowa, 241, 96 N. W. 769, it was said that, while the destruction of the article sold before it had been weighed rendered impracticable the ascertainment of the quantity by weighing, such quantity might be ascertained by the best evidence available, where the sole question was the amount to be paid.

And the language of Chief Justice Gibson in Scott v. Wells, 6 Watts & S. 357, 40 Am. Dec. 568, which was an action for the price of a raft of lumber, would seem to import that, even after destruction of the goods sold, the seller may, if the price is not exactly ascertained, nevertheless recover upon adequate proof of the quantity. He said: "By the bargain actually made, the vendor sold just so many feet as the raft actually contained. There is no process pointed out to ascertain the number; and why may he not recover in proportion to the number ascertained by the evidence?"

And in Martineau v. Kitching, L. R. 7 Q. B. 436, in reply to the question by the buyer's counsel: How could the buyer pay when he was to pay at a certain price per hundredweight, and the goods were never weighed, and therefore it could never be known with certain precision how many hundredweight there were?—Judge Blackburn said that, where the price was not ascertained, and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller could recover the price, if the risk was clearly thrown on the purchaser, by showing the amount due as nearly as he could.

As has been before stated, most of the decisions regard as immaterial the impossibility of ascertaining the exact price in strict accordance with the terms of the contract. These authorities make the right of the seller dependent upon the fact of the ownership of the destroyed goods. If the

the cotton were consumed by fire before there was any actual delivery. After some correspondence between the parties, the remaining 42 bales were taken by the defendants, and a payment for the purpose of settling the amount due for them was made, but which did not fully cover the principal and interest due; and the court, to whom the matter was submitted without the intervention of a jury, found in favor of the plaintiffs against the defendants for this balance, and found in favor of the defendants on the main issues in the case, the effect of which was to find that the plaintiffs were not entitled to recover the price of the cotton destroyed by fire. To this judgment the plaintiffs excepted.

The following facts appear from the testimony: The plaintiffs were cotton factors and warehousemen in Athens, and the defendants were cotton dealers in Savannah, with a buyer located in Athens. There was

evidence by the plaintiffs to show that there was in the Athens market, among cotton factors and warehousemen, and buyers from them, the following custom: The factor would extract from each bale of cotton in their possession for sale a sample, in which was wrapped a tag on which was written the number and marks of the bale from which it was drawn, and to the bale was attached a duplicate tag having on it the same number of marks. This sample, with its inclosed tag, was taken to the sample room and there kept for exhibition to and examination by prospective buyers. The bale in the warehouse represented by the sample could be positively identified by the duplicate tag attached thereto. When a buyer wished to purchase cotton, he would examine these samples and agree with the cotton factors on the price to be paid for each bale represented by the respective samples. It was also the custom of the market that,

title has passed to the buyer, the risk has also become his. Therefore, when a seller seeks to recover the price of goods which have been delivered to a buyer, but which have been destroyed before the quantity has been ascertained and the price fixed, it is incumbent upon the seller to show that he has parted with the ownership of the goods. And this, the courts hold, is to be determined from the intent of the parties; and therefore they apply themselves to discover what that intent is from the contract and the circumstances surrounding the sale.

Thus, in *Ober v. Carson*, 62 Mo. 209. it was said that the question of transferring title to, and vesting title in, the purchaser, always involved an inquiry into the intent of the contracting parties; and that it was to be ascertained whether the negotiations and acts showed an intention on the part of the seller to relinquish all claim as owner, and on the part of the buyer to assume such control with all liabilities. Hence, where, after the goods are delivered, a mere operation of weighing, measuring, or counting, or the like, remained to be performed for the purpose of ascertaining the price, such subsequent operation would not be regarded as part of the contract of sale where it was the intention of the parties to complete the sale on delivery.

And in *Wadhams v. Balfour*, 32 Or. 315, 51 Pac. 642, it was said that, in determining whether the contract passed the title, the primary consideration was the intention of the parties thereto; and that, if the intention was manifested clearly and unequivocally, it would control.

And in *Gonser v. Smith*, 115 Pa. 452, 8 Atl. 770, the court said that the vesting of title always depended upon the intention of the parties, to be derived from the contract and the circumstances; and that actual delivery, weighing, and setting aside were only circumstances from which the intention might be inferred; and that it was 19 L.R.A. (N.S.)

of no consequence, in the way of passing title to personal property, that the quantity was merely estimated and full settlement for the same deferred until the quantity could be exactly ascertained after its delivery.

And in *Gill v. Benjamin*, 64 Wis. 362, 54 Am. Rep. 619, 25 N. W. 445, the court said that, where the manifest intention of the parties was to transfer the title, the sale might be complete notwithstanding the property was yet to be measured and the amount of the price yet to be ascertained.

One of the best expressions of this principle is found in the following language in the opinion of Lord Chief Justice Cockburn in *Martineau v. Kitching*, supra: "It is perfectly true that, where anything remains to be done with a view to the appropriation of the thing agreed to be sold by the seller to the buyer, it is plain that the property will not have been intended by him to pass to the buyer, and the property will not have passed. But it is equally clear that, in point of principle, and in point of common sense and practical wisdom, there is nothing to prevent a man from passing the property in the thing which he proposes to sell and the buyer proposes to buy, although the price may remain to be ascertained afterwards. . . . What is there to prevent the parties from agreeing that the property shall pass from one to the other, although the price is afterwards to be ascertained by measurement? I take it that is the broad, substantial distinction. If, with a view to the appropriation of the thing, the measurement is to be made as well as the price ascertained, the passing of the property being a question of intention between the parties, it did not pass because the parties did not intend it to pass. But, if you can gather from the whole circumstances of the transaction that they intended that the property should pass, and the price should afterwards be ascer-

when this agreement was made, and the samples, with the tags therein, delivered to the buyer, or left with the cotton factor to be sent for by the buyer, and the sale listed on the books of the cotton factor, such bales then became the property of the buyer, and were held by the warehouseman thenceforth at his risk. It was a part of the custom that each bale was to be reweighed by a weigher representing the buyer, in the presence of the warehouse weigher, and the cotton settled for by the buyer at these reweights on the basis of the price per pound agreed upon when the samples were examined and the contract made. The buyer could waive the reweighing and take the cotton at the weights when first put into the warehouse, but the custom was to reweigh

each bale bought. If any bale bought was "falsely packed," or damaged, or was "mixed packed," or failed to come up to the sample, the buyer had the right to reject it. When the defects were not excessive, the seller would make good the defects by compromise or settlement of some kind. When the cotton was reweighed, a bill therefor was made out according to such reweights and the payment for the cotton made. Sometimes the buyer, at the request of the seller, would make a payment before the reweighing. The difference would then be paid when the cotton was reweighed. In this particular case the buyer of the defendants located in Athens contracted to buy from the plaintiffs, at a price of 11 3/16 cents per pound on a basis of Athens middling grade, 100

tained, what is there in principle, what is there in common sense or practical convenience, which should prevent that intention from having effect?"

The following cases also support the proposition that the destruction of goods sold and delivered under a contract of sale providing that the purchase price should be fixed by ascertaining the quantity of the goods sold after their delivery is in no wise material to the right of the seller to recover, though such destruction has made it impossible to ascertain the exact price stipulated for by the contract; and that such question is to be determined by the fact of ownership, that is, the passing of title, which is dependent entirely upon the intent of the parties as gathered from the contract and circumstances of the sale: *Seckel v. Scott*, 66 Ill. 106; *Vehmeyer v. Earl*, 22 Ill. App. 522; *Welch v. Spies*, 103 Iowa, 389, 72 N. W. 548; *Burrows v. Whitaker*, 71 N. Y. 291, 27 Am. Rep. 42; *Scott v. Wells*, 6 Watts & S. 357, 40 Am. Dec. 568; *Bond v. Greenwald*, 4 Heisk. 453; *Wilson v. Shaver*, 3 Ont. L. Rep. 110.

In accordance with these principles, it has been held that, where it was expressly stipulated that the goods, after delivery, should be at the purchaser's risk, the seller may recover, though the goods were destroyed before their quantity was ascertained so as to fix the price as stipulated in the contract of sale. *Bass v. Walsh*, 39 Mo. 192; *Castle v. Playford*, L. R. 7 Exch. 98, reversing L. R. 5 Exch. 165.

But in *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55, it was said, upon the question whether the sale was perfected so as to pass title to the goods purchased to, and impose the risk of their destruction upon, the buyer, that, whatever might have been the intention of either party or both, it must be controlled by the statute of frauds; and as, by the terms of that statute, the buyer must, in the absence of part payment or memorandum, accept and actually receive the property, both these conditions must be fulfilled before the title and risk can be transferred; and that where a buyer selected the goods purchased, but did 19 L.R.A. (N.S.)

not count them, though they were counted by the seller, which count the buyer refused to accept, and they were burned before they were counted by the buyer, such selection on the part of the buyer was not an acceptance of quantity, but only of quality, and that the quantity and the price of the quantity was therefore indeterminate, and though there was a manual caption of the goods by the buyer at the place of delivery, such delivery and caption were not enough to transfer the title without an acceptance of the property as a determined quantity, for such an acceptance depended upon the counting. It was accordingly held that the title had not passed, and that the loss of the goods by fire must be borne by the seller.

In attempting to determine the intent of the parties from the delivery and acceptance of purchased goods the price of which is to be afterwards fixed by ascertainment of their quantity, many of the courts look upon the fact that the goods were delivered as creating a strong presumption that the title and risk were also intended to become the buyer's, and refuse to see in the postponement of the ascertainment of the quantity until after delivery any intent upon the part of the parties to change this presumption.

Thus, in *Cunningham v. Ashbrook*, 20 Mo. 553, a leading and important case upon the question here discussed, the judgment of the trial court was reversed because of a charge that, if the chattels were sold by net weight, to be ascertained after delivery, the presumption that the sale was completed by delivery was met and repelled, and the loss fell upon the seller, unless he showed that the parties intended the sale to be complete upon delivery. The supreme court said that, although this circumstance was certainly proper for the jury upon the question of the intention of the parties, the presumption arising from a change of actual possession, that it was intended, also, to change the property, was not overcome, as a matter of law, by the fact that the thing bargained for was to be paid for by weight to be ascertained after delivery;

bales of cotton from samples, on a Saturday afternoon. The samples, with the inclosed tags, were kept by the plaintiffs and placed in a basket in their office. On the books of the plaintiff these 100 bales were listed as having been sold to the defendants, and duplicate lists of the marks, numbers, and grades of the bales were made out, one for the scalesman, and one for the warehouseman. The buyer, Mr. Butt, took the list and the number of each grade and went back to his office. This transaction occurred in the afternoon, after banking and business hours. Early the following morning all of the cotton was consumed by fire, except the 42 bales above referred to. The samples were left in the office of the plaintiffs, subject to the order of the buyer. Prior to the

fire the defendants' agent did not reweigh the cotton. Nothing was paid before the fire on the cotton bought. There was no express agreement about reweighing, or when the cotton was to be reweighed or delivered to the buyer, nor was there any express agreement about the time of payment. There was no testimony as to how long the 100 bales had been in the warehouse after being first weighed, nor was there any testimony as to whether or not the bales would come up to the sample.

1. The plaintiffs in this case contend that they are entitled to recover the price of the 58 bales of cotton sold and consumed by fire. The 42 bales not destroyed were delivered to the defendants and paid for by them, except a small balance due as interest.

and that, if the delivery was for the purpose of passing the property, it had that effect, although the price was afterwards to be ascertained and paid according to the net weight.

And in *Allen v. Elmore*, 121 Iowa, 241, 96 N. W. 769, the court said that the question of title was one of intent; and that, where the payment of the purchase price was not a condition precedent to the passing of title, the fact that weighing or measuring the goods sold and delivered still remained necessary to determine the price would not indicate an intention that the title should not pass until such acts were done.

In *Haxall Bros. v. Willis*, 15 Gratt. 434, and *Haxall Bros. v. Barbour*, 15 Gratt. 454, note, the rule was laid down that, where the subject of a contract of sale had been actually delivered, the mere fact that weighing, counting, or measuring was yet to be done by the buyer in order simply to ascertain the aggregate sum of money which he was to pay as the price therefor did not of itself show such a defect in the transfer of title as would prevent the risk of loss from being cast upon the buyer.

So, in *Wadhams v. Balfour*, 32 Or. 315, 51 Pac. 642, it was said that, where there was an unconditional delivery of specific property, though something remained to be done to ascertain its quantity for the purpose of determining the price, such delivery would overcome the presumption of law that, if something remained to be done for the purpose of fixing the amount to be paid for goods sold, the title did not pass until the act was done.

Of course, this presumption is not conclusive, and may be overcome by evidence of a contrary intent by the parties when the goods were delivered to the purchaser. Thus, in *Wilkinson v. Holiday*, 33 Mich. 386, Judge Cooley said that, while delivery was usually a significant fact in the sale of goods, it was not conclusive as to the passage of the title; and, as there might be an express understanding that the title should not pass, there might also be an implied understanding of a like character. 19 L.R.A. (N.S.)

So the judgment of the trial court was reversed because the trial judge had held, as a matter of law, that the title had passed upon delivery. To the same effect is *Lingham v. Eggleston*, 27 Mich. 324.

On the other hand, in *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450, the rule was declared to be that, if anything remained to be done between the parties to a sale of chattels to determine the price to be paid, the sale was not complete so as to pass the title, unless it could be inferred from the evidence that the parties intended the property should pass at once; and that, if the goods were yet to be numbered, weighed, or measured, or the like, the sale was *prima facie* not complete until the quantity was ascertained. The court cited *Riddle v. Varnum*, 20 Pick. 280, which is otherwise not in point in this note, to the effect that, when some act remained to be done in relation to the subject of the sale, as that of weighing or measuring, and there was no evidence showing an intention to make an absolute and complete sale, the performance of such act was a prerequisite to the passage of the title to the buyer.

Some authorities, in the absence of other circumstances showing the intention of the parties, look upon the question of the transfer of title in the class of cases included in this discussion as largely dependent upon which party the contract places the duty on of ascertaining the quantity of the goods sold. Accordingly, the rule is frequently laid down that, where the acts of measurement, counting, and weighing by the terms of the agreement or the uses of the trade are to be done by the seller, or by him and the buyer together, and, before this is done, the goods are destroyed, the seller will have to bear the loss though they are delivered to the buyer; but, if these acts are to be done by the buyer, the loss will be his.

Thus, in *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11, the court, in holding that the title to the goods in question had passed to the buyer, announced the following proposition: "Where the minds of the parties have assented to the present purchase and sale of a specific chattel, which may be

ecution issued upon such judgment. There, as in the Iowa case last cited, the mere fact that the defendant had property within the state where the general judgment for alimony was rendered did not make such judgment valid as to such property. In *Smith v. Smith*, supra, the supreme court of Vermont not only held that a personal judgment for alimony, rendered against a nonresident husband upon mere constructive service by publication, was void, but also held that the fact that a resident of the state had in his hands money due to the nonresident defendant in the divorce proceeding did not give the court jurisdiction to order such money to be paid to the plaintiff as alimony. And in *Bunnell v. Bunnell*, supra, where the wife's bill for divorce had alleged the ownership by her nonresident husband of described property within the territorial jurisdiction of the court, and had prayed for an injunction restraining its transfer and for alimony "out of the real and personal estate of the defendant," it was held by the United States circuit court for the eastern district of Michigan that a statute of that state which permitted its courts, in suits for divorce, to award alimony and sequester the property of the defendant within the jurisdiction, and appropriate the same to the payment of alimony, did not apply where the defendant was called into court by publication; and that a decree for alimony rendered against him was void for want of jurisdiction. In *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017, it was held that a wife could maintain in the state of her domicile an action for alimony, to be awarded to her out of the property of her husband in that state, and could make any person having possession of the husband's property, or holding title to the same in trust for him, a party to such action, for the purpose of applying the same to the payment of the alimony awarded her, and this would be a sufficient seizure of the property to enable her to proceed by constructive service against her husband.

In the case with which we are dealing, however, it is perfectly clear that the judgment for temporary alimony and attorneys' fees is not in any sense a judgment *in rem*, but is purely a judgment *in personam*. The court did not have in its grasp any property belonging to the nonresident husband, and did not even attempt to render a judgment in the nature of a judgment *in rem* against any property of the defendant within its territorial jurisdiction. While the petition alleged that the defendant had an interest in the estate of his deceased father, which estate, according to the allegations of the petition, was in the county where the suit was brought, and prayed that the administratrix upon his estate should be made

a party to the proceeding, and that permanent alimony should be awarded the plaintiff out of such interest, no effort was actually made to bring this interest of the defendant in such estate before the court. The administratrix was not made a party to the case, and process was not even prayed against her. Whether she could, under the laws of this state, have been made a party to the proceeding for the purpose indicated in the petition; and whether, if she had been, the distributive share of the nonresident husband in the estate of his deceased father, in her hands as administratrix, could have been reached by a judgment for temporary alimony,—it is useless to inquire. It appears from the opinion in *Smith v. Smith*, supra, that this could not have been done under the law in the state of Vermont when that case was decided. What could have been done by the plaintiff in the divorce proceeding which is before us, or what might have been done therein by the court, under a different set of circumstances, are not questions before us. The question for our determination is: What was the effect of that which was done? We have seen that the judgment for temporary alimony and attorneys' fees was a mere general judgment against the defendant, and that this judgment was absolutely void for want of jurisdiction of the person of the defendant. It follows, therefore, that this judgment could not be the basis for a judgment against the garnishee, as there has to be a valid judgment against the principal defendant before there can be a lawful judgment against a garnishee.

We have not overlooked the contention of counsel for the defendant in error that the garnishee cannot, in her bill of exceptions, attack the validity of the judgment for temporary alimony and attorneys' fees, for the reason that the record does not show that the question as to the validity of this judgment was raised in the court below. It is true that the record does not show that this question was raised upon the trial by an objection to the admission of this judgment in evidence, or by a motion to rule out the record of the divorce proceeding, including this judgment, or otherwise. Nor does it show what the contentions of counsel for the garnishee were, in the argument upon the question of the sufficiency of the evidence to authorize a judgment against her. But, if the evidence offered by the plaintiff for the purpose of proving she had obtained a judgment against the principal defendant clearly showed, as we have seen it did, that that which she relied upon as being such a judgment was a mere nullity, then the evidence before the court did not authorize a judgment against the garnishee, and counsel for

the garnishee could so contend in the oral argument before the trial judge; and, when the judgment against the garnishee had been rendered, she could present this contention in her bill of exceptions. It was not incumbent upon the garnishee to object to the introduction of the record in the divorce proceeding, upon the ground that it appeared therefrom that no valid judgment for alimony and attorneys' fees could be rendered therein, and it was not to her interest to do so. It certainly was to her interest that the record of the divorce suit leading up to the alimony judgment should be introduced, if that judgment was to be offered in evidence, as it was this record which showed such judgment to be absolutely void. While she might, perhaps, have objected to the introduction of the judgment itself, because, from the record of the case in which it was rendered, it appeared to be void, or, after it was introduced, have moved to rule out, for a like reason, the whole of the record of the divorce case, including this judgment, her failure to do so did not amount to an admission that this judgment was valid. If evidence offered for the purpose of proving something to be a fact which it is necessary for the party offering the evidence to establish is subject to objection, but is of no probative value for such purpose, it does not matter whether any objection is interposed to the introduction of such evidence or not. Mere failure to object to it does not raise it to the level of proof of the fact sought to be established. It simply goes in for what it is worth; and, if it is worth nothing to the party introducing it, no finding in his favor can be based thereon. This court has held that, although hearsay evidence is introduced without objection, it is of no probative value; and the same principle applies here.

In reaching our conclusion that the judgment of the lower court should be reversed, we have not dealt with one feature of the case, because it was not reached by any assignment of error in the bill of exceptions. It clearly appears from the record of the divorce case that the nonresident defendant therein was never served, even constructively by publication, with the application for temporary alimony and attorneys' fees, as such application was not embraced in the original petition, and the judgment granting the application was rendered on the same day that the petition was so amended as to pray for such alimony and fees. It has been held that, even where a resident defendant in a divorce suit has been regularly served, he is entitled to notice of a subsequent application for temporary alimony; and the same 19 L.R.A.(N.S.)

principle would seem to apply in a suit for divorce against a nonresident defendant.

Judgment reversed.

All the Justices concur.

GEORGIA SUPREME COURT.

DEADWYLER & COMPANY, Plffs. in Err.,

v.

KAROW & FORRER.

(— Ga. —, 62 S. E. 172.)

Sale — consideration — determination — impossibility.

1. A valuable consideration is essential to a sale, and, if its ascertainment becomes impossible, there is no sale. Where a contract is made for the sale, at a specified price per pound, of certain bales of cotton, even though there be a constructive delivery to the buyer, if the weights of the cotton be thus unknown, and such weights, by which the amount of the purchase price is to be determined, are, by such contract, to be ascertained by subsequent weighing by the buyer when actual delivery to him is made, and the cotton is destroyed by fire before being so delivered and weighed, and it becomes impossible to ascertain such weights, there is no sale.

Custom — statute — conflict.

2. A custom which contravenes a positive statute is invalid, and does not become a part of a contract.

Same — partial invalidity.

3. If a part of a custom would be valid if it stood alone as a separate and independent custom, such part would be invalid when another part of the entire custom of which it forms a part was invalid, unless it is reasonably certain that, to enforce the former as a separate and independent custom, would correspond with the intent and purpose with which the custom, as a whole, was established and used.

August 11, 1908.)

Headnotes by HOLDEN, J.

Case Note. — Effect on sale of destruction of property after actual or constructive delivery, preventing the ascertainment of the price according to the terms of the contract.

This note is confined to those cases in which it appears that the contract of sale sued upon concerned identified, specific chattels, the purchase price of which was to be fixed by ascertaining their quantity after they had been either actually or constructively delivered to the purchaser, and which were destroyed through the negligence of neither party, before the operation of weighing, measuring, counting, or the like, could be performed, so as to fix their

on the delivery book of the plaintiffs was as follows:

Nov. 10, 1905. Sold to L. F. Butt. Agt.			
Marks	No.	Wt.	Wt.
1 Ash.....	466	350	
2 "	470	424	

—and so on, covering the 100 bales, showing the original warehouse weight of the 100 bales in the first column marked "Wt." and in the second column marked "Wt." the re-weight of the 42 bales not burned; but it was blank in the second column as to the weight of those burned. Before the 42 bales not burned were taken and paid for, they were reweighed and settled for by the re-weights. Where the price per pound is agreed upon by the buyer and seller, and there is no agreement between them as to the number of pounds in such bale, under the facts appearing in this case it is proper to hold that the understanding was that the cotton would have to be reweighed in order to ascertain the amount to be paid therefor. Such facts show an understanding between the parties as a part of the agreement that the buyer was to pay for the cotton a certain price per pound according to the number of pounds in the bales at the time of the consummation of the trade, and this number of pounds was to be ascertained by weighing each bale. Whether viewed from the standpoint of a custom, or from the law governing what occurred between the parties, independent of custom, the amount to be paid by the buyer for the cotton bought was not determined before it was consumed by fire, and nothing appears in the record to show that after the fire it was possible to determine this amount as to the cotton burned. The amount to be paid would necessarily depend upon the number of pounds of cotton in each bale, and there is no way by which it can be determined from the record before us the number of pounds in any particular bale destroyed by the fire. If there was testimony from which it could be implied that the cotton was weighed when first brought to the warehouse, it does not appear when it was thus weighed, and what would be the probable loss in weight, if any.

Under the record before us, it would be impossible for the courts to determine what was the amount of consideration to be paid by the buyer for the cotton which was burned, and, where the consideration becomes impossible of ascertainment, there is no sale, under the provisions of Civil Code 1895, § 3548, which is as follows: "A valuable consideration is essential to a sale; it must either be definite, or an agreement made by which it can be made certain; if

its ascertainment becomes impossible, there is no sale." Where the consideration for the sale of property is to be determined by ascertaining its quantity, and meanwhile this is rendered impossible by reason of its destruction, there is a closely analogous instance to cases where the parties agree upon a sale of property, the value of which is to be fixed by a named third person, who refuses to act, or dies before fixing such value. In such cases the sale fails, because the consideration becomes impossible of ascertainment. See, in this connection, *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, 50 S. E. 964. We do not mean to intimate that, in cases of the nature referred to, were the property before its destruction converted by the prospective purchaser, or its loss were to ensue from such negligence as would render him liable in his character of bailee independent of any connection with the proposed sale, or if the delay in reweighing before the property was destroyed was the result of his negligence and in violation of his obligation to reweigh in a given or reasonable time, or under some other circumstances, an action could not be maintained by the seller of the property for the value of the property; but he could not recover on the contract as vendor of the property, there being in law no sale of such property where the consideration becomes impossible of ascertainment. Even if there was a valid contract to sell, and constructive or actual delivery of the cotton which was the subject thereof, there could be no recovery in this case, under § 3546 of the Civil Code of 1895, because of the fact that there was no sale, as this section, together with §§ 3545 and 3543, contemplates a sale. The provision in § 3546 that, when the property has been delivered to the buyer, the right of the seller to collect the purchase price shall not be affected by its subsequent loss or destruction, follows provisions in that section in regard to a sale of the property referred to, and is based on the fact of there being a sale; and, if there is no sale on which this provision is predicated, it would have no application. The provisions of this section have no application to this case, because, under its facts, there was no sale, either conditional or unconditional. The plaintiffs could not recover under § 3546, which provides that, when property is sold, and title is not to pass until the purchase money is paid, the loss of the property, without the vendee's fault, before such payment, falls on the owner. It is only under the latter part of § 3546 that the plaintiffs could recover the purchase money where cotton is sold with title retained by law in the vendor until the purchase money is paid, and it is destroyed after delivery to the vendee.

The latter part of this section provides that, when the cotton is delivered to the buyer and is destroyed, the right of the seller to collect the purchase price is just the same as it would have been had the cotton not been destroyed. Under the facts of this case, the seller could not have collected the purchase price if the cotton had not been destroyed until after it was reweighed, as it was sold at an agreed price per pound, and it was to be weighed to ascertain the number of pounds. The purchase price was not due, and could not be known, till the cotton was weighed. While the latter part of this section provides for the recovery of the purchase price in such cases, how can the purchase price be recovered when it is impossible to ascertain what is the amount of it? There is no purchase price when an effort is made to fix a purchase price and this effort fails and it becomes impossible to ascertain it. There can be no recovery of a purchase price of property when there is no purchase price fixed, and, without the buyer's fault, it becomes impossible to ascertain it. There can no more be a recovery of the purchase price when there is no purchase price fixed, and it is impossible to ascertain it, than there could be a recovery of a bale of cotton when there was no such bale in existence as the one sought to be recovered, or, if in existence, it was impossible to identify it. Property cannot be recovered which is not so described as to be capable of identification, nor can a purchase price be recovered when it cannot be ascertained what it is. This cotton was never actually delivered. The transaction occurred after banking and business hours on Saturday afternoon. In a letter from the plaintiffs to the buyer of the defendants, they say: "Had the cotton been classed earlier in the day, it would have been actually turned out to you on Saturday afternoon; but on account of the lateness of the hour at which it was classed, it was not to have been turned out to you until Monday morning. In the meantime the fire occurred." Hence it will be seen that it was not the buyer's fault that the cotton was not actually delivered and weighed before the fire occurred.

2. If the evidence in this case authorizes the conclusion that, when there was an agreement between the buyer and the cotton factor in the Athens market that the former should pay a certain price per pound for a bale of cotton represented by a sample, and the sample was actually or constructively delivered to the buyer; but there was no agreement as to the number of pounds in the bale, and the number of pounds was not definitely known at the time, but was to be determined by subsequent weighing when the cotton was actually delivered,—a custom

existed in such market that the property became the property of the buyer and was held by the warehouseman at the risk of the buyer, such custom would be invalid if the cotton was destroyed before the weights were known, and it was impossible to ascertain such weights, thereby making it impossible to determine the consideration to be paid by the buyer for the cotton. In such a case, as shown in the previous division of this opinion, there would be no sale, and a custom to the effect that there was a sale, and that the property became the property of the buyer, would contravene this positive statute, § 3548, and would be invalid. Such custom that the cotton became the property of the buyer would also contravene the provisions of § 3546, which says that in sales of this kind the title to the property sold remains in the seller until the purchase money is paid. A custom contravening a positive statute is invalid. It does not become a part of a contract. *Fleming v. King*, 100 Ga. 449, 28 S. E. 239. If there be a custom that in cases like the one above named any loss of the property by fire before reweighing and actual delivery would fall on the buyer, such custom would be invalid, for it is predicated on the other custom that the title to the property passes to the buyer under such circumstances, which is invalid for the reasons above stated.

The custom that the ownership and risk passed to the buyer seems to be one entire custom, and that the risk followed ownership. This would seem to be a proper construction of the testimony, a part of which is as follows: "Under the customs of the Athens market in November, 1905, it was understood that anything designating a specific number of bales of cotton as being the cotton sold passed the title to the buyer. . . . As between warehouseman and buyer, it was considered the buyer's cotton so that he should insure it, according to my understanding at that time. . . . I was not in the cotton business in November, 1905, but prior to that time, under the customs existing, the title and ownership of the cotton passed when samples of the cotton were received from the seller by classification and grade. . . . When cotton was delivered to them, it was at their risk so soon as ownership could be proven. . . . Under the customs of said market, after the cotton had been agreed on and entered up on the books as sold as above, the cotton was regarded as at the buyer's risk. . . . It was regarded in said market at the time in question as transferring the ownership and risk of the cotton from the seller to the buyer. . . . Under the customs of the Athens market, after my transaction with Mr. Butt, the cotton and the risk were Mr.

Butt's." It appears that the destruction of cotton by fire, under the circumstances of this case, had never at any previous time occurred in Athens. However, if such custom that any loss of the cotton by fire would fall upon the buyer were not invalid for any other reason, would it not be invalid for the reason that it was uncertain and indefinite in its terms? The loss feature of the alleged custom is its chief feature; and can it be told, under the facts, whether the loss is to be the value of the cotton, or its contract price, and, if either, whether it is to be computed from first weights, or on a basis of probable loss in first weights? The testimony shows that there may be a loss from first weights; but there is no testimony showing usual or probable loss, or when the cotton was first weighed.

The custom that the cotton was held at the risk of the buyer was interwoven with and predicated on the understanding that, by the working of the entire custom prevailing, a sale was accomplished, carrying with it both title and risk of loss to the purchaser. When a valid custom exists, and the parties contract with reference thereto, the custom affects the contract in the same manner as would a statute which contained a written law applying to such contract the same incidents which the custom attaches thereto; and, in determining whether a part only of a custom shall be enforced, we are to be guided by the rule which obtains with respect to a statute a part of which is found to be invalid. The rule in such instances is announced by Justice Simmons, in *Elliott v. State*, 91 Ga. 694, 696, 17 S.E. 1004, as follows: "When a statute cannot be sustained as a whole, the courts will uphold it in part when it is reasonably certain that to do so will correspond with the main purpose which the legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, enough remains to accomplish that purpose; but if the objectionable part is so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent, the rest of the statute must fall with it. The courts cannot construct from a defective statute a law which the lawmaking body did not intend to enact, and which it cannot be presumed it would have been willing to enact. See *Cooley*, Const. Lim. 6th ed. 209 et seq.; *Sutherland Stat. Constr.* §§ 169-180; *Baldwin v. Franks*, 120 U. S. 678, 32 L. ed. 766, 7 Sup. Ct. Rep. 656, 763, and cases cited." The central idea of the custom invoked in the present case is that risk follows ownership, and this accords with the general policy of the law.

These observations in reference to custom 19 L.R.A. (N.S.)

as affecting the rights of the parties are made without reference to the provisions of § 3546, which provides that the seller may recover the purchase price when property is delivered to him, though under such section he gets no title thereto. We have shown, under the preceding division of this opinion, that there can be no recovery under that section. We cannot say that the parties establishing and using a custom that the risk was with the buyer would have done so but for the custom existing with it that the ownership passed to the buyer, carrying with it the incidents and burdens imposed by law, including that of sustaining whatever loss its destruction involved. As we have stated, the chief feature of the custom was that risk followed ownership, and its evident scheme and intent would be destroyed if it were held that, while ownership did not pass, because the custom was invalid for that purpose, yet the buyer did, under what was left of the custom, assume the risk of loss. Under the facts of this case, the loss could not for any reason be the buyer's loss if there was no sale, either conditional or unconditional. The custom that the risk passed to the buyer was merely an incident of the proposed sale, and, when anything occurred making it no sale, the incident thereto passed away with it. The plaintiffs in this case were not entitled to recover.

Judgment affirmed.

All the Justices concur.

IOWA SUPREME COURT.

RE ASSIGNMENT OF E. E. SNYDER.

F. W. PORT et al. Appts.,
v.

L. M. CARPENTER, Assignee of E. E. Snyder, et al.

(— Iowa, — 114 N. W. 615.)

Lien — deposit of title deeds.

Placing in another's hands a deed to real estate together with a written memorandum stating that the property is pledged to secure the one in whose hands it is placed against loss from becoming a surety for the owner will create an equitable lien on the property, enforceable against the owner's assignee for creditors.

(January 20, 1908.)

Case Note. — *Equitable mortgage by deposit of title deeds.*

The English doctrine that a deposit of title deeds implies an agreement to give a mortgage upon which courts of equity may

APPEAL by claimants from a judgment of the District Court for Jones County refusing to establish a lien against certain real estate in the hands of an assignee for creditors. Reversed.

The facts are stated in the opinion.

Messrs. Jamison & Smyth for appellants.
Messrs. Park Chamberlain and F. O.

Ellison, for appellees:

The deposit of title deeds as security for a loan does not create an equitable mortgage.

20 Cyc. Law & Proc. p. 223; Pom. Eq. Jur. 3d ed. § 1265; Bloomfield State Bank v. Miller, 55 Neb. 243, 44 L.R.A. 387, 70 Am. St. Rep. 381, 75 N. W. 569; Vanmeter v. McFaddin, 8 B. Mon. 435; Probasco v. Johnson, 2 Disney (Ohio) 96; Shitz v. Dieffen-

bach, 3 Pa. St. 233; Meador v. Meador, 3 Heisk. 562; Gothard v. Flynn, 25 Miss. 58; Lehman v. Collins, 69 Ala. 127; Hall v. McDuff, 24 Me. 311; Harper v. Spainhour, 64 N. C. 629.

Ladd, Ch. J., delivered the opinion of the court:

On December 13, 1905, E. E. Snyder, who operated the Bank of Olin as a private bank, executed a general assignment for the benefit of creditors with L. M. Carpenter as assignee. Lot 12 and the south half of lot 16 of Highland park in the city of Des Moines were part of the estate, but the deed to E. E. Snyder, under which he acquired title, had been deposited with F. W. Port under the following circumstances: In 1903 Snyder,

base a lien, although referred to in a few decisions as being in force in this country, is more generally rejected as being violative of the statute of frauds, and incompatible with the system of registry of titles. Even in those jurisdictions in which it has not been rejected, it has failed to take root, having never seemingly been given actual application, unless it be in certain cases, hereinafter set forth, which may more properly be treated as instances of trusts *ex maleficio*.

The confusion which has been introduced into the subject by the citation of cases as supporting doctrines to which they merely allude is here relied upon as a justification for the setting out of such cases at greater length than their actual importance would otherwise warrant.

Such is notably the situation with respect to the decisions immediately following, which are commonly regarded as upholding the English doctrine:

In Jackson ex dem. M'Crea v. Dunlap, 1 Johns. Cas. 114, 1 Am. Dec. 100, a deed of land sold was retained by the grantor as security for the purchase money. Four judges held that there had been no delivery, and that the title had never passed. Kent, J. dissenting, thought that the title had passed, and that the retention of the deed by the grantor by way of security created an equitable lien.

In Jackson ex dem. Lowell v. Parkhurst, 4 Wend. 369, the foregoing statement of Kent, J., that, where a deed was actually delivered, the legal estate in the premises vested in the grantee, and the subsequent pledge or deposit of the deed with the grantor, by way of security, would only give him an equitable lien on the premises in the nature of a mortgage, was repeated, but was material to the decision of the case only in so far as it indicated that such grantor was not re-vested with a legal estate which could be set up to defeat a recovery in an action of ejectment.

In Rockwell v. Hobby, 2 Sandf. Ch. 9, it was held that, in the absence of other proof, evidence of an advance of money and the finding of title deeds of the borrower in

possession of the lender established an equitable mortgage. But, as remarked in Bloomfield State Bank v. Miller, 55 Neb. 243, 44 L.R.A. 387, 70 Am. St. Rep. 381, 75 N. W. 569, the case loses force from the further holding that, independently of the deed, the depositary was subrogated to the rights of the mortgagee, whom he had paid.

Other references to this doctrine by the New York courts are purely *obiter*, as in Stoddard v. Hart, 23 N. Y. 586, and in the cases of Chase v. Peck, 21 N. Y. 581, and Carpenter v. Black Hawk Gold Min. Co. 65 N. Y. 51, which contain allusions to Jackson ex dem. M'Crea v. Dunlap; Jackson ex dem. Lowell v. Parkhurst; and Rockwell v. Hobby,—*supra*.

In New Jersey, the recognition of the doctrine that an equitable mortgage may be created by the mere deposit of title deeds consists of *obiter dicta* to that effect in the cases of Robinson v. Urquhart, 12 N. J. Eq. 515; Brewer v. Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679; and Gale v. Morris. 29 N. J. Eq. 224, a different element existing in the case of Bullowa v. Orgo, 57 N. J. Eq. 428, 41 Atl. 494, *infra*.

In Hutzler Bros. v. Phillips, 26 S. C. 136, 4 Am. St. Rep. 687, 1 S. E. 502, after referring to the doctrine that, where title deeds are deposited as a present security, and with the intent thereby to give a lien upon the land, such deposit will operate as an equitable mortgage, as being firmly established in the English law, and in many of the American states, it was held that such doctrine could not operate to raise an equitable mortgage by the deposit of title deeds for the purpose of having an actual mortgage prepared for execution, in accordance with an agreement to that effect.

In Mandeville v. Welch, 5 Wheat. 277, 5 L. ed. 87, and in Biebinger v. Continental Bank, 99 U. S. 143, 25 L. ed. 271, the English doctrine is merely referred to,—in the one case for the purpose of excluding the question, and in the other in connection with the statement that there were no allegations in the bill which would bring the case within the principle of an equitable mortgage by deposit of title deeds, if that

doctrine in England are entirely wanting in this country. It is not in harmony with our system of conveyancing and registry. The object of that system is to afford security to titles by a public record, which parties dealing with land may, and for their own protection must, examine, and on which they may rely. Secret transfers and liens are sought to be prevented thereby. For some or all of the foregoing reasons, the courts of this country have quite generally rejected the doctrine, as will appear from an examination of the following authorities: *Probasco v. Johnson*, 2 Disney (Ohio) 96; *Vanmeter v. McFaddin*, 8 B. Mon. 435; *Gardner v. McClure*, 6 Minn. 250, Gil. 167; *Gothard v. Flynn*, 25 Miss. 58; *Meador v. Meador*, 3 Heisk. 562; *Lehman v. Collins*, 69

Ala. 127; *Bloomfield State Bank v. Miller*, 55 Neb. 243, 44 L.R.A. 387, 70 Am. St. Rep. 381, 75 N. W. 569; *Shitz v. Dieffenbach*, 3 Pa. St. 233. In the last case decisions in several states often cited to the contrary are reviewed, and it is shown that, though they have recognized the English doctrine, in none of them has it been applied. As it is conceded by the English authorities to be in violation of the statute of frauds, and supported by precedent only, and is said to have occasioned much injustice, we are not inclined to adopt it, but the rather to follow the authorities of this country to the effect that the doctrine has no applicability because of our registry laws.

2. Appellants argue, however, that, conceding the law to be as stated, the objection

thereof for a longer term than one year, should be in writing," etc.; as well as a statute declaring: "No estate of inheritance, or freehold, or for a term of more than one year, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing sealed and delivered."

In *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113, it was said that, while it has always been held in England that a lien was implied by the deposit of title deeds to land upon a loan of money; and while the same rule has been announced by some courts in this country, the better doctrine seems to be that the mere deposit of title deeds should not be regarded as constituting a lien upon real estate; the reason being that such rule would be in conflict with the uniformly established system of public registration and the statute of frauds.

In *Bloomfield State Bank v. Miller*, 55 Neb. 243, 44 L.R.A. 387, 70 Am. St. Rep. 381, 75 N. W. 569, it was held that a mortgage by the deposit of title deeds, without writing, is not effective, being violative of the statute of frauds and contrary to the policy of the recording acts; and that the exception of the statute of frauds with regard to estates arising by act or operation of law does not embrace cases where the creation of the estate depends solely on the intention of parties to a contract. The court in this case, upon reviewing many of the decisions cited as adhering to the English rule, reaches the conclusion that these cases are by no means so formidable as their bare citation in digests and text-books would indicate, their discussion of the question being generally limited to a citation of the English cases, and of an *obiter* character.

In *Harper v. Spainhour*, 64 N. C. 629, it was said that the doctrine of an equitable mortgage by the deposit of title deeds has never been adopted in North Carolina, the registration act making the possession of original title deeds of little importance.

In *Probasco v. Johnson*, 2 Disney (Ohio) 96, it was held that, as the system of registry dispenses with the necessity of an exhibition of title deeds, and supplies all the

evidence to protect both vendor and vendee, the reason of the English rule does not exist; and that therefore no equitable lien can be created solely by the deposit of a title deed to the land sought to be subjected, accompanied by a parol agreement that it was thereby intended a lien should be created.

In *Shitz v. Dieffenbach*, 3 Pa. St. 233, it was held that the delivery of a title deed was not good as an equitable mortgage, being contrary to the spirit of the statute of frauds and acts for the recording of mortgages, and for entering up liens for public information.

In *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673, it was held that, although there are cases in North Carolina containing *dicta* to the contrary, it has never been decided in that state that the mere deposit of title deeds to secure a debt creates an equitable mortgage; the court saying that the reason of the rule as administered in England, where the system of conveyance renders it necessary to have possession of the muniment of title, does not exist in this country, which has a general system of registration.

In *Meador v. Meador*, 3 Heisk. 562, it was held that "the delivery by a debtor to his creditor of a deed made to the debtor for land, upon the agreement and understanding between the debtor and creditor that the creditor is to hold the deed as security or indemnity for debts due from the debtor, or for which the creditor is bound as surety for the debtor, creates no lien or mortgage, legal or equitable, upon the land embraced in the deed;" since a contrary holding would be a judicial repeal of the statute of frauds.

In *Bicknell v. Bicknell*, 31 Vt. 498, although it was not found necessary to decide the question, the court expressed itself as opposed to the doctrine of creating mortgages by the mere deposit of title deeds, saying that the great weight and consequence attached in England to the production of title deeds may properly have no such application where a system of registration of all conveyances of land obtains.

was obviated by the memorandum accompanying the deed. It is true that, as asserted by appellee, this was first executed to secure the sureties on the bond of the year previous, but it was returned to Snyder, and by him redelivered with the notes and deed to Port, to be held for precisely the same purpose in connection with the last bond. Something is said concerning the evidence being inadmissible to establish this owing to the statute of frauds. Without deciding the point, it is enough to say that no such objection was made by pleading, or to the evidence in the district court, and it is too late now to be of any avail. *Crossen v. White*, 19 Iowa, 109, 87 Am. Dec. 420; *Holt v. Brown*, 63 Iowa, 319, 19 N. W. 235. As we understand another objection, it is

that the parties for whose benefit the instrument was delivered are not the same in both bonds. The only apparent difference is the omission of Lamb's name from the second bond. But according to Port it, with the deed, was delivered as security of the sureties on this bond, and claimants are conceded to be such. The deed accurately describes the property as in Des Moines, and the memorandum pledges as security "the Des Moines property," "to secure them against any loss by reason of signing" the bond of Snyder, to use his bank as county depository. While the instrument is informal, its purpose is manifest, and there is no reason for not enforcing the lien intended thereby to be created. No particular formality is necessary in order to make a valid

The case of *Mowry v. Wood*, 12 Wis. 414, and that of *Jarvis v. Dutcher*, 16 Wis. 308, which refers to it with approval, have been generally cited as holding that an equitable mortgage may be created by deposit of title deeds. On the contrary, the court expresses itself as opposed to such doctrine, the actual holding being that an equitable mortgage was created by the deposit of land certificates, accompanied by a writing subscribed by the depositor, stating that they were deposited as security for the payment of a debt. The court said: "Whether equitable mortgages may be created in this state by the deposit of title deeds, strictly so called, need not here be considered. In some of the states it has been held that they cannot,—that they are forbidden by the statute of frauds and inconsistent with the registry laws. . . . Whatever may be the merits, in opposition to the decisions of the English courts, of the objections founded upon the statute of frauds, those based on the registry laws seem to be supported by very strong reasons. Under their operation, the possession of title deeds is no longer necessary to the assertion of rights to real estate. Office copies answer every purpose, and may be used on all occasions, with the same effect as the originals, and without accounting for their absence. The possession of them, therefore, has ceased to be of any practical importance to the owner. Purchasers seldom examine them, but are governed by an inspection of the records; and it is very rare that they are transferred on a sale of the estate. This change of the law and policy in respect to land titles having obviated the necessity out of which the doctrine of implied or equitable liens arose, they would seem incompatible with it, and with the rights of third persons who may become interested in the estate."

The case of *Hall v. McDuff*, 24 Me. 311, sometimes cited as holding that an equitable mortgage cannot be created by the deposit of a title deed, does not seem to be authority for that proposition. What is therein held is that, where the grantor of premises obtained the possession of his unrecorded

deed and held it by consent of the grantee until he should be paid the part of the purchase money remaining unpaid, he obtained no title which would defeat a prior mortgage given by the grantee.

But it has been held that, though the deposit of title deeds may not constitute a valid and efficacious mortgage, a court of equity will not enforce a return thereof before the depositor has complied with his part of the agreement. *Sidney v. Stevenson*, 11 Phila. 178.

Deposit accompanied by oral agreement to give legal mortgage.

A distinction is to be noted between an equitable mortgage arising from a deposit of title deeds from which an agreement to execute a mortgage is implied, and one arising from an oral agreement to execute a legal mortgage. Whether equity will enforce the agreement last referred to is a question with which the present note is not concerned, further than to set out those cases in which the question whether an equitable mortgage grows out of a deposit of title deeds accompanied by such agreement is involved.

In *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 114 Am. St. Rep. 470, 80 Pac. 49, 6 A. & E. Ann. Cas. 44, it was held that, where a borrower, when the loan was made, left his land contract with the bank, and authorized it to procure a deed of the property from the land company, at the same time agreeing orally with the bank that it should hold the contract, and afterward the deed, as security for the loan, until a formal written mortgage could be prepared, which he agreed to give, the oral agreement to give the mortgage furnished a sufficient basis upon which, after performance by the bank, to found a lien valid as against a subsequent encumbrancer with notice, irrespective of whether the deposit of the title instruments created a lien.

In *Bullowa v. Orgo*, 57 N. J. Eq. 428, 41 Atl. 494, it was held that the deposit of title deeds in pledge for the payment of a debt until a formal mortgage should be executed, under an oral agreement, constituted an equitable mortgage.

mortgage between the parties thereto. *Frick v. Fritz*, 115 Iowa, 438, 91 Am. St. Rep. 165, 88 N. W. 961. Says Judge Story: "If the transaction resolves itself into security, whatever may be its form, it is in equity a mortgage." *Flagg v. Mann*, 2 Sumn. loc. cit. 533, Fed. Cas. No. 4,847. In *Jackson v. Rutherford*, 73 Ala. 157, the court held that "no technical words are necessary to constitute a mortgage which would be good at law any more than in equity. Any words would be sufficient which serve to show a transfer of the mortgaged property as security for a debt." Again, the same court observed in *Kyle v. Bellenger*, 79 Ala. 516, "a lien created by contract, and not sufficient as a legal mortgage, will generally be regarded as partaking of the nature of an equitable mortgage. The form of the contract is immaterial. Though a lien may not be expressed in terms, equity will imply a security from the nature of the transaction, and give effect as such in furtherance of the agreement of the parties, if there appears an intention to create a security." See *Wood v. Holly Mfg. Co.* 100 Ala. 326, 46 Am. St. Rep. 56, 13 So. 948. The rule is clearly expressed in *Howard v. Iron &*

Land Co. 62 Minn. 298, 64 N. W. 896. "Every express agreement in writing, whereby the party clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property, which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged." See also *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192, 58 Pac. 907; *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823; *Dulaney v. Willis*, 95 Va. 606, 64 Am. St. Rep. 815, 29 S. E. 324; *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113; 27 Cyc. Law & Proc. p. 990. The memorandum in connection with the deed is clearly within the doctrine as announced, and, as the assignee, in acquiring the property, was charged with notice of outstanding equities, a decree should have been entered awarding a relief as prayed.

Reversed.

Petition for rehearing denied.

Deposit accompanied by written agreement.

The decisions uniformly recognize that the chief objection to the creation of an equitable mortgage by the mere deposit of title deeds is not applicable where the agreement indicating the intention of the parties to create a lien on the land to which the deed or other muniment of title relates is evidenced by a written instrument accompanying the deposit. The agreement, however, rather than the deposit, is the real basis for the equitable lien, the deed simply performing the office as assisting in the identification of the property to which the agreement relates. But the agreement must evince an intention to create a lien upon the land described in the deed, and not upon the deed itself.

In *Woodruff v. Adair*, 131 Ala. 530, 32 So. 515, it was held that the rule adopted in that state, that a lien cannot be created by a deposit of title deeds, was not applicable to a transaction whereby a mortgagor who had become the purchaser upon foreclosure assigned the mortgage, notes, and certificate of purchase; but that a valid equitable mortgage was thereby created.

In *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192, 58 Pac. 907, a written agreement reciting that, in consideration of a loan, the borrower had deposited with the lender, as security, his government-land patent therein described, to be returned upon repayment of the loan at maturity; the borrower further agreeing that, should he fail to pay his obligation at maturity, he would transfer and assign all his right and title to the land,—was held to create a valid

equitable mortgage, there being more than a mere deposit of the title deed; the court saying: "There is, we think, a clear intention to make a transfer of the land itself by Manson should he fail to pay as agreed. Reading the entire instrument, it seems to us the intention is made manifest that the land should stand as security for the debt, and the land is sufficiently described to indicate what was intended to be mortgaged."

In *Stewart v. McLaughlin*, 11 Colo. 458, 18 Pac. 619, it was held that the deposit of a certificate of purchase of state land to secure the payment of a note, taken in connection with a written agreement by which the maker agreed to assign said certificate to the payee in case he should fail to pay said note, created an equitable lien superior to that of a subsequent encumbrancer with notice; the court saying: "We do not think the question whether an enforceable equitable mortgage may or may not be created by the deposit of title papers is necessarily involved."

In *English v. McElroy*, 62 Ga. 413, it was held that the following words in a note for cash borrowed, "for which I have placed in his hands two deeds to 100 acres of land whereon I now reside, to hold as collateral security for the payment of the above note, the deeds to be returned to me when the note is paid," while not creating a perfect statutory mortgage upon the land, manifested an intention of the parties to create a lien, so that a court of equity will consider as done what ought to have been done, and which the parties intended should be done; and that, as between the parties, the depository should be deemed to have a lien

upon the land as security for the money borrowed, and that the same be enforced by a sale thereof.

In *Mallory v. Mallory*, 86 Ill. App. 193, it was held that the delivery to a creditor by a debtor, of a deed to herself, accompanied by a writing, under seal, stating, in substance, that she had borrowed a stated amount and had delivered the deed to be held in escrow, and not to be recorded till said amount should be repaid within three years, and that she thereby agreed to bind herself, her heirs and assigns, so to do, constituted a valid equitable mortgage.

In *Carey v. Rawson*, 8 Mass. 159, it was held that, where an agreement was made under seal, that a deed to be executed should be deposited with a third person until a sum of money advanced by the grantee to the grantor should be repaid, or until a day specified, and, in default of such repayment, it should be delivered to the grantee, who might thereupon enter, such deed and agreement constituted a mortgage.

In *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113, it was held that, although a lien cannot be implied from the mere deposit of title deeds, there is a very marked difference between a deed to land, and a bond or contract for a deed upon conditions therein specified, which have been complied with; and that, therefore, the deposit of a contract for a deed as collateral security under a written instrument filed with it, stating that certain property, including "an article of agreement hereto attached," was deposited with the bank as security, created an equitable lien or mortgage on the property described in the contract, which was good as against a purchaser of the property with notice.

In *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823, it was held that a deposit of a title deed, in connection with a signed memorandum to the effect that such deed should be held as security, gave a right in equity to a specific lien on the land described in the deed; the court saying: "I think it sufficiently clear that the agreement in question amounted to an equitable mortgage, or an agreement to give a mortgage. It does, indeed, speak only of the deed as being security for the payment of the note; but there is an agreement not to sell, assign, or transfer the property mentioned in the deed, and an agreement that Martin shall hold the deed to secure him for any money he may have to pay on the note, so that, it seems to me, in order to give proper force and effect to the agreement, it must be construed as one pledging the land to the complainant."

No question under the statute of frauds was raised either by the answer or in argument."

In *Rickert v. Madeira*, 1 Rawle, 325, in which the question was whether the interest of the mortgagee could be taken on execution, it was said of title papers deposited as security with a surety: "It is, then, an equitable mortgage by deposit of title deeds, which may be created by parol, or by written agreement, as here, which is the better 19 L.R.A.(N.S.)

and safer way, showing the nature and intent of the transaction."

In *Luch's Appeal*, 44 Pa. 519, a certificate, under seal, setting forth that the person signing it had left in the hands of his creditor two certain deeds as collateral security for a certain note, promising, should he fail to pay the note in reasonable time, to make deeds of the property, was conceded to be a valid equitable mortgage.

In *Edwards v. Trumbull*, 50 Pa. 509, the deposit of title deeds with a power of attorney in blank to sell and transfer the land, the depository giving a receipt therefor reciting that the deed was to be held as collateral security for the payment of a balance due upon certain stock, was held to be a mortgage.

In *Spencer v. Haynes*, 12 Phila. 452, it was held that, although a mere deposit of title deeds as a security, without any writing, would not create an equitable mortgage, a written instrument certifying that the signer had deposited a certain deed as security for a loan, and agreeing to convey such property should the loan not be repaid, if under seal, would be at least a good equitable mortgage.

See also *Mowry v. Wood*, 12 Wis. 414, *supra*.

But in *Gardner v. McClure*, 6 Minn. 250, Gil. 167, it was held that, where the instrument executed at the time of deposit, stating the object thereof, did not pretend to create any interest in the land described in the deed deposited, but referred solely to the deed itself, the statute of frauds presented an insuperable obstacle to the creation of a mortgage thereby upon the lands described in the deed; the court saying that the custom of giving security by the deposit of title deeds can have no coexistence with the system of registering titles to land.

IOWA SUPREME COURT.

LA BARGE, Admr., etc., of August La Barge, Deceased.

v.

UNION ELECTRIC COMPANY, Appt.

(— Iowa, —, 116 N. W. 816.)

Street railway — proximate rails — negligence.

1. A street railway company is negligent in maintaining the tracks used by cars run-

Note. — As to exposure by passenger inside of street car of part of his body beyond side of car, see case notes to *Georgetown & T. R. Co. v. Smith*, 5 L.R.A.(N.S.) 274, and the later case of *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 16 L.R.A.(N.S.) 527.

As to contributory negligence of passenger in riding or standing on running board of street car, see case notes to *Burns v. Johnstown Pass. R. Co.* 2 L.R.A.(N.S.) 1191, and *Harding v. Philadelphia Rapid Transit Co.* 10 L.R.A.(N.S.) 352.

ning in opposite directions so close together that the natural sway of the cars in motion, emphasized by an uneven condition of the track which it permits to exist, brings passing cars within 3 to 6 inches of each other, without taking any precautions to prevent injury to passengers who, because of the crowded condition of the cars, may project some portion of the body beyond the sides of the cars.

Carrier — passenger — negligence — projecting head.

2. A passenger on an open street car cannot be said, as matter of law, to be negligent if, when compelled to stand because of the crowded condition of the car, he leans against a side post, and in the act of laughing throws his head back a few inches beyond the post, so that it comes in contact with a car passing in the opposite direction.

(June 10, 1908.)

APPEAL by defendant from a judgment of the District Court for Dubuque County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of her intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Hurd, Lenehan, & Kiesel and Matthews & Frantzen for appellant.

Messrs. T. J. Fitzpatrick and M. J. Wade for appellee.

Weaver, J., delivered the opinion of the court:

The appellant owns and operates a double-track electric street railway, at the place where the accident occurred, in the city of Dubuque, Iowa. On July 13, 1902, August La Barge was a passenger on an open or summer car moving north along the east track on Couler avenue. The car seats extended transversely, leaving no aisle or passageway down the middle, the passengers entering the space between the seats directly from the footboard extending along the side of the car. The sides of the car were not inclosed, except by upright posts erected at the ends of the seats. On the outside of these posts there were attached perpendicular hand holds or bars for the convenience of passengers in boarding or alighting from the car. While moving northward, a hinged or movable rail or guard was let down on the left side of the car, requiring passengers to enter and depart from the east footboard, and thus avoid danger of collision with cars moving south on the west track. This rail or guard when in place was a little less than 3 feet above the car floor, and with the posts above described constituted the only barrier or inclosure on that side. The deceased entered the car from the east side, 19 L.R.A. (N.S.)

and sat down at the west end of one of the seats. Shortly afterward, the car being full to crowding, deceased arose, and, giving his seat to a lady, stood up in the narrow space in front of the place where he had been sitting. Standing there with his back to the west, he appeared to be supporting or steadying himself against the guard rail and post, talking with some of his fellow passengers. In the course of the conversation something of an amusing nature was said or done, and deceased, in the act of laughing, threw his head back so that it extended a few inches beyond the outside of the post near which he was standing. At the instant of this movement on his part he was struck upon the head by the post or hand rail of another car moving rapidly southward on the west track, and fatally injured. The plaintiff charges the defendant with negligence in constructing its two tracks so close together that the cars moving thereon in an opposite direction would be separated by a space of very few inches, thereby exposing passengers to great danger of injury, especially when the cars were being operated at high speed. Other allegations of negligence were made, but not submitted to the jury by the trial court, and we need not here set them out. The jury returned a verdict for plaintiff, assessing damages in the sum of \$3,000.

The appellant in argument rests its demand for a reversal on the single proposition that, upon the admitted and undisputed facts, the plaintiff was not entitled to recover, and the jury should have been so instructed. As this position taken by the appellant requires us to assume the truth of all matters which the plaintiff's evidence fairly tended to establish, we may say that, in addition to the facts hereinbefore stated, it was shown that the two tracks of the appellant's road at the place of the accident are in such proximity that, with two cars standing thereon at rest, the distance between them would be about 11 inches. The tracks were somewhat uneven, the rails being depressed at the joints, and, while this fact was not submitted to the jury as a ground of negligence, we think it is still a proper matter to be considered, as bearing upon the question whether the tracks were too close together to be operated with safety. It is a matter of common observation that car bodies, owing to their weight, size, and manner of construction, have some tendency to rock and sway upon their trucks while in rapid motion, and that such tendency becomes more marked upon tracks which are rough or uneven. The testimony of the several witnesses of the accident is to the effect that at the

time the deceased was struck his head was thrown back not to exceed a distance of 3 inches to 6 inches from the outer edge of the post by which he stood, and if this be true, it would seem to indicate that in passing the two cars so away or rocked inward that the space between them was reduced to a very narrow margin. That it is evidence of negligence to construct parallel tracks so close together, for the operation thereon of open cars packed to their capacity with passengers, ought to need no argument. To the passenger standing or sitting at the end of the seat in a crowded car, the open side is a constant invitation to lean in that direction for breathing room, and for relief from the pressure to which he is subjected; and for the court to say that the railroad company owes no duty to guard the safety of a passenger who happens to reach his hand a few inches beyond the frame of the car, or of one who, while standing because of the crowded condition of the vehicle, voluntarily or involuntarily, permits any portion of his person to be exposed slightly beyond the post, would be to ignore the fundamental rule of the law of carriers, which requires active, vigilant, and constant care for the safety of those whom they undertake to transport over their lines. Living people cannot be packed into cars like bales of merchandise. Life presupposes motion, movement, and some reasonable degree of freedom of action, and those who cater to the public by furnishing means of carriage from place to place for hire must provide facilities and protection with these self-evident facts in view. Whether the lines of a double-track street railway are separated by a safe distance depends, in some degree, on the manner in which the cars are to be operated thereon. If intended for rapid transit, the tendency of the cars to sway or lurch from side to side, thereby reducing the distance separating them in passing, is a factor which cannot be safely overlooked, and failure to guard against such danger by increasing the space between the tracks, or employing other suitable devices to shield the passengers therefrom, is culpable negligence. But counsel insist with much earnestness that, in any event, the deceased was chargeable with contributory negligence as a matter of law. We think otherwise. There was no negligence in yielding his seat to another passenger. The company having filled the seats with other passengers, he was not negligent in standing up. There being no aisle in the center of the car, the only place to stand was at the outer end of the space in front of the seat or upon the footboard along the outside of the car. To uphold the appellant's contention is to say

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that the voluntary or involuntary act of the deceased in throwing his head backward in laughter slightly beyond the post against which he was standing was negligence as a matter of law, and that in so doing he did not act as a reasonably prudent man might fairly have been expected to act under the circumstances. In our judgment his conduct was not so glaringly imprudent that the jury might not fairly and reasonably acquit him of culpable negligence. No well-considered authority called to our attention supports the appellant's view in this respect, or holds the passenger to such extraordinary circumspection of conduct in order to claim protection at the hands of the carrier. It is a common, and not necessarily an improper, thing for street railway companies to load their cars, not only to the limit of seating capacity, but to fill the standing room inside and the footboards outside. This is often unavoidable, but the movement of cars and the handling of traffic must be so controlled and guarded as not to expose persons thus being carried to unnecessary or unreasonable danger. In other words, if the carrier exercises the right to carry passengers in this manner, care of their safety must be proportionate to the dangers to which they are exposed. *Treat v. Boston & L. R. Corp.* 131 Mass. 371; *Griffith v. Utica & M. R. Co.* 43 N. Y. S. R. 835, 17 N. Y. Supp. 692; *Clark v. Eighth Ave. R. Co.* 36 N. Y. 135, 93 Am. Dec. 495; *Geitz v. Milwaukee City R. Co.* 72 Wis. 310, 39 N. W. 866; *Lehr v. Steinway & H. P. R. Co.* 118 N. Y. 556, 23 N. E. 889; *Meesel v. Lynn & B. R. Co.* 8 Allen, 234.

A passenger sitting by a car window rested his arm on the sill, his elbow projecting a few inches beyond the side of the car, and was struck and injured by another car moving on the adjoining track. Held, that the question of his contributory negligence was for the jury. *Summers v. Crescent City R. Co.* 34 La. Ann. 139, 44 Am. Rep. 419. And it has often been held that the slight exposure of a passenger's hand, arm, or head outside of a car window or doorway is not necessarily an act of negligence. *Salmon v. City Electric R. Co.* 124 Ga. 1056, 53 S. E. 575; *Germantown Pass. R. Co. v. Brophy*, 105 Pa. 38; *Dahlberg v. Minneapolis Street R. Co.* 32 Minn. 404, 50 Am. Rep. 585, 21 N. W. 545; *South Covington & C. Street R. Co. v. McCleave*, 18 Ky. L. Rep. 1030, 38 S. W. 1055; *Francis v. New York Steam Co.* 114 N. Y. 380, 21 N. E. 988.

The contrary rule would be manifestly unreasonable and unjust. We think it unnecessary to go into a more extended re-

view of the authorities cited by counsel. The conclusion we have announced is in harmony with the general principles of the law governing carriers of passengers as the same has, from time to time, been applied by this court.

It is sufficient to say that in our judgment there was sufficient evidence to justify the trial court in refusing to direct a verdict in defendant's favor; and as this is the only question argued by counsel, the judgment appealed from must be, and it is, affirmed.

IOWA SUPREME COURT.

CHICAGO MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Appt.,

v.

B. H. HANKEN et al.

(— Iowa, —, 118 N. W. 527.)

Adverse possession — mistake as to boundary.

1. The possession beyond his true line, of the grantee of a particular lot, who occupies up to fences set over on his neighbor's property, claiming the ground as part of his lot and basing his possession on no other claim of right, is not adverse to the true owner.

Same — depot grounds.

2. Merely noting on a plat a dedication of land for depot purposes does not endow the entire tract set apart with the incidents of public use, so as to prevent the acquisition of title to it by adverse possession.

Boundary — acquiescence — railroad.

3. A railroad company is presumed, after the lapse of twenty years, to have acquiesced in the fact that a fence placed along land dedicated for depot purposes, but not in fact needed for public use, represents the true boundary line, although neither it nor the adjoining owner is required by law to maintain the fence.

(November 24, 1908.)

APPEAL by plaintiff from a judgment of the District Court for Jones County dismissing a petition to quiet title to certain land as part of plaintiff's depot grounds, and quieting title in the cross petitioners. Affirmed.

The facts are stated in the opinion.

Note. — As to whether a railroad right of way is a proper subject of adverse possession, see case note to *Roberts v. Sioux City & P. R. Co.* 2 L.R.A. (N.S.) 272.

Upon the question of adverse possession due to ignorance or mistake as to boundary, see note to *Preble v. Maine C. R. Co.* 21 L.R.A. 829.
19 L.R.A. (N.S.)

Messrs. J. C. Cook and H. Loomis, for appellant:

Defendants must prove possession for more than ten years, which was adverse in character and under claim of right or color of title.

Chicago, M. & St. P. R. Co. v. Snyder, 120 Iowa, 532, 95 N. W. 183; *Grube v. Wells*, 34 Iowa, 148; *Larum v. Wilmer*, 35 Iowa, 245; *Jones v. Hockman*, 12 Iowa, 101; *Lewis v. New York & H. R. Co.* 162 N. Y. 202, 56 N. E. 540.

The occupation by the defendants was not adverse in its character as against the plaintiff, because in no instance was it inconsistent with such use of the premises as plaintiff desired to make at the time, or with its right to take possession for the purpose of such use in the future.

Chicago, M. & St. P. R. Co. v. Snyder, supra; *Slocumb v. Chicago, B. & Q. R. Co.* 57 Iowa, 675, 11 N. W. 641; *Barlow v. Chicago, R. I. & P. R. Co.* 29 Iowa, 281; *Michigan Mill. Co. v. Ann Arbor R. Co.* 138 Mich. 216, 101 N. W. 574; *Northern Counties Invest. Trust v. Enyard*, 24 Wash. 366, 64 Pac. 516; *East Tennessee, V. & G. R. Co. v. Telford* (East Tennessee, V. & G. R. Co. v. West) 89 Tenn. 293, 10 L.R.A. 855, 14 S. W. 776; *Union P. R. Co. v. Kindred*, 43 Kan. 134, 23 Pac. 112; *Pierce, Railroads*, p. 160.

Plaintiff's title was a mere easement founded on grant for a public use, and as such could not be lost by mere nonuser.

Northern Counties Invest. Trust v. Enyard, supra; *Pope v. O'Hara*, 48 N. Y. 446; *Livermore v. Maquoketa*, 35 Iowa, 358; *Derby v. Alling*, 40 Conn. 410; *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 516; *McClelland v. Miller*, 28 Ohio St. 502; *Noll v. Dubuque, B. & M. R. Co.* 32 Iowa, 66; *Vorhes v. Ackley*, 127 Iowa, 658, 103 N. W. 998; *Schwallback v. Chicago, M. & St. P. R. Co.* 69 Wis. 292, 2 Am. St. Rep. 740, 34 N. W. 128; *Chicago, M. & St. P. R. Co. v. Snyder*, supra; *McClenahan v. Stevenson*, 118 Iowa, 110, 91 N. W. 925; *Lewis v. New York & H. R. Co.* 162 N. Y. 202, 56 N. E. 540; *Cameron v. Chicago, M. & St. P. R. Co.* 60 Minn. 100, 61 N. W. 814.

The depot grounds are an integral part of the railroad, and would be conveyed by the conveyance of the railroad as such without specific mention.

Chapman v. Pittsburg & S. R. Co. 26 W. Va. 299; *Atchison, T. & S. F. R. Co. v. Kansas City, M. & O. R. Co.* 67 Kan. 569, 70 Pac. 939, 73 Pac. 899; *Chamberlain v. Walter*, 60 Fed. 788; *Knevals v. Florida, C. & P. R. Co.* 13 C. C. A. 410, 23 U. S. App. 549, 66 Fed. 224.

The failure of the railway companies to take possession of the full amount of the

grounds dedicated is no evidence of election not to avail themselves of the dedication to the full extent whenever the exigencies of the situation should prompt such act.

Morgan v. Des Moines Union R. Co. 113 Iowa, 570, 85 N. W. 902; *Slocumb v. Chicago, B. & Q. R. Co.* 57 Iowa, 679, 11 N. W. 641.

The plaintiff's interest is only in the nature of an easement.

Brown v. Young, 69 Iowa, 625, 29 N. W. 941; *Barlow v. Chicago, R. I. & P. R. Co.* 29 Iowa, 276; *Ottumwa, C. F. & St. P. R. Co. v. McWilliams*, 71 Iowa, 164, 32 N. W. 315; *Mills, Em. Dom.* 1900, § 91-k; *People v. Kerr*, 27 N. Y. 197; *Kimball v. Kenosha*, 4 Wis. 321; *Goodall v. Milwaukee*, 5 Wis. 41; *Uhl v. Ohio River R. Co.* 51 W. Va. 106, 41 S. E. 340; *Lewis, Em. Dom.* 2d ed. § 140; *Skillman v. Chicago, M. & St. P. R. Co.* 78 Iowa, 404, 16 Am. St. Rep. 452, 43 N. W. 275.

Messrs. **Herrick & Bauder** for appellees.

Ladd, Ch. J., delivered the opinion of the court:

The plat of Langworthy was filed January 25, 1858, by William T. Shaw, and exhibits a right of way and depot ground, extending diagonally from the northeast to the southwest. On the space left for a depot is written "Dubuque Western Railroad Depot Ground." At each end of this ground the width of the right of way on each side of the track is indicated, but nothing on the plat shows the relative width of the portions of the depot ground north and south of railway track which was constructed shortly after the dedication. The plaintiff acquired, through mesne conveyances, the title to the road of the Dubuque Western Railroad Company, including the right of way and depot ground. The latter was not described in these several conveyances by metes and bounds, but in general terms. This is a suit to quiet title to the depot ground as dedicated. The several defendants interposed the defenses of adverse possession, boundaries established by acquiescence, and practical location and estoppel. In 1897 Hanken acquired the unplatted land north of the depot ground, extending from the east end southwest by 279 rods, and included in the conveyance was a strip of said ground 50 feet wide, so that boundary fence was but 50 feet north of the track and an extension of the right of way fence from the east. This fence appears to have been constructed at least thirty years previous to the trial, though by whom is in doubt. The railroad company reconstructed it in 1893, and this circumstance is corroborative of testimony that the original fence was erected

ed by one of its grantors. The land was used for pasture most of the time, though occasionally put in corn. The boundary fence of Hanken extended westerly, veering out from the track to near the westerly end of the depot ground. Wilkin owns several lots to the west from Hanken's land, a vacant space lying between the tracts, and with these lots is included a strip of the depot ground 177 feet long by about 47 feet wide on the east end and narrower to the west. The boundary fence is conceded to have been maintained by Wilkin and his grantors for thirty years, and numerous evergreens were planted along this fence twenty-two years ago, which have grown into what one witness denominates "monarchs of the forest." A house was built in 1860 or 1861 by the owner. Shrubs also have been planted on the disputed ground, which has been occupied by Wilkin and his grantors for at least thirty years; the house being only a few feet back from the line as claimed by the company. South of the track, and at the westerly end of the depot ground, the defendant Dirks occupies, of that originally dedicated, a strip about 100 feet wide and 313 feet long, together with the lots adjoining. The fence extends northeasterly from the right of way fences, the entire distance, and has been maintained by him and his predecessors for more than thirty years. The house and outbuildings were erected on this disputed strip still longer ago, and evergreen, cottonwood, and fruit trees were planted in the yard and along the fence more than twenty years since, and have grown to be large trees. Considerable of the strip east of the house is used as a pasture, but in connection with other portions of the premises. To the east of Dirks's lots are those owned by Heyan. He has been in possession of a strip of land dedicated as depot ground for sixteen years prior to the trial. The fence along that occupied by Dirks extended northeasterly for 305 feet, and had been maintained twenty years when it was set over far enough by Heyan so as to leave a strip 50 feet wide at the southwesterly end and 32 feet wide on the east. This was used in connection with part of his lots as a pasture. The evidence does not disclose any other improvements save the existence of trees along the fence 8 or 10 inches in diameter, but Heyan testified that he had always "thought the land belonged" to him, and that the company had never claimed it until a year prior to the trial, when it removed the fence to what it claimed was the true line.

From this statement of the facts, it is apparent that the plea of adverse possession cannot be sustained. The defendants and

their grantors did not acquire title to the disputed tracts, but to the lots abutting on them, and have occupied up to the fences because claiming the ground as part of their lots, and based their possession on no other claim of right. See *Grube v. Wells*, 34 Iowa, 148, and other like decisions. But they have been in possession up to these division fences, as marking the boundaries to their lots, for a period longer than that of the statute of limitations, during which the plaintiff and its grantors have acquiesced without raising the slightest objection. The plaintiff company acquired the road in 1881, and no claim to these strips was asserted until 1904. If, then, the doctrine of acquiescence may be invoked in such a case, these fences must be regarded as indicating the true boundaries between the lots of defendants and the depot ground of plaintiff. *Miller v. Mills County*, 111 Iowa, 654, 82 N. W. 1038; *Lawrence v. Washburn*, 119 Iowa, 109, 93 N. W. 73. The authorities are in conflict as to whether an abutting owner may acquire title to a portion of a right of way by adverse possession; some decisions treating the possession of a railroad company of its right of way as that of its private property, to enable the corporation to perform a public duty, while others regard property acquired for right of way purposes and held in good faith for future needs as endowed with the incidents of property devoted to the public use. The decisions first mentioned are to the effect that title by adverse possession may be acquired. *Illinois C. R. Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563; *Louisville & N. R. Co. v. Quinn*, 94 Ky. 310, 22 S. W. 221; *Matthews v. Lake Shore & M. S. R. Co.* 110 Mich. 170, 64 Am. St. Rep. 336, 87 N. W. 1111; *Pittsburgh, C. C. & St. L. R. Co. v. Stickley*, 155 Ind. 312, 58 N. E. 192. The line of decisions last referred to declares that possession by the abutting owner not inconsistent with the existence of the easement is permissive only and cannot bar the claim by the company when the property is required for the prosecution of the company's business. *Southern P. Co. v. Hyatt*, 132 Cal. 240, 54 L.R.A. 522, 64 Pac. 272; *Louisville & N. R. Co. v. French*, 100 Tenn. 209, 66 Am. St. Rep. 752, 43 S. W. 771; *Spottiswoode v. Morris & E. R. Co.* 61 N. J. L. 322, 40 Atl. 505. See *Warvelle*, Eq. § 471. The point was not determined in *Chicago, M. & St. P. R. Co. v. Snyder*, 120 Iowa, 532, 95 N. W. 183, but in *Slocumb v. Chicago, B. & Q. R. Co.* 57 Iowa, 675, 11 N. W. 641, the doctrine that property taken for the public use cannot be encroached on by the abutting owner so as to deprive the railroad company of title, save by appropriation absolutely inconsistent 19 L.R.A. (N.S.)

with such use when needed, finds approval. This doctrine is quite as applicable to depot ground as right of way where condemned for such use or actually occupied for that purpose. The difference to be noted is this: The statute determines the width of a right of way, while the extent of depot ground depends on the necessities of the company.

In the case at bar, the so-called depot ground was set apart in the plat long before any railroad was constructed. It was never adjudicated by condemnation or other proceedings to be essential to any company for depot purposes, and but a small portion of it has ever been occupied by the plaintiff or its grantors for that purpose: nor is it made to appear that that part not now so occupied will be likely to be needed in the future. Merely noting its dedication on the map as depot ground did not endow the entire tract set apart with the incidents of a public use. That which was actually occupied by the company for depot purposes may have been so used that it might not be subject to adverse possession, but certainly there is nothing in the record before us to indicate that the disputed strips ever have been so occupied, or that plaintiff or any of its grantors took or were in possession thereof for such purposes, or that these and much more will ever be needed by the company in the transaction of its business at Langworthy. The parties have assumed in argument that plaintiff acquired title under the plat. Whether upon abandonment title would revert to the original owner or someone else, and whether such reversioner would be bound by the fixing of lines by the company, may be considered when, if ever, these questions arise. It is enough now to pass on the rights of party originally acquiring title under dedication and those claiming under it. As neither the disputed strips of land nor the ground next to them appear to have been devoted to a public use, the doctrine of *Slocumb v. Chicago, B. & Q. R. Co.*, supra, ought not to be applied, but the boundaries defined the same as those between any other owners of adjoining lands. A railroad company is not compelled to fence the portion of its depot ground necessarily used by the public and the corporation in the convenient transaction of business. The same is true of the adjoining owner. The inference of an agreement upon a boundary does not arise from the obligation to fence or otherwise mark the division line, although this may add strength thereto, but from the fact that one or both the adjoining owners have in fact definitely defined such line by erecting a fence or other monument thereon, and both have treated the same as fixing the boundary between them for such length of

time that neither ought to be heard to deny that it is in fact what both have by their conduct declared it. Even though neither defendants nor plaintiff were bound to erect the division fences, they were erected and have been maintained, and this was notice to all of them of the claim that they marked the boundary between the depot ground and the several lots. No objection was raised thereto for more than twenty years, and from its long silence plaintiff must be presumed to have acquiesced in this claim.

Affirmed

**UNITED STATES CIRCUIT COURT
OF APPEALS, EIGHTH CIRCUIT.**

**WATER, LIGHT, & GAS COMPANY, Plff.
in Err.,**

v.

CITY OF HUTCHINSON.

(— C. C. A. —, 160 Fed. 41.)

**Election of remedy — action — contract
— quantum meruit.**

1. Bringing an action upon express contract for electric light furnished a city is not an election which will preclude an action upon *quantum meruit* in case the first action is dismissed for failure to prove compliance with the contract.

Judgment — res judicata.

2. A judgment in favor of defendant in an action to recover the contract price of light furnished a municipal corporation is no bar to a subsequent action to recover the value of the light upon *quantum meruit*.

(March 9, 1908.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of defendant in an action brought to recover the value of light furnished by plaintiff to defendant. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Adams, Circuit Judges, and Philips, District Judge.

Messrs. Frank Doster and H. S. Lewis for plaintiff in error.

Messrs. C. M. Williams, A. C. Malloy, and F. F. Prigg for defendant in error.

Philips, District Judge, delivered the opinion of the court:

Broadly stated, the question for decision on this record is whether or not, under the facts pleaded, a suit founded upon an express written contract for electric lights

furnished by the plaintiff in error to the defendant city, and judgment for the defendant, is a bar to a subsequent *quantum meruit* action for the value of the service so rendered by the plaintiff and enjoyed by the defendant. As judgment was directed in favor of the defendant on the pleadings, we must look to them for the facts. The petition, in substance, alleges that the plaintiff furnished electric lights for the defendant on its streets at its special instance and request, from the month of July, 1903, to the month of November, 1905, inclusive; that the reasonable value of the light service so furnished was \$262.40 per month, aggregating the sum of \$7,423.81, with interest on each of the monthly bills rendered, the itemized account of which was attached to the bill. The answer, after denying that the plaintiff furnished said light at the special instance and request of the defendant, and alleging that such service was voluntary on the part of plaintiff, against the objection of defendant, pleaded in bar of the action that, on the 14th day of July, 1904, the plaintiff, in the United States circuit court for the district of Kansas, instituted against it an action to obtain judgment for the electric-light service aforesaid, as also for moneys alleged to be due the plaintiff for hydrant rental in said city, and that in said action the plaintiff recovered judgment for the sum of \$8,301.77, which it pleads as an adjudication of the controversy in question. The defendant filed with the answer the record, pleadings, proceedings, etc., in said original suit as a part of the answer, to which reference is made, from which it appears that the first twelve counts of the original petition were based upon the written contract between the plaintiff's assignor and the defendant city for electric lights furnished to the defendant, covering the same monthly items sued for in the present action. Other counts in the original petition were for extra lighting service alleged to have been furnished by the plaintiff to the defendant. The other counts of the petition were for water furnished by the plaintiff's assignor to the city under written contract, amounting to \$7,540, for which judgment was prayed, with interest. It seems from the verdict returned therein that the jury found the issues for the plaintiff on the counts for hydrant rental alone. As to the extra lighting service sued for, the court directed a verdict for the defendant, on the ground that no evidence was adduced in support thereof. The charge of the court to the jury in said first action, which is presented as a part of the defendant's answer, explicitly required that to warrant a verdict for the plaintiff on ac-

Note. — As to effect of choosing by mistake remedy not legally available, see case not to Clark v. Heath, 8 L.R.A. (N.S.) 144. 19 L.R.A. (N.S.)

G. Steam Packet Co. v. Sickles, 24 How. 333, 16 L. ed. 650, which was a much stronger case for the defendant than the one at bar, the court said: "It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause because it might have been determined in the first action."

It is the identity and the legal quality of the subject of the two actions, as well as the identity of parties, which create the estoppel. It may not depend so much upon the identity of the thing sued for, "but rather from the want of identity in the issues involved in the two actions." This is aptly illustrated by the case of Buttrick v. Holden, 8 Cush. 233. The action was for breach of contract to convey land. The defendant, *inter alia*, interposed the defense that theretofore the plaintiff brought bill in equity, based on the contract, for a specific performance, in which the rights of the parties in the premises were tried out, and the bill was dismissed. It is true there were other parties to that suit, but Chief Justice Shaw hit the mark by saying: "A judgment for the defendants in that suit does not tend to negative the defendant's breach of contract, on which this action at law is brought."

The rule as expressed by Bigelow on Estoppel, p. 75, is as follows: "The peculiarity of the plea of former judgment consists in the fact that it shows that a certain claim or demand has already been tried and determined. To this end it must be shown that there is identity between the present and the previous cause of action. The question then to be decided is whether the two causes of action are the same. If they are not identical, the defense is not good."

In McCall v. Jones, 72 Ala. 371, the court said: "The rule of *res judicata* or former recovery is confined to those causes where the parties to the two suits are the same, the identical point is directly in issue, and the judgment has been rendered in the first suit on that point."

In his work on Judgments (volume 1, § 259), Freeman says: "The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present

and the former action. If this identity of evidence is found, it will make no difference that the form of the two actions is not the same. . . . Whatever be the form of action, the issue is deemed the same whenever it may, in both actions, be supported by substantially the same evidence. If so supported, a judgment in one action is conclusive upon the same issue in any other suit, though the cause of action is different. . . . On the other hand, if different proofs are required to sustain two actions, a judgment in one of them is no bar to the other. If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to a recovery, his right cannot be defeated by showing any judgment against him in any action where the evidence in the present suit could not, if offered, have altered the result."

To the same effect is the text in 2 Black on Judgments, § 726. See also Taylor v. Castle, 42 Cal. 372.

In the former action between these parties, the special written contract declared on having been admitted by the answer, it was only necessary for the plaintiff to show a substantial compliance with its requirements respecting the lights, and the failure of the defendant to pay therefor. As the contract fixed the amount of recovery, no proof was necessary as to the value of the material and services rendered; and no such evidence would have been admissible under the pleadings. Whereas, under the petition in the present action the plaintiff is required to go into the question as to the character of the material, the extent of the services rendered, the reasonable value thereof, and the enjoyment of the lights by the defendant. The only office the special contract might perform in this action would be to limit the amount of recovery.

The case of Franklin v. Matoa Gold Min. Co. recently decided by this court, 16 L.R.A. (N.S.) 381, 86 C. C. A. 145, 158 Fed. 941, presents an apt illustration of the rule of law in question. The action was predicated of a verbal contract for the delivery of certain bonds of the company for professional services rendered. The plea interposed by the defendant was that the contract was not in writing, and was, therefore, within the statute of frauds. This defense was sustained. But it was held that the plaintiff was entitled to maintain action *quantum meruit*. No question could successfully arise in such second action that the former judgment was *res judicata*. Notwithstanding the lights furnished by this plaintiff may not have been such as the contract called for, it would offend the common-sense of justice that the city should use and enjoy what was furnished without pay-

ing the reasonable value thereof, not exceeding the contract price.

If there be any uncertainty as to whether the recovery had by the plaintiff in the former suit embraced the items of the account sued on in the present action, resort may be had both to the record and extrinsic evidence, "showing the precise point involved and determined." *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214.

It results that the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to grant a new trial.

Petition for rehearing denied.

KANSAS SUPREME COURT.

CITY OF EMPORIA, Plff. in Err.,

v.

WILLIAM JUENGLING.

(— Kan. —, 96 Pac. 850.)

Highway — negligence — standing on wagon.

1. It is not *per se* negligence for a man

Case Note. — Standing on driven vehicle as negligence.

One is not chargeable with contributory negligence by reason of the fact that he was standing up in a vehicle which, upon approaching a crossing, was signaled by a brakeman to pass through a gap in a freight train, and, as the driver reached a parallel track, in order to avoid being struck by an approaching train, which was concealed from his view by the freight train, started his horses so violently forward as to throw the plaintiff to the ground and injure him. *Bryant v. International & G. N. R. Co.* 19 Tex. Civ. App. 88, 46 S. W. 82.

And this is true even though the negligence of the defendant in thus creating an appearance of danger may have caused the plaintiff to stand up in the vehicle, as, in that event, his act would not be negligent, or preclude a recovery, although it may have contributed to his injury. *Ibid.*

Upon a second appeal of this case (see [Tex. Civ. App.] 54 S. W. 364), the former decision was followed; it being held by the court that, even though the plaintiff was standing or stooping, instead of sitting down, as were the other occupants of the wagon, he still was free from contributory negligence. The court observed that "it is not contended that there was any negligence on the part of those in the wagon in undertaking to cross as they did upon the invitation of the brakeman, and we are unable to find anything in the evidence which would authorize the conclusion that standing in the wagon was, either of itself, or in the light of the other facts, contributory negligence, under the settled rules of law applicable to such a situation. If . . . [plaintiff] was standing when they under-

sixty-eight years old to stand up while riding on a dray in a city street.

Jury — view — oath of officer.

2. An additional oath need not be administered to the officer in charge of the jury sent to view the *locus in quo*, unless required by statute.

Same — tenant.

3. Failure to appoint a person to show to the jury the place they are sent to view is unimportant if they find and inspect the right place.

Same — misconduct.

4. A new trial will not be granted for misconduct of a jury sent to view the *locus in quo* in talking with strangers, taking measurements, and examining the earth, if no substantial prejudice could have resulted therefrom.

(July 3, 1908.)

ERROR to the District Court for Lyon County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

took to cross, the invitation of the brakeman had disarmed him of all apprehension, and the negligence of the company found him in that position, and he was not to blame. If the standing position was assumed as the result of the alarm, his act, however unwise, cannot avail the . . . [defendant] to defeat his action."

It was held in *Magee v. West End Street R. Co.* 151 Mass. 240; 23 N. E. 1102, that it could not be said, as a matter of law, that a fireman was not in the exercise of due care where, not having time to dress completely before starting for a fire, he proceeded to do so while riding upon a rapidly driven ladder truck, and, to steady himself and prevent his falling off while so doing, he stood with one foot upon the running board and with the other leg over the side piece of the outside ladder on the top tier, inserting it between the rounds of that ladder, and, while the truck was being driven sharply around a corner, the forward end of the ladders struck a street car, and they were pushed back upon the truck with such force as to cut off his leg at the knee.

So, it is not contributory negligence, as a matter of law, for a fireman riding to a fire on a hose wagon to stand up while putting on his coat, which he did not have time to do before starting for the fire, the firemen being allowed to dress themselves on the way in order to avoid getting wet, and to be in readiness for service upon arriving at the fire. *Birmingham R. & Electric Co. v. Baker*, 126 Ala. 135, 38 So. 87.

As to the general question of contributory negligence of one injured by defects in highways, see subject note to *James v. Wellston Twp.* 13 L.R.A. (N.S.) 1267.

Messrs. J. Harvey Frith and W. W. Parker, for plaintiff in error:

The person in whose charge the jury was should have been sworn.

12 Am. & Eng. Enc. Law, p. 31.

The jury, when making the view, attempted to make additional evidence.

12 Am. & Eng. Enc. Law, p. 369.

Messrs. R. M. Hamer and W. C. Harris, for defendant in error:

It was unnecessary to appoint a person to accompany the jury.

Coughlen v. Chicago, I. & K. R. Co. 36 Kan. 423, 13 Pac. 813.

The irregularities do not show prejudice which is necessary to avoid the verdict.

State v. O'Connor, 6 Kan. App. 770, 50 Pac. 949; Gleason v. Strauss, 5 Kan. App. 80, 48 Pac. 881; State v. Dickson, 6 Kan. 220; 12 Enc. Pl. & Pr. pp. 550, 661, 662.

Per Curiam:

William Juengling was injured by falling from a dray, on which he was riding, in a street of Emporia. He brought action against the city for damages, claiming that his fall was occasioned by a wheel striking the cover of a manhole, which had been negligently permitted to project about 8 inches above the level of the highway. He recovered judgment, and the defendant prosecutes error.

It is contended that there was no evidence of negligence on the part of the city, but the argument in support of this contention goes rather to the credibility of the testimony given by one of the plaintiff's witnesses. What the actual condition of the street was, and whether the city was negligent in permitting such condition to exist, were fair matters for the determination of the jury. The plaintiff, at the time of the accident, was standing up in the dray; and it is urged that this fact constituted contributory negligence on his part, especially in view of his age, sixty-eight years. It cannot be said, as a matter of law, however, that it is negligence for one to stand up while riding upon a dray in a city street.

The jury were allowed to view the place of the accident. Objections are made in this connection upon the following grounds: That the officer placed in charge of the jury was not sworn, that no person was appointed to show the jury the place, and that some of the jurymen were guilty of misconduct during the view. To these in turn it may be said: The statute (Gen. Stat. 1901, § 4724) does not require any additional oath to be administered to the officer selected to have charge of a jury under such circumstances. The only purpose of having some other person accom-

pany the jury is that he may show them the place to be viewed; and, as they found and inspected the right place, the omission was necessarily unimportant. *Coughlen v. Chicago, I. & K. R. Co.* 36 Kan. 422, 13 Pac. 813. The specifications of misconduct are that some of the jurors talked with an outsider about which way the sewer ran, that one made measurements at the manhole, and that another dug into the earth near it with a knife, and said that he had struck gravel, or rock, or something. It is apparent that no substantial prejudice could have resulted from any of these matters, and therefore there was no occasion for granting a new trial. 12 Enc. Pl. & Pr. p. 550; *Indianapolis v. Scott*, 72 Ind. 196, 205; and *Hardin v. State*, 40 Tex. Crim. Rep. 208, 221, 49 S. W. 607, are cases where more serious misconduct has been held nonprejudicial. In the former (an action for damages resulting from a defective sidewalk) a juror, without authority, examined a sleeper at the place of the injury, breaking off pieces and thrusting his knife into it. In the latter (a murder case) one juror stepped the distance from the point of the homicide to the place from which a witness testified that he had seen it, and another measured a bullet hole in a neighboring wall.

The judgment is affirmed.

Petition for rehearing denied.

KANSAS SUPREME COURT.

STATE OF KANSAS EX REL. F. S. JACKSON, Attorney General,

v.

J. H. WILCOX.

(— Kan. —, 97 Pac. 372.)

Mayor — forfeiture of office — neglect of duty.

The mayor of a city, who sanctions a system of imposing fines upon places where intoxicating liquor is illegally sold, as a method of obtaining public revenue on the traffic, and who fails to make a bona fide attempt to enforce the law against them, or inform the prosecuting attorney of known violations of the law, forfeits his office.

(July 3, 1908.)

Note. — The above decision seems to be one of first impression upon the removal of municipal officers for sanctioning or enforcing a system of fines as a substitute for closing disorderly houses, such as houses of ill fame, or houses where gambling is permitted or intoxicating liquors sold in violation of law, as an extensive search has failed to disclose any other case in which that question was passed upon.

APPPLICATION for a writ of quo warranto to oust respondent from the office of mayor of Coffeyville for neglect of official duty. Granted.

The facts are stated in the opinion.

Messrs. F. S. Jackson, Attorney General, John S. Dawson, and Charles D. Shukers for plaintiff.

Mr. J. P. Rossiter for defendant.

Per Curiam:

This was an action brought by the attorney general, in the name of the state, to oust J. H. Wilcox from the office of mayor of Coffeyville for failure and neglect of official duty in the enforcement of the law relating to the sale of intoxicating liquors and the keeping of gambling houses. It was alleged that he had failed and neglected to notify the county attorney of violations of the prohibitory liquor law, or to furnish the names of witnesses by whom such violations could be proven, and that, in co-operation with other officers of the city, he had purposely assisted in imposing and collecting license taxes on the business of illegally selling and keeping for sale intoxicating liquors within the city under the pretense of imposing fines. In his answer the defendant denied all of the charges made by the attorney general. Much testimony has been taken in the case, which shows that, during the term of Mayor Wilcox, and until about the time this proceeding was brought, saloons and joints where intoxicating liquors were unlawfully sold were in open operation in the city. There is some conflict in the testimony; but, after a careful reading and consideration of the same, we are satisfied that the unlawful traffic in intoxicating liquors was carried on with the knowledge and consent of the mayor and other officers of the city, and with the understanding that, upon the payment of pretended monthly fines of fixed amounts, the joint keepers would be permitted to operate free from interference by the city officers. These fines were regularly collected by the officers of the city and paid into the city treasury, and, until shortly before the commencement of this action, the joint keepers were given the immunity and protection which the payments were intended to secure them. The mayor appears to have proceeded on the theory that he was justified in following this course so long as the wide-open policy was in vogue in the county.

It is the finding of the court that the defendant did not give the county attorney notice of known violations of the law prohibiting the sale of intoxicating liquors, nor make a bona fide attempt to enforce the law, as his duty and the obligations of the law required; that the system of imposing fines was adopted as a means of obtaining public rev-

enue for the city from the traffic; and, further, that it was carried on with the sanction and concurrence of the defendant. The finding and decision is that he has forfeited the office of mayor of Coffeyville, and a judgment of ouster will be rendered in accordance with the prayer of the plaintiff's petition.

Petition for rehearing denied September 23, 1908.

KENTUCKY COURT OF APPEALS.

NETTIE MAY REED et al., Appts.,

v.

HENRY FORD.

(— Ky. —, 112 S. W. 600.)

Negligence—assault—proximate cause.

1. The assault by an intoxicated person upon, and his use of abusive language toward, another in a house where he is not shown to be a trespasser, gives no right of action against him to a pregnant woman in the house, not related to the person assaulted, who is out of sight although within hearing of the assault, and whose presence is not known to the assailant, for injuries resulting to her from fright causing mental pain and agony, illness, threatened miscarriage, and possibly permanent impairment of health, since, not knowing of her presence, the assailant cannot reasonably have anticipated injury to her from his conduct.

Damages — assault — fright.

2. Damages for mental pain and anguish, illness, threatened miscarriage, and possibly permanent injuries, due to fright resulting from an assault committed by a stranger in the hearing of a pregnant woman, are too remote to form a basis of action on her behalf against the assailant.

(September 25, 1908.)

APPPEAL by plaintiffs from a judgment of the Circuit Court for Barren County dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Duff & Hutcherson for appellants.

Messrs. Baird & Richardson, for appellee:

Fright and fear of appellant, and the threatened miscarriage resulting therefrom, are not sufficient to constitute a cause of action.

Phillips v. Dickerson, 85 Ill. 11, 28 Am.

Note. — As to right to recover for physical injury resulting from fright caused by a wrongful act, see note to *Huston v. Freemansburg*, 3 L.R.A.(N.S.) 49.

Rep. 609; *Fent v. Toledo*, P. & W. R. Co. 59 Ill. 349, 14 Am. Rep. 13; *Derry v. Flitner*, 118 Mass. 131; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L.R.A. 582, 5 C. C. A. 349, 12 U. S. App. 381, 55 Fed. 950; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 290, 30 N. W. 888; *Braum v. Craven*, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657; *Reed v. Maley*, 115 Ky. 816, 62 L.R.A. 900, 74 S. W. 1079, 2 A. & E. Ann. Cas. 453; *Morse v. Chesapeake & O. R. Co.* 117 Ky. 11, 77 S. W. 361; 1 *Jaggard, Torts*, p. 371; *Pullman Palace Car Co. v. Trimble*, 8 Tex. Civ. App. 335, 28 S. W. 96; *Stivers v. Baker*, 87 Ky. 508, 9 S. W. 491.

Settle, J., delivered the opinion of the court:

Appellants complain of a judgment of the Barren circuit court sustaining a demurrer to their petition, as amended, and dismissing the action. The appeal, therefore, presents for our consideration but one question, viz.: Do the facts alleged in the petition state a cause of action?

The original petition is as follows: "The plaintiffs, Nettie May Reed and her husband, I. W. Reed, state that, during the month of September, 1907, the defendant, Harry Ford, came to their house in Glasgow, Kentucky, during the darkness of the night, in a drunken condition, and, in front of the rooms in which they resided, and in the hearing of the plaintiffs, assaulted one James D. McConnell, who occupied a room near them, and then and there in a loud and boisterous manner cursed and abused said McConnell and threatened to kill him; that the defendant remained in front of this said room for a half hour or longer, and continued to curse and abuse said McConnell, and to threaten to take his life, who was perfectly defenseless and unable to resist him. The plaintiffs state that the plaintiff Nettie May Reed was, at the time, pregnant with child; that she was greatly alarmed and frightened at the action of the defendant as aforesaid, so much so that she was compelled to take her bed and remain there ten days; that her nervous system was greatly shocked; that she has since been threatened with a miscarriage in consequence of the fright received by her; that she has suffered great mental agony and physical pain from said fright; and that her health has been greatly, and, as they fear and believe, permanently, impaired as the result of the fright aforesaid."

The following are the averments of the amended petition: "Amending their petition herein, the plaintiffs state that the assault on James D. McConnell took place in

the hall immediately in front of the room occupied by the plaintiffs at the time, and within 3 or 4 feet from the plaintiff Nettie May Reed; that the plaintiff Nettie May was made violently sick by the fright which she received; that she was compelled to and did take her bed for at least ten days, as the result of said fright; and they state that her health has been greatly impaired, and they fear permanently destroyed, as the result of the fright aforesaid; and they further state she sustained physical injuries in consequence of the fright aforesaid, and has been and was damaged, as set out in the original petition herein, in the sum of \$500, which injuries are and were the direct and proximate result of the fright complained of by her in said original petition."

A careful analysis of the language of the petition and amendment will demonstrate that the sole ground of recovery alleged is that injury and damage resulted to the appellant Nettie May Reed from fright superinduced by the conduct of appellee in committing an assault upon, and using in her hearing and within a few feet of her profane and abusive language toward, a third person, one James D. McConnell; that the fright given her by the misconduct of appellee toward McConnell caused her great physical and mental suffering, made her ill for ten days, nearly produced a miscarriage, and perhaps permanently impaired her health. While it is alleged in the petition that appellee's assault upon and abuse of McConnell occurred in her house at night, where he had gone in a drunken condition, these facts did not necessarily make him a trespasser as to the person or premises of Mrs. Reed. It is alleged that McConnell occupied a room in the same house near hers, and not alleged that appellee did not lawfully enter the house. He may have gone there upon McConnell's invitation, or to see him on a business matter, and for some reason, whether with or without provocation, became angry with and abusive toward him after entering the house.

It will be observed that neither the original nor amended petition alleges that appellee, at the time of his assault upon or abuse of McConnell, was seen by Mrs. Reed; that he saw her, knew she was in hearing, or in a room near him, or that she was then an occupant of a room in the house; nor does either aver that the door to the room she was occupying was open, thereby affording appellee an opportunity to discover her presence therein. It is also true that the petition does not charge that appellee assaulted the appellant Nettie May Reed, that he knew she was pregnant, or that anything said or

dene by him was directed to or at her. On the contrary, its only averments on that point are to the effect that McConnell, who was not a member of her family or related to her, was alone the subject of appellee's wrath and abuse. It is patent from the averments of the petition, as amended, that appellee committed no assault upon or trespass against the appellant Nettie M. Reed. The pain and suffering alleged resulted solely from fright, and were unaccompanied by any physical injury. The damages sought to be recovered are too remote and speculative. The injury is more sentimental than substantial. Being easily simulated and hard to disprove, there is no standard by which it can be justly, or even approximately, compensated. As said by this court in *Reed v. Maley*, 115 Ky. 816, 62 L.R.A. 900, 74 S. W. 1079, 2 A. & E. Ann. Cas. 453, a case in which the question here involved was considered: "The objection to a recovery for injury occasioned without physical impact is the difficulty of testing the statements of the alleged sufferer, the remoteness of the damages, and the metaphysical character of the injury considered apart from physical pain." *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 950; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 200, 30 N. W. 888; *Morse v. Chesapeake & O. R. Co.* 117 Ky. 11, 77 S. W. 361.

It is equally certain that no right of recovery can be asserted in this case upon the ground that appellee's assault upon or abuse of McConnell, occurring at the house of the appellant Nettie M. Reed and in her hearing, constituted negligence for which he should be made to respond in damages for the alleged injury resulting to her. It seems to be well settled that no recovery can be had for injuries resulting from mere fright, caused by the negligence of another, when no immediate personal injury is received. *Thomp. Neg.* §§ 156, 157; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354; *Gulf C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 860, 54 S. W. 944. Moreover, under the facts alleged, negligence can in no event be imputed to appellee in this case, or regarded as the proximate cause of appellant's injuries; for, not seeing appellant, being unseen by her, and not knowing of her presence in the adjacent room, it cannot be claimed that he could have foreseen or reasonably anticipated that any injury would probably result to her from his assault upon or abuse of McConnell.

Being of the opinion that the petition fails to state a cause of action, the judgment sustaining the demurrer thereto is affirmed.

19 L.R.A. (N.S.).

KENTUCKY COURT OF APPEALS.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, Appt.,

v.

ANNIE SPRINGGATE.

(— Ky. —, 112 S. W. 681.)

Insurance — forfeiture — waiver.

1. Notification of a policy holder by an insurer after his premium note is overdue that, unless the note is paid at once, it will be compelled to return the note, which will cancel the policy, is a waiver of the forfeiture for nonpayment of the note when due; and the insurer cannot thereafter insist upon the forfeiture upon learning that the insured was in a dying condition when the notification was mailed.

Same — nonreceipt.

2. That a letter from an insurer waiving a forfeiture for nonpayment of a premium note is not received or read by the insured before his death does not destroy its effect as a waiver.

On Petition for Rehearing.

Same — estoppel — authority.

3. An insurance company is estopped to deny the effect of a demand by its general state agent for payment of a past-due premium note as a waiver of the forfeiture caused by such nonpayment although the policy provides that no waiver of conditions shall be valid unless in writing, signed by an officer of the company.

(October 7, 1908.)

APPEAL by defendant from a judgment of the Circuit Court of Meade County in plaintiff's favor in an action brought to recover the amount alleged to be due on a life-insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Thomas W. Bullitt and William Marshall Bullitt, for appellant:

The letter of the insurance agents was not an unconditional demand for payment of the past-due premium note, and therefore was not a waiver of the forfeiture which had already lapsed the policy.

Walls v. Home Ins. Co. 114 Ky. 611, 102 Am. St. Rep. 298, 71 S. W. 650; *Moreland v. Union Cent. L. Ins. Co.* 104 Ky. 129, 46 S. W. 516; *Union Cent. L. Ins. Co. v. Duvall*, 20 Ky. L. Rep. 441, 46 S. W. 518; *Union*

Note. — The question whether the unsuccessful attempt of an insurance company to collect an overdue premium, or note given therefor, will be deemed a waiver of a provision in the policy avoiding the same for the nonpayment of the premium, will be found discussed in the case note to *Hes v. Mutual Reserve L. Ins. Co.* 18 L.R.A. (N.S.) 902.

Cent. L. Ins. Co. v. Spinks, 119 Ky. 261, 69 L.R.A. 204, 83 S. W. 615, 84 S. W. 1160, 7 A. & E. Ann. Cas. 913; Manhattan L. Ins. Co. v. Pentecost, 105 Ky. 642, 49 S. W. 425; Manhattan L. Ins. Co. v. Savage, 23 Ky. L. Rep. 484, 63 S. W. 278; Home Ins. Co. v. Karn, 19 Ky. L. Rep. 273, 39 S. W. 501; Crutchfield v. Union Cent. L. Ins. Co. 113 Ky. 53, 67 S. W. 67; New York L. Ins. Co. v. Warren Deposit Bank, 25 Ky. L. Rep. 325, 75 S. W. 234; Fidelity Mut. L. Ins. Co. v. Price, 117 Ky. 25, 77 S. W. 384; Manhattan L. Ins. Co. v. Myers, 109 Ky. 372, 59 S. W. 30.

The letter was not received until after Springgate's death, and therefore could not have been a waiver.

Home Ins. Co. v. Karn, 19 Ky. L. Rep. 276, 39 S. W. 501; Bennecke v. Connecticut Mut. L. Ins. Co. 105 U. S. 359, 26 L. ed. 992.

The policy itself expressly prohibited the agents from making such a waiver.

Crutchfield v. Union Cent. L. Ins. Co. supra.

Mr. N. McC. Mercer, with Mr. Claude Mercer, for appellee:

The general agents of the company have power to waive the forfeiture clause in the policy, which provided for the forfeiture of the policy upon the nonpayment of a premium note, and thereby continue it in effect, notwithstanding the provision of the policy that agents have no power to waive forfeitures.

Mississippi Valley L. Ins. Co. v. Neyland, 9 Bush, 430; Hartford Life & Annuity Ins. Co. v. Hayden, 90 Ky. 39, 13 S. W. 585; Phoenix Ins. Co. v. Spiers, 87 Ky. 285, 8 S. W. 453; National L. Ins. Co. v. Tweddell, 22 Ky. L. Rep. 881, 58 S. W. 699; Connecticut Indemnity Asso. v. Grogan, 21 Ky. L. Rep. 717, 52 S. W. 959; Mudd v. German Ins. Co. 22 Ky. L. Rep. 308, 56 S. W. 977; Washington L. Ins. Co. v. Menefee, 107 Ky. 244, 53 S. W. 200; Germania L. Ins. Co. v. Lauer, 123 Ky. 727, 97 S. W. 363; Hartford Ins. Co. v. Haas, 87 Ky. 531, 2 L.R.A. 64, 9 S. W. 720; Crutchfield v. Union Cent. L. Ins. Co. 113 Ky. 59, 67 S. W. 67; German-American Ins. Co. v. Yellow Poplar Lumber Co. 27 Ky. L. Rep. 106, 84 S. W. 551; Continental Ins. Co. v. Thomason, 27 Ky. L. Rep. 160, 84 S. W. 546.

The insurer waived its right to enforce the forfeiture clause by demanding the payment of the past-due note after its maturity.

Moreland v. Union Cent. L. Ins. Co. 104 Ky. 129, 46 S. W. 516; Joyce, Ins. §§ 1372, 1379; Union Cent. L. Ins. Co. v. Duvall, 20 Ky. L. Rep. 441, 46 S. W. 518; Bane v. Travelers' Ins. Co. 85 Ky. 677, 4 S. W. 787; Kehler v. Phoenix Mut. L. Ins. Co. 4 Ky. 19 L.R.A. (N.S.)

L. Rep. 903; Rogers v. Farmers' Mut. Aid Asso. 106 Ky. 371, 50 S. W. 543; Moore v. Continental Ins. Co. 107 Ky. 273, 53 S. W. 652; Walls v. Home Ins. Co. 114 Ky. 611, 102 Am. St. Rep. 298, 71 S. W. 650; Manhattan L. Ins. Co. v. Myers, 109 Ky. 380, 59 S. W. 30; Park v. Hilton, 21 Ky. L. Rep. 1320, 54 S. W. 949; Home Ins. Co. v. Mears, 105 Ky. 326, 49 S. W. 31; Manhattan L. Ins. Co. v. Pentecost, 105 Ky. 647, 49 S. W. 425; Manhattan L. Ins. Co. v. Savage, 23 Ky. L. Rep. 487, 63 S. W. 278; Fidelity Mut. L. Ins. Co. v. Price, 117 Ky. 25, 77 S. W. 384; Crutchfield v. Union Cent. L. Ins. Co. supra.

The insured died after the demand for the payment of the note had been made, and the policy was undoubtedly in the same force and effect as though the note had been paid when death came.

Kentucky Life & Acci. Ins. Co. v. Kaufman, 102 Ky. 6, 42 S. W. 1104.

Hobson, J. delivered the opinion of the court:

On April 7, 1905, the New England Life Insurance Company issued to John C. Springgate a policy insuring his life in the sum of \$1,000, payable to his wife, Annie Springgate, the annual premium being \$37.70, due on April 15th of each year. The first annual premium was paid. When the second premium fell due on April 15, 1906, the insured paid \$10.70 in cash and executed three notes for \$9 each, due in three, six, and nine months. He paid the first two of the notes, but failed to pay the third note, due January 15th. The policy contained this provision: "In case any of said premiums or any premium note or notes given for the said premiums are not paid when due and payable, this policy and all payments made thereon shall thereupon become forfeited and void, except as provided by the statutes of the commonwealth of Massachusetts." The note also contained these words: "But this note, if not paid at maturity, is not to be considered as payment of said premium, and said policy will thereupon, without notice, become forfeited and void, except as provided by the statutes of Massachusetts." On March 4, 1907, Thomas & Kaye, the state agents of the insurance company at Louisville, mailed to the insured the following letter:

Mr. John C. Springgate,
Guston, Ky.

My Dear Mr. Springgate:—

The thirty days' grace on your note expired February 15. This matter must receive your immediate attention; otherwise we will be compelled to return your note, which will cancel your insurance. Kindly

remit to us by return mail the amount due, \$9.50.

Yours very truly,

Thomas & Kaye,
General Agents.

The letter reached Springgate's home on March 5th, but he was then unconscious, and died the next day without ever knowing of the existence of the letter. After his death, Annie Springgate, the widow, remitted to the company the \$9.50, as requested in the letter, but it returned the money to her with a denial of any liability upon the policy. She then brought this suit against the company to recover on the policy. The circuit court having entered judgment in her favor, the company appeals, asking a reversal on the following grounds: "(1) The letter of the insurance agents was not an unconditional demand for payment of the past-due premium note, and therefore was not a waiver of the forfeiture which had already lapsed the policy. (2) The letter was not received until after Springgate's death, and therefore could not have been a waiver. (3) The policy itself expressly prohibited the agents from making such a waiver." These objections will be considered in the order stated.

1. In *Moreland v. Union Cent. L. Ins. Co.* 104 Ky. 131, 46 S. W. 516, the insured gave a note for a premium which matured on January 29th. He failed to pay the note, and in March the company, still retaining the note, demanded payment of it from him, and then sent it to its attorney for collection by suit. After this the insured died in July, and suit was brought upon the policy. After stating the facts, the court thus expressed the question before it: "And the question is: Can the company insist on payment of the note, and at the same time consistently say that the policy, having been forfeited by its nonpayment, remains forfeited? Or will not the real intention of the parties be effected by holding that, although the policy was forfeited by this nonpayment, yet, as the retention of the note and demand for its payment after maturity are acts inconsistent with an intention to insist on a continued forfeiture, therefore the forfeiture is to be deemed waived?" In determining the question, the court, holding the company liable, quoted with approval the following from 2 Joyce on Insurance, § 1379: "As a general rule, if the company has treated the policy as valid, and has sought to enforce payment of the premium, or has, otherwise, with knowledge, recognized, by its own acts or declarations or those of its agents, the policy as still subsisting, it waives thereby prior forfeitures." In *Moore v. Continental Ins. Co.* 107 Ky. 273, 53 S. W. 652, the

facts were substantially the same as in the *Moreland Case*; the only difference being that a longer time had elapsed, and that the insured had promised the attorneys to pay the note. The same result was reached as in the former case. The question came up again in *Walls v. Home Ins. Co.* 114 Ky. 611, 102 Am. St. Rep. 298, 71 S. W. 650, and in *Union Cent. L. Ins. Co. v. Spinks*, 119 Ky. 261, 69 L.R.A. 264, 83 S. W. 615, 84 S. W. 1160, 7 A. & E. Ann. Cas. 913, and on facts much the same as in the two preceding cases. In the latter case the court said: "It is the well settled law of this state that, if an insurer desires to avail itself of conditions in its policy to declare it forfeited for the nonpayment of a premium note, it must unequivocally elect to so treat it, and in fact then and thereafter so treat it. It will not be allowed, though, to claim both that it is not bound on the policy, but that the insured is bound to pay the note. Its action must be consistent. While it may retain the note as evidence of its nonpayment, it must not retain it or treat it as an evidence of that much indebtedness." It is insisted that these cases are to be distinguished from that before us because there the company made an effort to collect the notes through an attorney, a bank, or an agent, while here nothing was done but to write the letter quoted. But this difference does not go to the root of the matter, or affect the principle upon which the decisions rest. This principle is that the company must stand on the forfeiture if it wishes to have the benefit of it. It cannot claim the forfeiture, and insist on the payment of the note. Its assertion of a claim on the note is inconsistent with a claim that the policy is forfeited; for, if the policy is forfeited, there is nothing to be paid on it. To allow the company to treat the policy as valid after the right to forfeit it has accrued, and insist on the note being paid as long as it deems this to its interest, and then, when it learns that the assured is sick or dead, to rely on the past forfeiture, which, at the time, it elected to waive, would be to allow it to take inconsistent positions. So the question comes to this: Did the company, when the right to forfeit the policy accrued, elect to forfeit it or to treat it as a subsisting obligation? If it elected then to treat the policy as a subsisting obligation, it cannot, when subsequent events make it to its interest to do so, withdraw the election it then made, and say the policy was forfeited. It is not a question of misleading the insured, to his prejudice. It is not material whether the note was sent to an attorney, a bank, or an agent for collection. These things may be evidence

of the company's intention; but the intention may be shown otherwise. Forfeitures are not favored in law. When once waived, they cannot be afterwards insisted on. So in each case the question is: On all the facts, did the company forfeit the policy when the right to do so accrued? The letter in question plainly told the assured that the note must be paid at once; "otherwise, we will be compelled to return your note, which will cancel your insurance." This was in effect an unequivocal statement that the policy was not then canceled, and would not be if the note was paid. If the assured had remained in good health, and had sent the money to the company when his wife sent it a few days later, manifestly there could have been no forfeiture of the policy. The company was insisting on the payment of the note. It treated the policy as in force, and took the risk of the assured being in good health. It cannot be allowed to withdraw the election it thus made when it subsequently ascertained that the assured was then sick, and afterwards died. The letter shows an unequivocal election to treat the policy as a subsisting obligation. The wife, when she opened and read it, had the right to assume that, if she paid the note in a day or so, it would be all right.

2. It is not material that the letter was not received or read by the assured. The case does not turn on his conduct, but on the election of the company not to treat the policy as forfeited. This precise question was presented in *Union Cent. L. Ins. Co. v. Duvall*, 20 Ky. L. Rep. 441, 46 S. W. 518. In that case, after the note was due, the company wrote the assured a letter similar to that in this case. The letter was directed to Walton, Kentucky. He had left Walton, and gone to Gum Sulphur. It was forwarded to him at Gum Sulphur; but did not reach there until after his death. The widow sent the money, and the company returned it and denied liability. After copying at considerable length from the opinion in the *Moreland Case*, the court said: "It seems to us upon principle, as well as authority, that the appellant in the case at bar had elected to waive the forfeiture, and insist upon the payment in full of the note. Moreover, it is by no means certain that appellant did not at first elect to accept the payment sent to it by appellee, and only returned same because it had heard of the death or sickness of the insured. It can hardly be doubted that if appellant, at the time of receiving the inclosure from appellee, had not been advised of the death or sickness of the insured, that it would have proceeded to collect the check and have retained the money." The insured 19 L.R.A. (N.S.)

ance company loses no right if it simply remains silent and retains the note in such cases as this (*Manhattan L. Ins. Co. v. Peartecost*, 105 Ky. 647, 49 S. W. 425), or if it accompanies its request for the payment of the note with a demand of a health certificate (*Fidelity Mut. L. Ins. Co. v. Price*, 117 Ky. 25, 77 S. W. 384), or if its conduct or notice is not such as to evince a waiver of the forfeiture of the policy; but the company cannot be permitted to waive the forfeiture when it supposes the insured is in good health, and to retract the waiver when it learns the fact is otherwise.

3. The policy provided: "No alteration or waiver of any of the conditions of this policy shall be valid unless made in writing and signed by an officer of the company." The general agent for the state was an officer of the company as to insurance policies, for he had power to make contracts of insurance, and this clause of the policy, like any other clause in it, may be waived by any agent authorized to make contracts of insurance. *Mudd v. German Ins. Co.* 22 Ky. L. Rep. 308, 56 S. W. 977; *German-American Ins. Co. v. Yellow Poplar Lumber Co.* 27 Ky. L. Rep. 106, 84 S. W. 551; *Continental Ins. Co. v. Thomason*, 27 Ky. L. Rep. 160, 84 S. W. 546.

Judgment affirmed.

A petition for rehearing having been filed, the following response was handed down by *Hobson, J.*, on December 2, 1908:

The general agent for the state represented the insurance company. His act in demanding the premium was the act of the company. It could not on one hand demand the premium and on the other insist on the forfeiture. Estoppels arise by operation of law. The acts of the insurance company here estop it from insisting on the forfeiture.

Petition overruled.

KENTUCKY COURT OF APPEALS.

LOUISVILLE RAILWAY COMPANY,
Appt.,
v.

BRIDGET MCCARTHY.

(— Ky. —, 112 S. W. 925.)

Husband — imputed negligence.

Where a wife may sue in her own name to recover damages for injuries to her person.

Note. — As to whether the negligence of a husband as driver is imputable to his wife who is riding with him. see subject note to *Schultz v. Old Colony Street R. Co.* 8 L.R.A. (N.S.) 597, 656.

son, and her husband has no interest in the recovery, his negligence as driver of the conveyance in which she was riding at the time of the injury will not be imputed to her so as to preclude her recovering against the other negligent person, where, in the particular instance, the relation of principal and agent or master and servant did not exist between them.

(October 16, 1908.)

APPEAL by defendant from a judgment of the First Division of the Common Pleas Branch of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Fairleigh, Straus, & Fairleigh, and Howard B. Lee, for appellant:

The negligence of a husband who is driving a vehicle in which his wife is a passenger is imputable to the wife.

Central Pass. R. Co. v. Chatterson, 14 Ky. L. Rep. 665; Pennsylvania R. Co. v. Goode-nough, 55 N. J. L. 577, 22 L.R.A. 400, 28 Atl. 3; Morris v. Chicago, M. & St. P. R. Co. 26 Fed. 22; Toledo, St. L. & K. C. R. Co. v. Crittenden, 42 Ill. App. 469; Gulf, C. & S. F. R. Co. v. Greenlee, 62 Tex. 344; Carlisle v. Sheldon, 38 Vt. 440; Nanticoke v. Warne, 106 Pa. 373; Joliet v. Seward, 86 Ill. 402, 29 Am. Rep. 35; Yahn v. Ottumwa, 60 Iowa, 429, 15 N. W. 257; Peck v. New York, N. H. & H. R. Co. 50 Conn. 379; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; Huntoon v. Trumbull, 2 McCreary, 314, 12 Fed. 844; Street v. Holyoke, 105 Mass. 82, 7 Am. Rep. 500.

Messrs. Greene & Van Winkle also for appellant.

Mr. M. K. Yonts for appellee.

Lassing, J., delivered the opinion of the court:

This is an appeal from a judgment of the Jefferson circuit court, wherein appellee recovered \$1,500 damages for personal injuries which she received in a collision with one of appellant's cars while she was being driven west on Frankfort avenue in a carriage. She charged that the collision and consequent injury to her was due to the gross negligence of the agents and servants of appellant in charge of the car. The answer, in addition to traversing the allegations of the petition, pleaded contributory negligence. A reply traversed the affirmative matter of the answer, and upon the issues thus joined the case was tried, and the verdict appealed from rendered. Several reasons were urged in the motion for a new trial why the verdict should be set aside 19 L.R.A. (N.S.)

and a new trial awarded, but upon this appeal but one ground for reversal is urged, to wit, the failure of the court to properly instruct the jury on the subject of imputed negligence.

The appellant asked the court to give the following instructions: "(A) The court instructs the jury that, although they may believe from the evidence that the motorman in charge of the car that collided with the surrey in which plaintiff was riding was negligent in the management and operation of his car at the time of said collision, yet, if they further believe from the evidence that the person driving said surrey was also negligent at said time and place, and but for his negligence, contributing or helping to bring about said accident, the same would not have occurred, then the law is for the defendant, and the jury should so find. (B) If the jury believe from the evidence that the driver of the surrey in which plaintiff was riding at the time of the collision complained of herein drove the same across the track on which defendant's car was running so close to the front end of said car that he rendered it impossible for the motorman, in the exercise of ordinary care, to stop his car in time to prevent a collision with said surrey, then the law is for the defendant, and the jury should so find." This the court refused to do, and gave, instead, instruction No. 5, which is as follows: "In this case, gentlemen, the plaintiff is responsible only for such negligence, if any there was, that she was guilty of. She is not liable for any contributory negligence, if any there was, that may have been committed by her husband, who was the driver of the surrey. I will say, further, to you, that, if you believe from the evidence that the motorman discharged all of the duties of which I have spoken to you,—that is, that he did keep a lookout ahead, did have his car under reasonable control, did sound the customary signals, and did exercise ordinary care to prevent injury to the vehicle in which the plaintiff was riding,—but that the vehicle suddenly appeared upon the track that the street car was occupying, so close to the street car that the motorman could not avoid the accident by the exercise of ordinary care, then the law is for the defendant, and you should so find." And it is the action of the court in refusing to give instructions A and B, asked for, and in giving instruction No. 5, of which appellant now complains.

The evidence shows that appellee and her husband and two others were driving west on Frankfort avenue on Sunday afternoon, and a car of appellant company was going in the same direction, and, while the carriage in which appellee was riding was upon the

west-bound track of appellant, its car ran into the vehicle from behind, overturned it, and threw them out, and appellee sustained the injury complained of. It is the contention of appellant that the horse which was being driven by appellee's husband became frightened at a passing railroad train, and swerved suddenly upon the track a short distance before the car, and when the car was so close upon it that the accident and collision were unavoidable. It is conceded for appellant that appellee did nothing whatever, and was a passive occupant of the carriage, and, unless the negligence of her husband (if any there was), as driver, can be imputed to her, then she is without fault, and must recover in any event, if those in charge of the car were shown to have been negligent of their duty. This presents the question squarely as to whether or not the negligence of a husband while driving a vehicle in which his wife is a passenger can be imputed to the wife, in an action for damages by her, and whether or not the relation of husband and wife is such as that the wife cannot recover under such circumstances if it is shown that the husband, with whom she was riding, was guilty of negligence. A somewhat similar question was raised in the case of *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345, 18 S. W. 2, where it was held that a person who was injured while riding in a vehicle at the invitation of the owner cannot have the contributory neglect of the owner, who was the driver, imputed to him, unless the relation of principal and agent or master and servant exist between the passenger and the owner of the vehicle. The principle announced in that case has been followed in a number of subsequent cases.

While admitting that the trend of this opinion is to the effect that the occupant of a vehicle is not chargeable with the contributory neglect of the driver thereof, unless the relation between them is that of principal and agent or master and servant, or such that the passenger has some authority and control or direction over the acts of the driver, appellant relies upon the case of *Central Pass. R. Co. v. Chatterson*, 14 Ky. L. Rep. 665, and the authority of numerous courts of last resort in other states, to support its contention that the contributory neglect of the husband is to be imputed to the wife, because of the marital relation. The case of *Central Pass. R. Co. v. Chatterson* was decided before the passage of the Weissinger act, and, as counsel for appellant correctly states, the doctrine of imputing the neglect of the husband to the wife did not arise at common law by reason of the fact of the husband's interest in his wife's estate, and of the further fact that

the wife was not allowed to sue without joining her husband as a party plaintiff. Such was the rule in Kentucky prior to the passage of the Weissinger act, and necessarily "this question could not have arisen in Kentucky before the Weissinger act was passed." This being true, the Kentucky authority relied upon by appellant does not apply. In the *Chatterson* Case both husband and wife were joined as plaintiffs, and the court evidently regarded the driver as the agent and servant of both, and held that the jury should have been so instructed. Since the passage of the Weissinger act our court has not been called upon to pass upon this question; but, as above indicated, it is not a new one, but one which has been passed upon by most every state in the Union. An examination of the authorities shows that in many states the negligence of the husband in driving a vehicle is attributed to the wife, and she has been denied the right to recover. The supreme courts of Illinois, Texas, Vermont, Pennsylvania, Iowa, Connecticut, and Massachusetts have so held; while, on the other hand, the supreme courts of the states of Indiana, New York, and Ohio, and numerous Federal authorities, hold that the negligence of the husband is not to be imputed to the wife, and that, even though he is negligent, she is not denied the right of recovery because thereof.

In the case of *Louisville, N. A. & C. R. Co. v. Creek*, 130 Ind. 139, 14 L.R.A. 733, 29 N. E. 481, in passing upon a similar question, after commenting upon the right of one to recover for injuries sustained while riding in a carriage as the guest of the driver, the court said: "We can see no good reason why the foregoing statement may not apply to a wife riding with her husband with as much reason as to a stranger riding with him; nor why she may not be in such case a mere passive guest, without authority to direct or control his movements, and without reason to suspect his prudence or his skill. A husband and wife may undoubtedly sustain such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our opinion, there will be no more reason or justice in a rule that would, in cases of this character, inflict upon a wife the consequences of her husband's negligence solely and alone because of that relationship, than to hold her accountable at the bar of eternal justice for his sins because she was his wife." And in the case of *Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. Rep. 827, 18 N. E. 452, the rule was thus stated: "Where the negligence of a driver is sought to be imputed to an occupant of the vehicle, it must be

shown that the relation of the person injured to the one whose negligence contributed to the injury was such that, in contemplation of law, the negligent act of a third person was, upon the principle of agency or co-operation in a joint or common enterprise, the act of the person injured." And in the case of *Honey v. Chicago, B. & Q. R. Co.* (C. C.) 59 Fed. 423, it was held that "to render the contributory negligence of a wife, regarded as the agent or servant of her husband, imputable to him, the circumstances must be such that he would be liable for her negligent act if it had resulted in injury to a third person."

It seems to us that this rule is in consonance with reason and justice; that the negligence of the husband or the wife, as the case may be, should not be attributable to or charged to the other, unless it should appear that in that particular instance the relation of principal and agent or master and servant existed between them. The mere fact that the one is the husband or the wife of the other should not render him or her answerable for the negligence of the other. Under the enlarged property rights which a married woman now enjoys, she may prosecute a suit in her own name for personal injury without joining her husband. The husband has no interest in the recovery, and we see no good reason for denying to a wife the right of recovery because her husband, into whose care she, for the time being, intrusted herself, was guilty of an act of negligence which contributed to bring about her injury. This was the wife's status at common law; but the purpose of all modern legislation, and the trend of judicial interpretation thereof, has been to give to married women, when dealing with their property rights, more and more freedom from the restraint, control, and dominion of their husbands, until now in Kentucky and in most states they may deal with the same, with few exceptions, as though they were unmarried. Hence the reason for the rule that, unless the relation of master and servant or principal and agent is made to appear in a particular case, the wife is not held chargeable with the negligent acts of her husband, and in cases where personal injury results from the concurrent negligence of the husband and a third party the negligence of the husband is not ordinarily attributable to the wife, so as to bar her right of recovery.

We are of opinion that the trial court did not err in refusing to give the instructions asked for by appellant, as the whole law of the case was embodied in the instructions given.

The judgment is therefore affirmed.

19 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

JOE WOODS et al., Appts.,

v.

H. C. RINER, Admr., etc., of Sarah E. Woods, Deceased.

(— Ky. —, 113 S. W. 79.)

Insurance — insurable interest — child.

1. An adult son has an insurable interest in the life of his mother although he is not dependent upon her for support and has no direct pecuniary interest in her life.

Same — contract with stranger — effect.

2. That a son, in taking insurance on the life of his mother, contracts with a cousin to pay a portion of the premiums and share in the proceeds of the policy, does not invalidate the policy so far as the rights of the son are concerned.

(October 30, 1908.)

APPEAL by cross petitioners from a judgment of the Circuit Court for Shelby County denying them a portion of the relief claimed in a proceeding by the administrator of Sarah E. Woods, deceased, for advice as to the distribution of the proceeds of a policy of insurance on her life. Reversed.

The facts are stated in the opinion.

Mr. P. J. Beard for appellants.

Case Note. — Insurable interest of adult child in life of parent.

The earlier cases upon the question of an adult child's insurable interest in a parent's life are collected in the note to *Life Ins. Clearing Co. v. O'Neill*, 54 L.R.A. 225, which apparently is the last case expressly passing thereon prior to the decision in *WOODS v. RINER*.

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The mere existence of a law imposing upon a son the duty of supporting his father in case the latter becomes unable to support himself gives the son no insurable interest in the father's life, in the absence of any expenditures, past or prospective, towards such support. *Ibid*.

Ability on the part of the father to support his adult son in case of the latter's inability to support himself is necessary in order to give the son an insurable interest in the father's life, under a statute imposing upon fathers the duty of caring for their indigent children. *Ibid*.

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west-bound track of appellant, its car ran into the vehicle from behind, overturned it, and threw them out, and appellee sustained the injury complained of. It is the contention of appellant that the horse which was being driven by appellee's husband became frightened at a passing railroad train, and swerved suddenly upon the track a short distance before the car, and when the car was so close upon it that the accident and collision were unavoidable. It is conceded for appellant that appellee did nothing whatever, and was a passive occupant of the carriage, and, unless the negligence of her husband (if any there was), as driver, can be imputed to her, then she is without fault, and must recover in any event, if those in charge of the car were shown to have been negligent of their duty. This presents the question squarely as to whether or not the negligence of a husband while driving a vehicle in which his wife is a passenger can be imputed to the wife, in an action for damages by her, and whether or not the relation of husband and wife is such as that the wife cannot recover under such circumstances if it is shown that the husband, with whom she was riding, was guilty of negligence. A somewhat similar question was raised in the case of *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345, 18 S. W. 2, where it was held that a person who was injured while riding in a vehicle at the invitation of the owner cannot have the contributory neglect of the owner, who was the driver, imputed to him, unless the relation of principal and agent or master and servant exist between the passenger and the owner of the vehicle. The principle announced in that case has been followed in a number of subsequent cases.

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We are of opinion that the trial court did not err in refusing to give the instructions asked for by appellant, as the whole law of the case was embodied in the instructions given.

The judgment is therefore affirmed.
19 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

JOE WOODS et al., Appts.,

v.

H. C. RINER, Admr., etc., of Sarah E. Woods, Deceased.

(— Ky. —, 113 S. W. 79.)

Insurance — insurable interest — child.

1. An adult son has an insurable interest in the life of his mother although he is not dependent upon her for support and has no direct pecuniary interest in her life.

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2. That a son, in taking insurance on the life of his mother, contracts with a cousin to pay a portion of the premiums and share in the proceeds of the policy, does not invalidate the policy so far as the rights of the son are concerned.

(October 30, 1908.)

APPEAL by cross petitioners from a judgment of the Circuit Court for Shelby County denying them a portion of the relief claimed in a proceeding by the administrator of Sarah E. Woods, deceased, for advice as to the distribution of the proceeds of a policy of insurance on her life. Reversed.

The facts are stated in the opinion.

Mr. P. J. Beard for appellants.

Case Note. — Insurable interest of adult child in life of parent.

The earlier cases upon the question of an adult child's insurable interest in a parent's life are collected in the note to *Life Ins. Clearing Co. v. O'Neill*, 54 L.R.A. 225, which apparently is the last case expressly passing thereon prior to the decision in *WOODS v. RINER*.

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The mere existence of a law imposing upon a son the duty of supporting his father in case the latter becomes unable to support himself gives the son no insurable interest in the father's life, in the absence of any expenditures, past or prospective, towards such support. *Ibid*.

Ability on the part of the father to support his adult son in case of the latter's inability to support himself is necessary in order to give the son an insurable interest in the father's life, under a statute imposing upon fathers the duty of caring for their indigent children. *Ibid*.

As to the insurable interest of a minor child in its parent's life, see the note to *Life Ins. Clearing Co. v. O'Neill*, 54 L.R.A. 225.

such interest as will support a policy by the one on the life of the other." Among the cases recognizing this doctrine may be cited the following: *Valley Mut. Life Assn. v. Teewalt*, 79 Va. 423; *Reserve Mut. L. Ins. Co. v. Kane*, supra; *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L.R.A. 217, 16 Am. St. Rep. 893, 12 S. W. 621; *Tucker v. Mutual Ben. Life Co.* 121 N. Y. 718, 24 N. E. 1102; *Trenton Mut. Life & F. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Hilliard v. Sanford*, 4 Ohio N. P. 363.

In speaking of the duties due from children to their parents, *Blackstone* (1 Lewis's ed. p. 428) says: "The duties of children to their parents arise from a principle of natural justice and retribution; for to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after. They who protected the weakness of our infancy are entitled to our protection in the infirmity of their age. They who, by sustenance and education, have enabled the offspring to prosper, ought in return to be supported by that offspring in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws." It may be safely said that no relationship in life, arising from ties of blood, is more sacred or more binding than that of parent and child. As the mother looks into the eyes of her child and uses every effort to guard it from harm and prolong its life, so the child as maturity comes raises a strong arm to protect her in her old age, and looks with fear to the time when she will be taken away. Thus every common instinct, to say nothing of love and affection, makes each interested in the long life of the other. With such a tie uniting parent and child, we cannot accede to the doctrine that some pecuniary loss or disadvantage must result to the son from the death of his mother in order that he may be interested in the continuation of her life. We therefore conclude that the relationship between parent and child is of itself sufficient to give either an insurable interest in the life of the other, and that no other element is required.

Nor do we think the fact that appellants entered into a contract with *George T. Woods*, by which he was to furnish one third of the premiums and to share in one third of the proceeds of the policy, had the effect of invalidating the policy so far as the appellants are concerned. This precise question was before this court in the case of *Beard v. Sharp*, supra. There the son had for a number of years paid the premium on the policy of insurance on the life of his mother issued for his benefit. After paying several premiums, he caused a new cer-

tificate to be issued, making himself and a stranger joint beneficiaries, the stranger agreeing to pay the premiums. This court held that the son was entitled to the whole amount of the proceeds of the policy, less the premiums paid by the stranger, with the interest thereon, and further held that the insurance was not invalidated by the designation of a person prohibited by law from being a beneficiary. Indeed, it may be said to be the general rule that a contract of insurance in not invalidated by the designation of a person prohibited by law to be a beneficiary. *Caudell v. Woodward*, 96 Ky. 646, 29 S. W. 614; *Weigelman v. Bronger*, 96 Ky. 132, 28 S. W. 334; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924.

Being of the opinion that *Sarah E. Woods* was mentally capable of contracting, and that no fraud was practised, either upon her or appellees herein, in securing the contract of insurance, that the subsequent contract made by appellants with *George T. Woods* did not affect the validity of the policy, or appellants' interest therein, and that the relationship existing between appellants and their mother was sufficient, in and of itself, to give them an insurable interest in her life, we therefore conclude that appellants are entitled to the whole proceeds of the policy.

For the reasons given, the judgment is reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARTHA J. FIELD

v.

ROBERT GOWDY.

(199 Mass. 568, 85 N. E. 884.)

Sidewalk — casting water — liability.

1. A property owner who throws water from his roof, by means of a spout, onto his walk in such a manner that by the natural slant it flows to a public walk, where it freezes and renders the walk unsafe, is liable for injuries thereby caused to a

Note. — As to the liability of abutting property owner for injury caused by ice formed from water artificially turned across sidewalk, see note to *Brown v. White*, 58 L.R.A. 321, and supplementary case note to *Hynes v. Brewer*, 9 L.R.A.(N.S.) 598.

As to liability of municipal corporation for injuries from smooth, level ice or snow accumulating from natural causes on a sidewalk not otherwise defective, see case note to *Evans v. Concordia*, 7 L.R.A.(N.S.) 933.

pedestrian who is himself in the exercise of due care.

Same — liability of abutting owner — contributory defect.

2. That a town has negligently left a depression in a sidewalk will not relieve from liability for injuries to a pedestrian who falls on ice there accumulated, the abutting owner who negligently turns water collected from his roof onto the walk, and thereby contributes to the injury.

Same — notice.

3. A property owner who, in the exercise of ordinary prudence, has reasonable notice that water from his roof, in conjunction with any other cause, produces a dangerous condition upon a public sidewalk, is responsible for the injury thereby caused.

Same — municipal ordinance — evidence.

4. A municipal ordinance forbidding any person to permit water from his eaves to be discharged upon the sidewalk, or to permit any conduit upon his land to discharge water upon the sidewalk, is not immaterial upon the question of the negligence of the property owner who cast water from his own roof upon his own walk in such a manner that it flowed naturally upon the sidewalk.

Appeal — evidence — exclusion — error.

5. The exclusion, in an action against a property owner for injuries to a pedestrian falling on a sidewalk because of the alleged freezing of water turned from his roof onto the walk, of a photograph of the direction taken by water coming from the roof during a severe rainstorm, is not so plainly wrong that it will be interfered with by the reviewing court.

(October 19, 1908.)

EXCEPTIONS by defendant to rulings of the Superior Court for Hampden County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in plaintiff's favor. Overruled.

The facts are stated in the opinion.

Messrs. Henry W. Ely and Joseph B. Ely for defendant.

Messrs. R. J. Morrissey, J. B. Carroll, and W. H. McClintock, for plaintiff:

The condition was dangerous to public travel, constituting a nuisance.

Neas v. Lowell, 193 Mass. 441; Hynes v. Brewer, 194 Mass. 435, 9 L.R.A. (N.S.) 598, 80 N. E. 503; Oxford v. Leathe, 165 Mass. 254, 43 N. E. 92; Leahan v. Cochran, 178 Mass. 566, 53 L.R.A. 891, 86 Am. St. Rep. 506, 60 N. E. 382, 79 N. E. 810; Holyoke v. Hadley Water-Power Co. 174 Mass. 424, 54 N. E. 889; Shepard v. Creamer, 160 Mass. 496, 36 N. E. 475; Wilcox v. Zane, 167 Mass. 19 L.R.A. (N.S.)

302, 45 N. E. 923; O'Malley v. Twenty-Five Associates, 170 Mass. 471, 49 N. E. 641; Jackman v. Arlington Mills, 137 Mass. 277; Dalay v. Savage, 145 Mass. 38, 1 Am. St. Rep. 429, 12 N. E. 841; Brown v. White, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962; Dahlin v. Walsh, 192 Mass. 163, 6 L.R.A. (N.S.) 615, 77 N. E. 830.

The conductor constituted a nuisance, and it was none the less so because some of the water lodged in the depression; and the fact that the town was also negligent does not excuse the defendant.

Holyoke v. Hadley Water-Power Co. 174 Mass. 428, 54 N. E. 889; Rockport v. Rockport Granite Co. 177 Mass. 246, 51 L.R.A. 779, 58 N. E. 1017; Corey v. Havener, 182 Mass. 250, 65 N. E. 69; Mooney v. Edison Electric Illuminating Co. 185 Mass. 547, 70 N. E. 933; Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726; Fenneff v. Boston & M. R. Co. 196 Mass. 575, 82 N. E. 705.

The by-law was admissible.

Newcomb v. Boston Protective Department, 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; Finnegan v. Winslow Skate Mfg. Co. 189 Mass. 580, 76 N. E. 192; Lane v. Atlantic Works, 111 Mass. 136; Holbrook v. Jackson, 7 Cush. 154; 1 Wigmore, Ev. 18, p. 57; Whitcher v. McLaughlin, 115 Mass. 167.

Rugg, J., delivered the opinion of the court:

This is an action of tort by the plaintiff, a traveler upon a public sidewalk, against the defendant, an abutting landowner, for collecting water from his roof and conducting it through a spout to his own walk, whence it flowed by natural slant to the public walk and froze, so that the plaintiff, while walking with due care after dark on a December day, slipped and was injured.

1. The refusal of the trial judge to rule that the plaintiff was not entitled to recover was correct. There was evidence that the plaintiff was in the exercise of due care. A landowner has a right to change the surface of his lot, or improve it by the construction of buildings or by other means, in any lawful manner, and, if the natural course of surface water is thereby altered, no liability is imposed on him. But he has no right to collect water into a definite channel by a spout or otherwise and pour it upon a public way. If he does this, and, through the operation of natural causes, the water freezes, he is the efficient cause in the creation of a nuisance, and is liable for whatever damage ensues as a probable consequence. Cavanagh v. Block, 192 Mass. 63, 6 L.R.A. (N.S.) 310, 116 Am. St. Rep. 220, 77 N. E. 1027; Hynes v. Brewer, 194 Mass. 435, 9 L.R.A. (N.S.) 598, 80 N. E. 503; Leahan v. Cochran, 178 Mass. 566, 53 L.R.A. 891, 86 Am.

St. Rep. 506, 60 N. E. 382. There was evidence tending to show that from two spouts on the defendant's house, one about 11 feet from the street line, and the other nearer by the width of a piazza, water was collected from the roof and turned upon his concrete walk, and by the natural grade of the walk flowed to the sidewalk, where it froze in a ridge across the width of the public walk about 3 inches in thickness in the middle. This was sufficient to warrant a finding that the defendant collected the surface water in an artificial course and poured it upon the public way in such a manner as to create a nuisance. *Moore v. Gadsden*, 87 N. Y. 84, 41 Am. Rep. 352, is distinguishable on the ground that no water was there collected in a definite channel; that falling upon the lot was permitted to flow according to gravity without being gathered.

2. There was evidence from which it was argued that there was a depression or gully in the sidewalk, into which the water from the defendant's spout flowed and froze. Upon this aspect the defendant asked for rulings, in substance, that the plaintiff could not recover if the water would have run off but for the defect in the sidewalk, and that the defendant, in maintaining his premises, was not obliged to take into account the effect of this condition. This request was refused, and the jury instructed that, if the defendant materially contributed to the cause of the defect which occasioned the plaintiff's injury, he would not be excused because some other cause also contributed; and that, if the defendant's conductor was a nuisance, and water from it froze on the sidewalk, so as to be dangerous, the defendant would be liable, even if the sidewalk was otherwise dangerous. No error is here disclosed. The town and the defendant were not joint tortfeasors in producing the dangerous condition of the sidewalk, which resulted in the plaintiff's injury, yet, if each contributed an efficient causal factor, either may be liable. *Mooney v. Edison Electric Illuminating Co.* 185 Mass. 547, 70 N. E. 933; *Lowell v. Glidden*, 159 Mass. 317, 34 N. E. 459; *Boston v. Coon*, 175 Mass. 283, 56 N. E. 287. A landowner, in turning water upon a public way, is bound to take into account its actual condition, and determine at his peril whether his act in conjunction with the way, as it exists from time to time, will create a nuisance. A defect in a highway, when bare, may be so conjoined with snow or ice that both together may operate as a proximate cause to which an injury may be attributed. *Newton v. Worcester*, 174 Mass. 181, 187, 54 N. E. 521. An abutting landowner can no more rely upon perfection of conduct in the public officers having charge of highways than upon like conduct in an in-

dividual to shield himself from the consequences of his own tortious act. If both are wrongdoers and both contribute to the injury as a cause, each may be liable, though there is no concert of action. *Corey v. Havenner*, 182 Mass. 250, 65 N. E. 69. The verdict of the jury has established the fact of the defendant's wrongdoing. Even though this wrongful act alone may not have been a sufficient cause for the plaintiff's injury, but, working concurrently with another wrongful act of a third person, both being efficient causes, the harm is occasioned to the plaintiff, either may be liable. *Feneff v. Boston & M. R. Co.* 196 Mass. 575, 82 N. E. 705. In the requests of the defendant, the concurrent operation of two causal wrongful agencies in the creation of the dangerous situation was omitted, and they were properly refused, while the instructions given conformed to the law. The defendant has argued in his brief that there was no evidence as to the length of time the defect in the sidewalk had existed; but that point does not appear to have been raised at the trial, and the portion of the charge dealing with it is not reported. It is now too late to raise the question. The defense was apparently directed to the point that water from the spouts did not flow over the sidewalk. If the defendant had, in the exercise of ordinary prudence, reasonable notice that his storm water, in conjunction with any other cause, produced a dangerous condition, he is responsible. *Davis v. Rich*, 180 Mass. 235, 62 N. E. 375.

4. There was admitted in evidence, subject to the defendant's exception, a by-law of the town of Westfield that "no person shall permit water from the eaves or leader pipes of any building owned or cared for by him to be discharged upon the sidewalk . . . or make or permit any drain, sluice, gully, or conduit upon his land to discharge water upon the sidewalk." It is contended that there was no evidence of a violation of this by-law, and that hence it should have been excluded. Its language does not prohibit alone direct and immediate discharge without any intervening agency, but includes as well cases where the house, standing back from the street line, is so fitted with eaves and leader pipes that the collected waters flow with accelerated volume and directed force to the highway. The walk of the defendant may have been found to act as a trough to carry the water from the spout to the sidewalk. There being some evidence of the violation of the by-law, it was competent evidence, to be considered with all the other circumstances, as bearing upon the liability of the defendant, although not conclusively establishing it. *McCarthy v. Morse*, 197 Mass. 332, 83 N. E. 1109. The

defendant's request for instruction upon this branch of the case did not accurately state the law as applicable to the language of the by-law and the other circumstances, and was properly refused. The by-law was not offered for the purpose of establishing a duty on the part of the defendant, violation of which was the sole foundation of the plaintiff's action. The existence of a nuisance cannot be predicated solely upon violation of a municipal ordinance when the act prohibited is in itself indifferent and no duty exists apart from the ordinance. *Dahlin v. Walsh*, 192 Mass. 103, 6 L.R.A. (N.S.) 615, 77 N. E. 830. But there was independent affirmative testimony of the tortious act of the defendant in turning the water upon the sidewalk, which subsequently congealed and injured the plaintiff. That this act, which might have been found wrongful in itself, was also a violation of a by-law, was a circumstance to be weighed with all other evidence bearing upon the issue. *Finnegan v. Winslow Skate Mfg. Co.* 189 Mass. 580, 76 N. E. 102; *Newcomb v. Boston Protective Department*, 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; *Glassey v. Worcester Consol. Street R. Co.* 185 Mass. 315, 70 N. E. 199. See *Doherty v. Ayer*, 197 Mass. 241, 14 L.R.A. (N.S.) 816, 83 N. E. 677.

5. The defendant, having offered to show that, since the accident to the plaintiff, there had been no change in any of the material facts on the face of the earth, proffered a photograph taken in the course of the trial during a rainstorm of much greater severity than any occurring near the time of the accident, for the purpose of showing the direction taken by water thrown from the spout, and after it reached the defendant's walk, and that such water could not and did not flow to the public walk. To the exclusion of this evidence the defendant excepted. The ground of this ruling is not stated. A photograph of the place, when there was no storm, was admitted in evidence. That excluded was at best a photograph of an experiment. A photograph has no higher character as evidence than the experiment itself. Whether the conditions were sufficiently similar to make the observation of any value in aiding the jury to pass upon the issue submitted to them was primarily for the trial judge to determine as a matter of discretion. His decision in this respect will not be interfered with unless plainly wrong. Such observations and experiments, though sometimes admitted, have often been excluded, in the discretion of the presiding judge. There is nothing in the present case to show that the exclusion of the photograph was error. *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 793; *Dow v. Bulfinch*, 192 Mass. 281, 78 N. E. 416; *Com. v. Tucker*, 189 Mass. 457, 478, 19 L.R.A. (N.S.)

7 L.R.A. (N.S.) 1056, 76 N. E. 127; *Baker v. Harrington*, 196 Mass. 339, 82 N. E. 33. The other exceptions were either waived, or were not argued and are treated as waived.

Exceptions overruled.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JAMES FITZGERALD, Admr., etc., of
George H. Fitzgerald,
v.

WORCESTER & SOUTHBRIDGE STREET
RAILWAY COMPANY.

(200 Mass. 105, 85 N. E. 911.)

Master — negligence — rules.

1. It may be found to be negligence for a street car company to fail to take precautions against the forgetting or misunderstanding of an order which requires a regular car to await the arrival of a special one before proceeding out on the track, where the result of its nonobservance may be death; and so, where the custom is to notify the conductor and motorman of the regular car of the order, and to post it on the bulletin, failure to comply with the custom may be found to be negligence.

Same — superintendent — statutory liability — car despatcher.

2. A car despatcher to whom is confided the management of cars on a street railway is an employee intrusted with and exercising superintendence, and whose sole and principal duty is that of superintendence, within the meaning of a statute rendering the employer responsible for the negligence of such person.

Negligence — intervening cause — forgetfulness.

3. The forgetting by a conductor of a street car of a verbal order to await the arrival of a special car before taking his car out on the track is not such an immediate and sole cause of an injury resulting from a collision of the two cars as to relieve the company from liability because of its negligence in failing to notify the motorman of the car of the order, and post it on the bulletin according to custom.

(October 23, 1908.)

Case Note. — Failure to reduce to writing orders, governing the running of trains or cars.

There are but few cases in which the failure to reduce orders governing the running of trains or cars to writing is one of the essential factors; and a search reveals none in which it appears, as in the foregoing case, that the failure to reduce the orders to writing was relied upon to show negligence on the part of the defendant.

In one or two cases, the question is raised whether or not it was negligence on the

R EPORT by the Superior Court of Worcester County for the opinion of the Supreme Judicial Court after directing a verdict in defendant's favor of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Judgment for plaintiff.

The facts are stated in the opinion.

Messrs. Charles M. Thayer and J. Otis Sibley, for plaintiff:

Deceased had the right to assume that the defendant's agents would perform their duties in accordance with the rules, or with the usual customs as sanctioned by the defendant.

Carroll v. New York, N. H. & H. R. Co. 182 Mass. 240, 65 N. E. 69; Rafferty v. Nawn, 182 Mass. 503, 65 N. E. 830; Edgar v. New York, N. H. & H. R. Co. 188 Mass. 420, 74 N. E. 911; Meadowcroft v. New York, N. H. & H. R. Co. 193 Mass. 249, 79 N. E. 266.

The defendant was responsible for the negligence of the train despatcher.

Doe v. Boston & W. Street R. Co. 195 Mass. 168, 80 N. E. 814; Lewis v. Seifert, 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514; Slater v. Jewett, 85 N. Y. 62, 39 Am. Rep. 627; Hankins v. New York, L. E. & W. R. Co. 142 N. Y. 416, 25 L.R.A. 396, 40 Am. St. Rep. 616, 37 N. E. 466; Darrigan v. New York & N. E. R. Co. 52 Conn. 285, 52 Am. Rep. 590.

The custom to notify both a motorman

part of the injured employee, or on the part of one of his fellow servants, to run a train or car on verbal orders, where he or the fellow servant knew that the rules called for written orders.

Thus, in Smith v. Wabash, St. L. & P. R. Co. 92 Mo. 359, 1 Am. St. Rep. 729, 4 S. W. 129, it was held that, admitting or assuming that the train despatcher was the representative of the railroad, and by his negligence the accident occurred, the fact that the engineer took an engine out upon the despatcher's verbal orders, although he knew that written orders were required by the rules, would not prevent a recovery for injuries received by his fireman.

And in Doe v. Boston & W. Street R. Co. 195 Mass. 168, 80 N. E. 814, it appeared that the conductor and motorman of a trolley car should not, under the rules of the company, have left a certain switch without a written order,—that is, an order written out by the conductor who received it by telephone,—until a certain car going in the opposite direction had passed. They, however, received a telephone order from the despatcher to proceed, and their car collided with the approaching car. The court held that the defendant would be lia-

ble for the injuries received notwithstanding the negligence of the conductor and motorman in not taking the order down in writing.

The court said: "If the collision which followed would not have been caused if the conductor and the motorman had observed these rules, yet that such a result was probable should have been anticipated from the knowledge and experience of the train despatcher under whose order the car proceeded. He was called upon, before giving this order, to take every reasonable precaution to ascertain whether three cars had passed; and, if he failed to ascertain this important fact, his negligence could have been found to have been the efficient cause of the disaster."

In Deverson v. Eastern R. Co. 58 N. H. 129, it was held that the fact that the plaintiff, an engineer on defendant's road, did not reduce to writing, as required by the rules, certain telegrams announcing a breakdown of his engine, was not a legal bar to a recovery for injuries received by him for a failure on the part of the defendant properly to keep the track clear for his disabled engine; but the jury might consider this fact as bearing upon his contributory negligence.

Carroll v. New York, N. H. & H. R. Co. 182 Mass. 237, 65 N. E. 69; Edgar v. New York, N. H. & H. R. Co. and Meadowcroft v. New York, N. H. & H. R. Co. supra; Brady v. New York, N. H. & H. R. Co. 184 Mass. 225, 68 N. E. 227; Nagle v. Boston & N. Street R. Co. 188 Mass. 38, 73 N. E. 1019.

The failure of the despatcher to notify the motorman was negligence.

Labatt, Mast. & S. § 16a; Baltimore & O. R. Co. v. Camp, 13 C. C. A. 223, 31 U. S. App. 213, 65 Fed. 952; Gerrish v. New Haven Ice Co. 63 Conn. 9, 27 Atl. 235; Bailey v. Rome, W. & O. R. Co. 139 N. Y. 302, 34 N. E. 918.

If the jury could have found that the order was given negligently, the defendant would have been liable for the result of such negligence.

Devine v. Boston & A. R. Co. 159 Mass. 348, 34 N. E. 539; Prendible v. Connecticut River Mfg. Co. 160 Mass. 131, 35 N. E. 675; O'Brien v. West End Street R. Co. 173 Mass. 105, 53 N. E. 149; Eaves v. Atlantic Novelty Mfg. Co. 176 Mass. 369, 57 N. E. 669; Doe v. Boston & W. Street R. Co. supra; Hough v. Grants Pass New Water, Light, & P. Co. 41 Or. 531, 69 Pac. 655.

The failure of a servant to perform such a duty delegated by his principal is the failure of the principal.

Coombs v. New Bedford Cordage Co. 102 Mass. 572, 3 Am. Rep. 506; Wheeler v.

Wason Mfg. Co. 135 Mass. 294; Jarvis v. Coes Wrench Co. 177 Mass. 170, 58 N. E. 587; Western U. Teleg. Co. v. Burgess, 47 C. C. A. 168, 108 Fed. 26.

The probable and natural result of a violation of the customary precautionary rules, or of complying with them negligently, would be collision; and such result might well have been foreseen; and for the probable and natural result of its acts the defendant is liable.

Lane v. Atlantic Works, 111 Mass. 136; Derry v. Flitner, 118 Mass. 131; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; Koplan v. Boston Gaslight Co. 177 Mass. 15, 58 N. E. 183; Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726; Felton v. Harbeson, 44 C. C. A. 188, 104 Fed. 737; Baltimore & O. R. Co. v. Camp, 105 Fed. 212; Mexican C. R. Co. v. Glover, 46 C. C. A. 334, 107 Fed. 356; Cincinnati, I. & St. L. R. Co. v. Lang, 118 Ind. 579, 21 N. E. 317; Town v. Michigan C. R. Co. 84 Mich. 214, 47 N. W. 665.

The deceased did not assume the risk that the officers of the defendant would not perform their duties and obey the rules.

Mahoney v. Bay State Pink Granite Co. 184 Mass. 287, 68 N. E. 234; Meagher v. Crawford Laundry Mach. Co. 187 Mass. 586, 73 N. E. 853; Baggeski v. Lyman Mills, 193 Mass. 103, 78 N. E. 852.

Messrs. Charles C. Milton, Chandler Bullock, and F. H. Dewey for defendant.

Loring, J., delivered the opinion of the court:

This action was brought to recover damages for the conscious suffering and death of George H. Fitzgerald, who, in August, 1907, was a motorman in the defendant's employ.

By the defendant's regular schedule, it was Fitzgerald's duty to run a car each week day, with one Campbell as conductor, from Charlton to Worcester, starting from the car barn in Charlton at 5:45 A. M. On the evening of August 28th, Fitzgerald and Campbell received a verbal order from one Kingdon, the defendant's car despatcher, to run their car as a special car from Charlton to Southbridge and return before starting their regular trip from Charlton to Worcester at 5:45 A. M. The order was to start from the Charlton car barn at 5:05 A. M., go to Southbridge, leave Southbridge on the return trip at 5:27 A. M., passing two cars at the optical works (in Southbridge), "then right of way to the car barn and then on regular schedule," to quote from the testimony of Campbell.

Fitzgerald and Campbell left Charlton on the morning of August 29th as instructed, arrived at Southbridge, and started on the 19 L.R.A. (N.S.)

return trip. There was evidence that, when they were within one and one-half minutes or two minutes of Charlton they were run into by a car which, by the regular schedule, left Charlton for Southbridge at 5:45 A. M., the same minute at which, by the same schedule, Fitzgerald's and Campbell's car was to leave Charlton for Worcester; that Fitzgerald first saw this car when it was about 200 feet away, as he came around a curve at full speed (from 20 to 25 miles an hour); that he did all in his power to stop his car, but that, in spite of this, the other car (an open one) "mounted" his car (a closed one) and he was caught before he could get out of the way.

Whether Fitzgerald and Campbell were behind time on the one hand, or, on the other hand, whether the other car started before the schedule time, was not clear on the evidence, and is not important. There was evidence that the car despatcher told the conductor of this other car "to wait at the car barn until he had seen us [Fitzgerald and Campbell] go by," to quote again from Campbell's testimony.

One Farquhar was the motorman of this other car, which, by the regular schedule, was to leave Charlton for Southbridge at 5:45 A. M.

It appeared that the car despatcher's office was at the defendant's car barn at Oxford.

It happened that Kingdon, the car despatcher, Fitzgerald and Campbell (the motorman and conductor of the car which ran as a special car to Southbridge with the right of way on its return trip to Charlton), and Smith (the conductor of the regular car leaving Charlton for Southbridge and running against the special car if it left Charlton before that car arrived there) were at a reception at Webster on the evening of August 28th, and that all the orders given by Kingdon, the car despatcher, were given there by word of mouth. Farquhar (the motorman of this other car) was not at the reception, and received no order or notice in the matter. This reception was given to one Anderson, the superintendent of the defendant's railway, who was leaving its employ, and was attended by some 18 to 20 employees.

The plaintiff introduced evidence from which the jury were warranted in finding that it was the general custom of the defendant corporation to notify both the conductor and the motorman of a regular car which is to wait for a special car, and also to post all orders for special cars which conflict with the regular schedule on a bulletin board hung under the clock in the motormen's and conductors' lobby in the Charlton street car barn.

Where the result of an employee's forgetting an order is not of serious consequence, an employer's duty is performed if the proper order is given clearly by word of mouth to one employee. But, where life or death hangs on an order's being executed as given, no chances should be taken. It might well be found in such a case to be an act of negligence if precautions were not taken against the order's being forgotten or misunderstood.

The general custom of the defendant's road (which was testified to in the case at bar) required such precautions to be taken in giving an order of that kind. That general custom testified to was to notify the motorman as well as the conductor of the regular car which was to wait for the special car, and to post such an order on the bulletin board in the motormen's and conductors' lobby in the car barn from which the regular car was to start.

In the case at bar the plaintiff waived all but two counts of the declaration. In both of these the plaintiff counted on "the negligence of employees of the defendant who were intrusted with and were exercising superintendence and whose sole or principal duty was that of superintendence." His contention is that the negligence of a car despatcher is the negligence of an employee of the defendant, who was intrusted with and was exercising superintendence.

The plaintiff was right in this contention. It was decided in *Doe v. Boston & W. Street R. Co.* 195 Mass. 168, 80 N. E. 814, that a car despatcher to whom is confided the management of cars on the tracks of a street railway is an employee intrusted with and exercising superintendence, and whose sole or principal duty is that of superintendence, within Rev. Laws, chap. 106, § 71, cl. 2. See also, in this connection, *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L.R.A. 396, 40 Am. St. Rep. 616, 37 N. E. 466; *Lewis v. Seifert*, 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 500.

From what has been said the jury were warranted in finding that Kingdon was negligent in not giving the order to Farquhar, the motorman of the regular car, as well as to Smith, the conductor of it, to wait in the car barn until the special car had passed, and in not posting that order on the bulletin board.

The defendant has made the further contention that the cause of the accident here in question, and the sole cause of it, was Smith's having forgotten the order which the evidence shows was given to him by Kingdon by word of mouth; and for that reason that the case comes within *Stone v.* 19 L.R.A. (N.S.)

Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; *Glassey v. Worcester Consol. Street R. Co.* 185 Mass. 315, 70 N. E. 199, and *Higgins v. Higgins*, 188 Mass. 113, 74 N. E. 471.

But the reasons which make it the duty of the employer or his superintendent (in such a case as that now before us) to take precautions against an order being forgotten or misunderstood make the failure to do that a proximate cause of the accident if an order verbally given to the conductor alone is forgotten and an accident occurs.

In this event, by the terms of the report, judgment is to be entered for the plaintiff for \$5,000, with interest and costs. But, since the \$2,500 for which a verdict is given in the first count goes to different persons from those to whom the \$2,500 for which a verdict is given in the second count should be paid, we construe the report to mean that the verdict entered for the defendant should be set aside, that a judgment for \$2,500 is to be entered on each count, as of the date of the trial; and that judgment should carry interest from the date of the verdict, with one set of costs.

So ordered.

MASSACHUSETTS SUPREME JUDICIAL COURT.

HORACE V. YOUNG

v.

GEORGE H. SNELL.

(200 Mass. 242, 86 N. E. 282.)

Evidence — sufficiency — defect.

1. Proof of the existence of a nail projecting from the floor near a machine a week after an employee stumbles over something at that point and falls into the machine to his injury will justify a finding that it was there at the time of, and was the cause of, the accident.

Case Note. — Master's Liability for injuries sustained by servant from falling over nail or bolt projecting from floor.

The case of *Jennings v. Tompkins*, cited by the court in *YOUNG v. SNELL*, was not a master and servant case.

The only case similar in its facts to the above case is *Taylor v. Penn. Steel Castings & Mach. Co.* 217 Pa. 269, 66 Atl. 353, which holds that a servant cannot recover for injuries sustained in consequence of stumbling over a bolt which projected from $\frac{1}{8}$ to $\frac{3}{4}$ of an inch above the floor, and thereby falling into an open elevator shaft, where such bolt was necessary to sustain weighing scales which it was the servant's duty to use, as the danger therefrom was obvious and fully known to him.

Same — defect — notice.

2. That, upon examination of the place at which an employee stumbled and fell into a machine to his injury, a nail was found projecting from the floor, will justify a finding that a proper inspection before the accident would have disclosed its presence to the employer.

Master — unsafe working place.

3. An employer may be liable for an injury to his employee through his fall into a machine by stumbling over a nail projecting from the floor near the machine, which is concealed by the litter on the floor.

Same — fellow servant — negligence.

4. An accident to an employee who stumbles over a nail projecting from the floor and falls into a machine cannot be said to have been caused by the negligence of a fellow servant in failing to remove the litter from the floor, where there is nothing to show that he had neglected to remove it when his duty required him to do so.

Same — contributory negligence.

5. A workman is not negligent *per se* in walking toward a machine in motion without sweeping the litter from the floor to ascertain if it contains projections which may cause him to stumble and fall into the machine.

Same — assumption of risk.

6. A workman does not assume the risk of injury by being thrown into a machine by falling over a nail projecting from the floor, where it is habitually covered with litter so that the risk from it is not obvious.

(November 24, 1908.)

REPORT by the Superior Court for Bristol County for the opinion of the Supreme Judicial Court of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. Frederick S. Hall, for plaintiff:

It was the defendant's duty to use due diligence to discover defects, and the duration of those defects may be considered as bearing on such diligence.

2 Thomas, Neg. p. 1392; Walton v. Ensign, 27 Ohio C. C. 505.

If there are facts from which a reasonable inference of negligence may be drawn, there is sufficient evidence to go to the jury.

Cleveland Terminal & Valley R. Co. v. Marsh, 63 Ohio St. 236, 52 L.R.A. 142, 58 N. E. 821; Northern Mill. Co. v. Mackey, 99 Ill. App. 57; Dixey v. Philadelphia Traction Co. 180 Pa. 401, 36 Atl. 924; Corbin v. Western Electric Co. 78 Ill. App. 516.

Mr. D. F. Slade, for defendant:

The plaintiff was, as a matter of law, bound to exercise caution in approaching these dangers.

19 L.R.A. (N.S.)

Ford v. Mt. Tom Sulphite Pulp Co. 172 Mass. 544, 48 L.R.A. 96, 52 N. E. 1065; May v. Whittier Mach. Co. 154 Mass. 29, 27 N. E. 768.

The plaintiff assumed the risk incident to his employment.

Kanz v. Page, 168 Mass. 217, 46 N. E. 620.

The presence of the nail was one of those temporary dangers which the employers could not reasonably guard against; and, considering the use to which the room was being put, it could not be said that the defendant was called upon, in the exercise of due diligence, to know of its presence.

McCann v. Kennedy, 167 Mass. 23, 44 N. E. 1055; Donovan v. American Linen Co. 180 Mass. 127, 61 N. E. 808.

Loring, J., delivered the opinion of the court:

The plaintiff was hired by the defendant to put up an addition to his planing mill about six weeks before the accident here complained of. He testified that he was invited by the defendant to use the machinery in the mill whenever he had work to be done which could be done more quickly on one of the machines. On the day in question he had occasion to square up a piece of quarter round board, and undertook to use the defendant's buzz planer in doing that work. His story was that he found that he did not have the right gauge on; that he went and set the gauge; that he then "went to pick up" the board in question, when something caught his foot and "caused him to stumble" onto the buzz planer which was exposed, and parts of two of his fingers were cut off by the machine. He was alone in the room at the time, and he testified that "it was not light around the machine and you could not see the floor around the machine; that there were a good many shavings on the floor; that these were directly under his feet and all around the planer." The accident was on a Monday.

He further testified that, a week later, he went to the place with another carpenter who never had worked for the defendant, and found a nail sticking up "about 1 inch or more" above the floor, and about 18 inches from the bottom of the planer; "that it was where it came directly in the way of his right foot." He described the nail as "hooked over, the head of it," and "that the head of it was towards him as he stood there working on the machine;" that he saw an "impression in the floor" which indicated that the nail had been in the board; "that the depression looked old" and "the nail looked old;" it had been worn slightly; the nail was not there in the depression, but was sticking up from it; the depression was

about the same length as the part of the nail which stuck up from the floor, and the nail seemed to fit it. When he went there a week after the accident and found the nail, "he took a stick and brushed the shavings away and found the nail." The depression showed where the head of the nail had been driven into the wood.

The story of finding the nail was corroborated by the testimony of the carpenter who went with the plaintiff when he went to the factory a week after the accident, as has just been stated. He (the carpenter) testified to the shavings, to brushing them aside, and finding the nail. He saw that the nail "was sticking up an inch to an inch and $\frac{3}{4}$." He also corroborated the plaintiff's story as to the place where the nail was found, adding, "it was sort of a bad place for it," and, as to the nail being bent over, he testified that it "looked as if it was stamped on;" that it looked to him as if the nail had been tramped on some around there;" that the nail head was bent over; that "the nail was loose in the floor, in the hole in the floor, from being tramped on; that there was a depression under the head of the nail;" "that the nail did not look very new."

The plaintiff's story as to what the nail looked like was further corroborated by one Fitch, who was an employee of the defendant. His testimony confirmed the story told by the plaintiff as to where the nail was, as to its sticking up from the floor, as to its being bent over, and as to the depression in the floor. He also testified "that it appeared to be a nail that had worked itself out of the floor, or had been driven in the floor and tipped over by working around by the tramping on it; that it looked like a nail after it was scraped some on the side by the feet of anyone there and loosened out of the wood which kind of bent over the head of it; that it looked as if it had been tramped down in the floor as a nail naturally would be that had been tramped on the floor;" and "that the floor was all worn there; that it was worn up under the edge of the planer."

One of the defendant's employees called by the defendant testified that his attention was called to the nail by the plaintiff. He said that the nail was $2\frac{1}{2}$ inches long, and "that about $\frac{1}{2}$ an inch or $\frac{3}{4}$ of an inch" of it only "was in the floor." His testimony corroborated that of the plaintiff as to where the nail was, as to the nail being bent over, as to its being "worn some" and "shiny," "that it showed shiny in a part of it where it had been struck by the feet," and "that it was not a new nail." He also testified that between the time of the accident and the time the plaintiff found the

nail he did not do any cleaning "as far as he could remember."

There was evidence that the floor about the buzz planer was habitually covered with shavings, and that these shavings were usually cleaned up once a week on Saturday night, and that it was the duty of the last witness to clean up the shavings at that time.

There was some evidence which tended to contradict what might be inferred from the testimony of the plaintiff and his witnesses. It is not necessary to state what it was, for, even if not contradicted, the jury could disbelieve it *in toto*. *Lindenbaum v. New York, N. H. & H. R. Co.* 197 Mass. 314, 84 N. E. 129.

The case does not come within *Jennings v. Tompkins*, 180 Mass. 302, 62 N. E. 265. The nail in the case at bar (if the plaintiff's story was believed) was bent over so as to make a person stumble, and was in such a position with reference to the buzz planer as to make its existence a source of great danger. In addition, the jury were warranted in finding that it stood up above the floor from an inch to an inch and $\frac{3}{4}$ in place of $\frac{3}{16}$ of an inch, as in *Jennings v. Tompkins*.

It is not an infrequent occurrence that the condition in which the *locus* is found after an accident is of itself alone sufficient evidence of its having been in the same condition before the accident. In *Comerford v. Boston*, 187 Mass. 564, 73 N. E. 661, the plaintiff was injured by the sidewalk having settled down about 2 inches below the curbing. There was evidence that, after the accident, the facing of the inside of the curbing was "pretty nigh black." This was held sufficient evidence that the sidewalk had been in this condition such a length of time before the accident that the city, by the exercise of reasonable diligence, might have known of it in season to have it remedied, within Pub. Stat. 1882, chap. 52, § 18 (Rev. Laws, chap. 51, § 18).

In *Gould v. Boston Elev. R. Co.* 191 Mass. 396, 77 N. E. 712, a seat in an open car fell on the plaintiff by the breaking of the metallic armature. Evidence that, after the accident, half of the break of the armature was rusty, black, and corroded was held to be evidence that the crack was an old one, and would have been seen on inspection if due care had been used by the defendant.

Hannan v. American Steel & Wire Co. 193 Mass. 127, 78 N. E. 749, is another case of the same kind. There an injury was caused by the breaking of an iron bolt, and, after the accident, it was found that part of the break was fresh and the other part rusty. It was held that the condition in which the bolt was found to be after the accident warranted a finding that it was

an old flaw which could have been found had proper inspection been made by the defendant, in the exercise of due care.

In our opinion the case at bar comes within these decisions, and the evidence here warranted the jury in finding that the nail found by the plaintiff a week after the accident was there before it and was the cause of it; and that, on proper inspection, it would have been found by the defendant. Further, in our opinion this is not the case of a transitory risk, as in *Donovan v. American Linen Co.* 180 Mass. 127, 61 N. E. 808, and *McCann v. Kennedy*, 167 Mass. 23, 44 N. E. 1055.

Neither was the accident caused by the neglect of a fellow servant in not sweeping up the shavings. On the uncontradicted testimony, the shavings were to be swept up but once a week. There is no evidence that they were not swept up on the Saturday night preceding the Monday on which the accident occurred. The shavings around the planer at the time of the accident might well have been made on that Monday morning. The case therefore does not come within *McRea v. Hood Rubber Co.* 187 Mass. 328, 72 N. E. 1015.

We are also of opinion that the jury were warranted in finding that the accident was not caused by contributory negligence on the part of the plaintiff. They were warranted in finding that the nail was hidden by shavings at the time of the accident. In our opinion a workman cannot be said, as matter of law, to be guilty of negligence if he walks to a buzz planer over a floor covered by shavings, without sweeping them away and examining the condition of the floor.

Since the floor was habitually covered with shavings, the risk from this nail was not an obvious one, and, for that reason, was not one assumed by the plaintiff as an incident to the employment which he chose to accept.

In accordance with the terms of the report the entry must be—

Judgment for the plaintiff in the sum of \$1,000.

MICHIGAN SUPREME COURT.

SARAH MAYER

v.

IGNATZ MAYER, Appt.

(— Mich. —, 117 N. W. 890.)

Foreign judgment — alimony — enforcement.

1. The courts of one state may enforce a decree of another state for alimony payable in instalments where no power to 19 L.R.A.(N.S.)

change the decree is reserved by the court or conferred by statute.

Same — support of minors — right to modify.

2. The courts of one state may not enforce payment of arrears under a decree of another state directing one party to a divorce suit to pay the other a certain amount per month for support of the children where the court reserved the right to modify the order in regard to the children at any time.

Contempt — disobedience of judgment — statutory provision.

3. Statutory authority to punish by imprisonment disobedience of an order for payment of alimony, made in any suit for divorce, does not extend to the authorization of such punishment for noncompliance with a decree directing payment of money due under a foreign decree for alimony.

(October 5, 1908.)

APPEAL by defendant from a judgment of the Circuit Court of Wayne County in Chancery directing him to comply with a foreign judgment for the payment of alimony and punishing him for contempt for refusal to do so. Modified.

The facts are stated in the opinion.

Messrs. Frazer, Griswold, & Slyfield, for appellant:

The decree is a nullity because an action is not maintainable on a decree of a court of a sister state for alimony till the court which rendered it has first fixed the specific amount due.

Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555, 162 N. Y. 405, 48 L.R.A. 679, 76 Am. St. Rep. 332, 56 N. E. 979, 41 App. Div. 280, 58 N. Y. Supp. 567; *Israel v. Israel*, 9 L.R.A.(N.S.) 1168, 79 C. C. A. 32, 148 Fed. 576, 8 A. & E. Ann. Cas. 697; *Sistare v. Sistare*, 80 Conn. 1, 66 Atl. 772; *Freund v. Freund*, 71 N. J. Eq. 524, 63 Atl. 756; *Wetmore v. Markoe*, 196 U. S. 72, 49 L. ed. 391, 25 Sup. Ct. Rep. 172, 2 A. & E. Ann. Cas. 265; *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735.

Mr. Willard E. Warner, for appellee:

While the *lex loci* regulates the rights under a foreign contract, yet the *lex fori* controls as to the remedy for enforcing those rights.

2 Bishop, Marr. Div. & Sep. ¶ 847; Bishop, Contr. ¶¶ 1403-1412; Judd v. Judd, 125 Mich. 228, 84 N. W. 134; *Lohrstorfer v. Lohrstorfer*, 140 Mich. 551, 70 L.R.A. 621, 104 N. W. 142; *Bullock v. Bullock*, 51

Note. — As to actions to recover instalments of alimony accruing under a decree rendered in another state, see case note to *Israel v. Israel*, 9 L.R.A.(N.S.) 1168, and the subsequent case of *Hunt v. Monroe*, 11 L.R.A.(N.S.) 249.

N. J. Eq. 444, 27 Atl. 435; *Stack v. Detour Lumber & Cedar Co.* 151 Mich. 21, 16 L.R.A. (N.S.) 616, 114 N. W. 876; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Townsend v. Jemison*, 9 How. 407, 13 L. ed. 194; *Home L. Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334; *Bank of United States v. Donnally*, 8 Pet. 361, 8 L. ed. 974.

The decree, if conclusive in Oklahoma, is equally conclusive here.

Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; *Fletcher v. Ferrel*, 9 Dana, 372, 35 Am. Dec. 143; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Nations v. Johnson*, 24 How. 195, 16 L. ed. 628; 2 Story, Const. § 1313; *Reynolds v. Reynolds*, 115 Mich. 378, 73 N. W. 425; *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *Ex parte Sternes*, 77 Cal. 156, 11 Am. St. Rep. 251, 19 Pac. 275.

Complainant is simply seeking to recover the actual amount of arrears, which is a definite and fixed amount.

Bennett v. Bennett, Deady, 299, Fed. Cas. No. 1,318; *Arrington v. Arrington*, 127 N. C. 190, 52 L.R.A. 201, 80 Am. St. Rep. 791, 37 S. E. 212; *Trowbridge v. Spinning*, 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125; *Wagner v. Wagner (Wagener v. Latham)* 26 R. I. 27, 65 L.R.A. 816, 57 Atl. 1058, 3 A. & E. Ann. Cas. 578; *Knapp v. Knapp*, 59 Fed. 641; *Brisbane v. Dobson*, 50 Mo. App. 170.

In the decree the award of alimony is absolute, and cannot be altered after the term unless the decree expressly reserves the right, or the statute gives such right.

2 Am. & Eng. Enc. Law, 2d ed. p. 136; *Perkins v. Perkins*, 12 Mich. 456; *Chandler v. Chandler*, 24 Mich. 176; *Goodman v. Goodman*, 26 Mich. 417; *Smith v. Smith*, 139 Mich. 134, 102 N. W. 631; *Waldo v. Waldo*, 52 Mich. 94, 17 N. W. 710; *Mutual F. Ins. Co. v. Phoenix Furniture Co.* 108 Mich. 170, 34 L.R.A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095; *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067.

Montgomery, J., delivered the opinion of the court:

Complainant and defendant were formerly husband and wife. On the 20th of April, 1896, the district court of the fifth district of Oklahoma passed a decree dissolving the marriage between the parties, and awarding the custody of five minor children of the parties to the defendant upon the following terms and conditions: "The said children are to be sent to the public schools during the school year, and said children are not to be sent out to work unless by permission of the court or judge. The plaintiff is to have 19 L.R.A. (N.S.)

the right to visit the said children at their home between the hours of 9 A. M. and 9 P. M. on Wednesdays and Saturdays of each week without interference or molestation from the defendant, the court reserving the right to modify the order in regard to the children at any time." The decree further adjudged that the complainant should pay to defendant as alimony for the support of herself the sum of \$25 per month, payable monthly, such payments to cease on defendant's death or in case defendant should marry. The decree then proceeds as follows: "It is further ordered that the plaintiff pay to the defendant for the support and maintenance of the children the sum of \$10 per month for each of said children, payable to the defendant monthly, said payments to continue until each of the said children shall have arrived at the age of twenty-one (21) years, or shall have married, or until the further order of the court. As a condition precedent to the payment of alimony by the plaintiff, the defendant is required to turn over to the plaintiff his books, literary and professional, also the instruments of his profession now being in the possession of the defendant, also his private papers, pictures, and photographs; and the plaintiff may withhold the payment of said alimony until this order is complied with, the cost of packing and shipping to be paid by the plaintiff." The complainant, who was the defendant in the divorce proceedings, afterwards removed to New York, and the defendant removed to the city of Detroit, in this state, and complainant later also removed to the city of Detroit and filed the bill in this case, which sets up, in substance, that she has substantially complied with all the terms of the decree on her part, but that the defendant has failed to make payments of the amount of alimony due to complainant of \$25 per month, that he has failed to keep up the payments awarded to her for the care and support of the children, and that there is now due on each item a large sum of money. The circuit judge found that there was unpaid to complainant for her support at the date of the decree \$1,700.50, and that there was unpaid to complainant of the sums which she was entitled to receive for the support of the children \$3,172.34, and gave a decree for the total amount of \$4,872.84, payable forthwith. The decree not having been complied with, upon proper proceedings had, the defendant was adjudged guilty of contempt for failure to comply with the decree, and an appeal has been taken to this court from the original decree, and also from the order adjudging the defendant guilty of contempt; and the questions involved in both

orders are before the court for determination.

The case presents three questions: First, whether a decree for alimony made in a court of a sister state, where no reservation of a right to modify the decree appears in the decree itself, and where no such right is conferred upon the court by statute, is such a final determination of the rights of the parties as to create an obligation enforceable in our courts; second, whether the award of money for the care and support of the children, as in this case, where there is a reservation in the decree of a right to modify or change the order, either in the statute or in the decree itself, is such a final decree or order as is enforceable in the courts of this state; and, third, whether, if such decree is either wholly or in part enforceable within this state, it may be enforced by proceedings as for contempt on the failure of the delinquent to comply with the order of the court in chancery.

The case of *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, affirms the right of a wife under a judicial decree of separation from bed and board, who has been awarded alimony by the courts of the state of New York, payable in instalments, to maintain a suit in equity in a court of the United States in the state of Wisconsin by her next friend to enforce the payment of such alimony. It was said in the course of the opinion: "Courts of equity will interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court in England. Such a jurisdiction is ancient there, and the principal reason for its exercise is equally applicable to the courts of equity in the United States. It is that, when a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony. . . . The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any state of the United States, the court having ju-

risdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the states have jurisdiction." This case was cited as an authority in *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761, and in *Wagner v. Wagner* (*Wagener v. Latham*) 26 R. I. 27, 65 L.R.A. 816, 57 Atl. 1058, 3 A. & E. Ann. Cas. 578, and, if the holding be limited to a case in which a final award of alimony has been made in a sister state, with no power reserved in the court, in the decree itself or inherent in the court under the law, either the common law or the statute law, to modify or amend the decree as to the amount, its authority should be said to remain unshaken. It will be noticed that, as to the award of alimony to the wife in this case, the decree contains no reservation of authority to subsequently modify the decree. The statute of Oklahoma was introduced in evidence by the defendant, and the only provision which bears upon the power of the court in such cases is as follows: "When a divorce is granted, the court shall make provision for guardianship, custody, support, and education of the minor children of the marriage, and may modify or change any order in this respect whenever circumstances render such change proper." [2 Rev. & Anno. Stat. 1903, § 4838.] It will be seen that this limits the statutory authority to modify the decree to the subject of the allowance for the support and education of the minor children. It is contended in the brief of the defendant's counsel that this right exists in a court of equity independent of statute. We do not agree with this contention. On the contrary, we think the authorities generally sustain the proposition that a decree for alimony in a case of divorce *a vinculo*, made without reserve, although payable in instalments, is final, and cannot be changed after enrolment of the decree. See *Sampson v. Sampson*, 16 R. I. 456, 3 L.R.A. 349, 16 Atl. 711; *Livingston v. Livingston*, 173 N. Y. 377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123; *Kamp v. Kamp*, 59 N. Y. 220; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. In most of the states the power to amend the decree as to alimony is reserved to the court by statute; but, in the absence of such reservation or authority, or of a reservation in the decree itself, we think the determination should be treated as final. We think the decree for the arrears due the wife is within the authority of the court, and should be affirmed. But different considerations control as to that portion of the decree which found in favor of the complain-

ant for the arrears in payments for the support of the minor children.

A well-considered case, which has become a leading case upon this question, is that of *Lynde v. Lynde*, reported in 41 App. Div. 280, 53 N. Y. Supp. 507, in 162 N. Y. 405, 48 L.R.A. 679, 76 Am. St. Rep. 332, 56 N. E. 979, and in 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555. In that case an action was brought in the supreme court of New York to recover upon the final decree of the circuit court in chancery of the state of New Jersey, which New Jersey court had adjudged that the plaintiff was entitled to recover of the defendant \$7,800 and a counsel fee of \$1,000, and that the defendant should pay to her permanent alimony at the rate of \$80 per week from the date of the decree, and to give security for the payment of the several sums directed, etc. On the hearing of this case, the appellate division held that, in so far as the decree of New Jersey adjudged the defendant to be indebted to the plaintiff in a certain sum at the date of its rendition, it was a final adjudication, and entitled as such to recognition in the court of a sister state, established a debt against the defendant, and had extraterritorial value and force. It also found that, so far as the decree made provision for the payment of alimony in the future, it remained subject to the discretion of the chancellor and lacked conclusiveness of character, and recovery was therefore limited to the amount found due at the date of the decree. From this decision both parties appealed to the court of appeals, where, upon a very full discussion of the subject, and a full review of the case of *Barber v. Barber*, the court affirmed the judgment. From this decree both parties again appealed to the Supreme Court of the United States. The opinion was delivered by Mr. Justice Gray, and contains the following: "The decree for the payment of \$8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might, at any time, alter it, and was not a final judgment for a fixed sum." The conclusion reached in *Lynde v. Lynde* has been followed in *Page v. Page*, 189 Mass. 85, 75 N. E. 92, 4 A. & E. Ann. Cas. 296, in *Israel v. Israel*, 9 L.R.A. (N.S.) 1168, 79 C. C. A. 32, 148 Fed. 576, 8 A. & E. Ann. Cas. 697, and in *Sistare v. Sistare*, 80 Conn. 1, 66 Atl. 772, while the authority of the case is questioned in *Wagner v. Wagner*, *supra*. In speaking of the latter case, the supreme court of Utah in *Hunt v. Monroe*, 32 Utah, 428, 11 L.R.A. (N.S.) 249, 91 Pac. 260, says: 19 L.R.A. (N.S.)

"This is the only case decided after the *Lynde Case* . . . which holds to the doctrine that a judgment like the one at bar may be sued on in a sister state before the state court . . . has fixed an absolute sum due and payable at some time prior to the bringing of the action thereon." So far as our examination has extended, we have also failed to find any other case in which the doctrine of the *Lynde Case* has been either misapprehended or repudiated.

It follows from what we have said that the decree, in so far as it contains an award for the arrears in payments accruing to the defendant for the care and custody of the minor children, should be reversed, without prejudice to the right of the complainant to apply for relief to the court in Oklahoma. See also *Nixon v. Wright*, 146 Mich. 231, 109 N. W. 274, 10 A. & E. Ann. Cas. 547.

The remaining question is whether the remedy by proceedings as for contempt is open in this case. In the absence of a statute authorizing attachment for nonpayment of permanent alimony, it has been held in this state that such remedy is not open. See *North v. North*, 39 Mich. 67. We have a statute, however, which provides (act No. 230, p. 360, Pub. Acts 1899) that "every court of record shall have power to punish by fine or imprisonment, or either, any neglect or violation of duty . . . in the following cases: . . . The disobedience or refusal to comply with any order of such court for the payment of alimony, either permanent or temporary, made in any suit for divorce." It is to be noticed that the authority conferred by this statute is limited to suits for divorce. The present suit is not a suit for divorce. It is a suit brought for the purpose of obtaining a money decree based upon a judgment of another state, and does not call upon the court to consider the question of divorce at all. As was said in *Page v. Page*, *supra*: "In this commonwealth the authority to grant alimony is now derived wholly from the statutes. . . . Upon this petition, therefore, we cannot make any inquiry as to the proper amount to be allowed as alimony, nor can the order of the Maine court as to alimony be enforced in any of the ways set forth in our statutes. . . . We can have no part in the matter until the question of amount has been there settled, and even then we cannot make use of the statute proceedings because they are not applicable."

The order adjudging the defendant guilty of contempt will be set aside. The decree below is modified as indicated by this opinion, and the defendant will recover costs of

this appeal, to be applied upon the decree awarded complainant.

Petition for rehearing denied November 30, 1908.

MINNESOTA SUPREME COURT.

MARSHALL FIELD & COMPANY

v.

EVANS, JOHNSON, SLOAN COMPANY.

CHARLES E. HAMILTON, Receiver, etc.,
et al., of Evans, Johnson, Sloan Com-
pany, Appts.,

v.

LOEB & SCHOENFELD COMPANY, Respt.

(— Minn. —, 118 N. W. 55.)

Corporations — stockholder's liability — pledgee.

1. One to whom corporate stock has been transferred as collateral security, but who appears upon the books of the corporation as the general owner thereof, is liable as a stockholder for the debts of the corporation. Where, however, shares of stock are

Headnotes by STARR, Ch. J.

Case Note. — Liability of pledgee of stock as a shareholder.

This note is supplemental to that appended to the case of *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 139, where the earlier cases upon the subject are collected.

Where pledgee does not appear as owner.

One whose relation to a national bank is that of a pledgee of its stock, and who is not registered as owner, but as holding it as collateral, and who has not held himself out as such, is not chargeable with personal liability for debts of the bank imposed by law upon shareholders. *Beal v. Essex Sav. Bank*, 15 C. C. A. 128, 33 U. S. App. 101, 67 Fed. 816.

He can become chargeable with such liability, only by becoming the owner of the shares in fact, or by holding himself out to be the owner, and thereby estopping himself to deny his personal liability as such. *Rankin v. Fidelity Ins. Trust & S. D. Co.* 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553.

So, he does not become the owner by paying an assessment made by the Comptroller to make good the impaired capital of the bank, and charging the same to the pledgee or as an additional advance. *Higgins v. Fidelity Ins. Trust & S. D. Co.* 46 C. C. A. 509, 108 Fed. 475, affirmed in 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553.

Nor does he become the owner thereof by assenting to the reduction of the capital stock, made agreeably to law, under the approval of the Comptroller of the Currency. *Ibid.*

19 L.R.A. (N.S.)

transferred to a party as collateral security, and they are so registered in the stock record of the corporation, whereby his true relation to the stock appears, he is not liable as a stockholder for the debts of the corporation.

Same — evidence.

2. The findings of fact herein, to the effect that the shares of stock here in question were issued by the corporation to the respondent as collateral security for the payment of a debt due to it by the corporation, and the fact that the stock was so issued and held was duly entered in the stock record of the corporation, are sustained by the evidence. The trial court did not err in denying appellant's motion to amend such findings.

(November 6, 1908.)

APPEAL by plaintiff and the receiver of defendant from a judgment of the District Court for Ramsey County allowing respondent's claim upon a complaint in intervention as a creditor of defendant. Affirmed.

The facts are stated in the opinion.

A national bank which receives as collateral security for a note the stock of another national bank, and, on default, proceeds to sell the stock and bid it in, is not liable as a stockholder, where it never has a transfer of the shares made on the books, and, as between the pledgee bank and the debtor, who claims that the sale is invalid, the stock continues to be held merely as collateral for his debt. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. ed. 530, 21 Sup. Ct. Rep. 383, affirming 36 C. C. A. 584, 94 Fed. 964. The court said that, where one national bank takes the shares of another national bank as security for a loan, there is a presumption against any intention to become the owner of the collateral.

And, where there is no pretense of a change of ownership, one who has taken national-bank stock as collateral is liable as a shareholder only upon the ground of estoppel. *Fratr v. Old Nat. Bank*, 42 C. C. A. 133, 101 Fed. 391, affirming 86 Fed. 1008; *Welles v. Larrabee*, 2 L.R.A. 471, 36 Fed. 866.

And only in a clear case can a pledgee of national-bank stock be held liable on this ground. *Fratr v. Old Nat. Bank*, supra.

Where pledges appears as owner.

One who takes a certificate of stock from its owner as collateral security for a loan, and thereafter causes a new certificate to be issued to him in his own name, will be liable for the unpaid portion of the subscription price of the original shares either to the corporation (*People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329), or to corporate creditors (*Fouche v.*

respondent as a stockholder and the issuing of any stock to it.

The findings of fact of the trial court, so far as they relate to the appellant's claim, as receiver, to recover the amount of the alleged stock liability, are substantially as follows: On July 15, 1904, the defendant was indebted to the respondent intervener in the sum of \$5,000, which was evidenced by a promissory note executed for that amount by the defendant to the respondent, no part of which has ever been paid, except the sum of \$1,028.50. On the same day the defendant issued and delivered to the respondent its certificate for 50 shares of its stock as collateral security for the payment of such note. Upon the issuance of the stock, an entry was made in the stock

book or certificate stub book of the defendant company, by the person duly authorized to make such entries, in words and figures as follows: "*Issued for Collateral Security for note of even date for PE, JJJ, JJ. W. E. J. Certificate No. 58 for 50 Shares Issued to Loeb & Schoenfeld, Co. 451 Broadway. Dated July 15, 1904. From whom transferred: . . .*" The words above italicized were entered in writing, and the balance of the entry constituted the printed portion of the stub. No other entry of the issuance of the stock was at any time made upon any of the books of the defendant company. A large amount of the indebtedness of the defendant which is still unpaid was incurred after July 15, 1904. As a conclusion of law the court directed judgment

ly, the latter will be held an innocent purchaser; and, when the certificate does not contain notice of a lien thereon for the balance of the unpaid value, upon a sale by the corporation therefor, the pledgee is entitled to receive two thirds of the purchase price and the corporation one third. *Ingles Land Co. v. Knoxville F. Ins. Co. (Tenn. Ch. App.) 53 S. W. 1111.*

Where the corporate officers have knowledge that stock is held in pledge, the corporation cannot enforce a lien thereon for an indebtedness due it from the original holder under a by-law, of which the pledgee is ignorant, providing that no transfer, unless made on the books of the corporation, shall be binding upon it; and that no transfer shall be made when the registered holder is indebted to it. *Des Moines Loan & T. Co. v. Des Moines Nat. Bank, 97 Iowa, 668, 66 N. W. 914.*

Dummy holder.

The pledgee of national-bank stock, who is not registered as the owner, may have such stock listed in the name of an irresponsible employee without becoming liable to creditors as a shareholder, even though this is done for the purpose of escaping such liability. *Rankin v. Fidelity Ins. Trust & S. D. Co. supra; Hulitt v. Ohio Valley Nat. Bank, 69 C. C. A. 609, 137 Fed. 461; Wilson v. Merchants' Loan & T. Co. 39 C. C. A. 231, 98 Fed. 688, affirmed in 183 U. S. 121, 46 L. ed. 113, 22 Sup. Ct. Rep. 55; National Park Bank v. Harmon, 25 C. C. A. 214, 51 U. S. App. 148, 79 Fed. 891, affirmed in 172 U. S. 644, 43 L. ed. 1182, 19 Sup. Ct. Rep. 877.*

Where one to whom national-bank shares have been pledged, under a power of attorney indorsed thereon, caused them to be transferred on the books of the bank to a third person as trustee for the pledgeor and the pledgee, the latter is not liable for an assessment levied by the Comptroller upon the stockholders. *Hayes v. Federal Ins. Trust & S. D. Co. 105 Fed. 160.*

And the formal assent of the pledgeor is unnecessary where the certificates are indorsed in blank. *Higgins v. Fidelity Ins. 19 L.R.A. (N.S.)*

Trust & S. D. Co. 46 C. C. A. 509, 108 Fed. 475, affirmed in 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553.

And, where the question whether shares of national-bank stock registered in the name of another than the pledgee are held by him as owner or as pledgee turns upon the proper conclusion to be drawn from a commercial correspondence, in connection with other facts and circumstances, it is properly referred to a jury, although the construction of written instruments is ordinarily a question for the court. *Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553.*

So, whether such pledgee is estopped to deny his personal liability as a shareholder by speaking of himself as holding or owning the stock, in letters to the officers of the bank, who understood perfectly the capacity in which such stock is retained, is a question for the jury. *Ibid.* See also *Williams v. American Nat. Bank, infra.*

Payment of debt or retransfer.

The pledgee of national-bank stock pledged by the owner as collateral security for a loan, with power of a public or private sale for the liquidation of the pledge, becomes the beneficiary owner of such stock, and, as such, subject to liability of a stockholder upon an assessment by the Comptroller of the Currency, where, after the death of the pledgeor, the pledgee causes the stock to be registered in the name of an employee with no beneficial interest, and afterwards indorses upon the note the supposed value of the stock as of the date of credit, and presents the note, as reduced by the amount of such valuation, to the pledgeor's administrator, who allows the claim in this form. *Ohio Valley Nat. Bank v. Hulitt, 204 U. S. 162, 51 L. ed. 423, 27 Sup. Ct. Rep. 179.*

A transfer of bank stock on the corporate books to a pledgee does not render him liable as a stockholder for corporate indebtedness created after the stock had been retransferred on the books to the pledgeor on payment of the loan, notwithstanding the pledgee's failure to give notice of the re-

allowing the respondent's claim in full. The appellant moved the court to amend its findings to the effect that the certificate for the 50 shares of stock was absolute on its face, and ever since the issue of such shares they have stood of record on the books of the defendant in the name of the respondent, whereby it became and now is the legal holder of such shares. The motion was denied, and judgment entered allowing the respondent's claim, but not that of the receiver. He appealed from the judgment.

1. The first question raised by appellant's assignment of errors is that the trial court erred in denying its motion to amend its findings of fact as requested. If the stock was issued to the respondent by the defendant simply as collateral security for the

payment of its promissory note to the respondent, and such fact appeared upon the face of the stock record of the defendant, it is immaterial in this case what the terms of the certificate were. Again, the certificate was not in evidence, and there was no evidence which would require a finding that the certificate did not conform to the entry in the defendant's stock record. Nor was the court required to find that the respondent was the owner and record holder of the legal title of the shares of stock. The court found all the evidentiary facts relevant to the question whether respondent was such owner of record, or whether such record showed that the respondent was holding the stock as collateral security for the payment of its note. The necessary

transfer as required by the corporate charter to exempt him from the existing individual liability as a stockholder, which is limited to the par value of his stock at the time any indebtedness is created. *Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, 43 L. ed. 491, 24 Sup. Ct. Rep. 314, affirming 112 Fed. 812.

One to whom a certificate of stock is issued directly as collateral security for a loan made to the subscriber therefor is liable for a statutory liability as a shareholder, even though the stock had been retransferred to the subscriber by the pledgee before the bank became insolvent, under a statute rendering stockholders so liable for one year after any sale or transfer of their stock. *State v. Bank of New England*, 70 Minn. 398, 68 Am. St. Rep. 538, 73 N. W. 153.

Taking stock as pledge from corporation.

One receiving unpaid stock as collateral security for a loan of money to the corporation which issued it does not render the holder liable to the corporate creditors unless they be misled thereby, where, by statute, the issue of unpaid stock is forbidden and declared to be void. *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166, rehearing denied in 36 L.R.A. 153, 23 C. C. A. 454, 46 U. S. App. 619, 77 Fed. 774.

Neither is one to whom such stock is transferred for the pledgee's benefit liable thereon, unless he has permitted himself to be held out as a shareholder, and credit has been extended the corporation in reliance thereon. *Sturtevant v. National Foundry & Pipe Works*, 32 C. C. A. 57, 60 U. S. App. 235, 88 Fed. 613.

So, where one loans money to a corporation, and takes a certificate of stock as collateral security in his own name without qualification, and the stock pledgeor, after his name, states, "Note five years. Stock as collateral, due 1907,"—he is not liable as a stockholder, where, by statute, it is provided that "a pledgee for value, holding a certificate of stock of a corporation for security merely, shall not, while he holds such 19 L.R.A. (N.S.)

stock, be subject to any of the liabilities of a stockholder unless he appears on the books of the corporation as the absolute owner of such stock." *Re Noyes Bros.* 136 Fed. 977.

And the above decision was followed in *Ex parte Clark*, 136 Fed. 981, where the entry upon the stock book was: "Jan. 23, 1902, three year note, due Jan. 23, 1905,"—together with the name of the holder, the number of shares, and the certificate number.

And, upon the insolvency of a corporation, one cannot be held liable to creditors as a shareholder where he holds stock which the corporation had issued to him as collateral security for a loan to it, where the claims of creditors accrued before he so acquired the stock. *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885.

So, one holding a certificate of stock may show by parol that he holds it merely as collateral security for a loan made to the corporation itself. *Williams v. American Nat. Bank*, 29 C. C. A. 203, 56 U. S. App. 316, 85 Fed. 376.

Upon a rehearing of the last case (42 C. C. A. 101, 101 Fed. 943), it was held that the pledgee was not estopped from showing that she was not a stockholder by reason of having received from the receiver of the bank a list of shareholders among which her name appeared without denying that fact, and that she did not bring an action to recover the loan until two years thereafter.

Neither is the pledgee estopped from showing such fact by reason of entries upon the corporate books showing her to be a stockholder, though she did not receipt for the certificate of stock, and it did not appear that she knew of such entries ever having been made. *Ibid.*

Nor does an estoppel arise by the fact that in letters written to the Comptroller of the Currency the pledgee, who was an inexperienced woman in business matters, referred to herself as a shareholder, where the bank officers testify that she received the stock merely as collateral security for the loan, as, under all the circumstances, the question of estoppel was for the jury.

the defendant for \$100. The plaintiff made a motion on various grounds to set aside the verdict as to both defendants, and for a new trial. The motion was denied as to the Holmes & Hallowell Company, and granted as to Spear, unless he consented that the verdict against him should be increased to \$350. This he did, and the motion was therefore denied. Thereafter, on motion of the Holmes & Hallowell Company, the court ordered judgment in its favor notwithstanding the verdict. From the judgment entered on this order, the plaintiff appealed to this court.

The assignments of error are very numerous, but many of them need not be considered in view of the fact that we are satisfied that no cause of action was proven against the Holmes & Hallowell Company.

At the time of the accident, the Holmes & Hallowell Company was engaged in the fuel business in the city of Minneapolis. The defendant Spear was employed by it to deliver coal to the company's customers in the city. In making such deliveries, he used two teams, and was paid a stipulated sum per ton for coal delivered by his teams. The horses, harness, and bob sleds used in the work were owned and furnished by Spear, while the employer furnished the sled boxes, shovels, and chutes. Each team used by Spear consisted of two horses, with the accompanying outfit. Spear employed and paid a man named Davis to drive one of the teams. Davis worked for Spear, and not for the company. The teamsters did not collect for the coal delivered. Spear also owned a fifth horse, which he had for some time been renting to another employee of the company, named Osterman, and this party had been using it in delivering coal under an agreement similar to that existing between Spear and the company. For about four weeks prior to the accident Spear had not used this horse himself. On the morning of February 6, 1907, Osterman brought the horse to the company's yard for the purpose of returning it to Spear, and left it in one of the sheds, where it remained until near 3 o'clock in the afternoon. One of Spear's teams, with a load of coal ready for delivery, was standing in front of the coal-yard office, waiting until the proper ticket was made out for the driver. About 4 o'clock, Spear, being ready to start, took the extra horse and tied it to an iron brace on the rear of the sleigh with a rope which was fastened to the horse's halter. There was conflicting evidence as to the length of this rope, but it was evidently long enough to permit the horse to have entirely too much freedom. It may be conceded that the horse was thus hitched in a careless and negligent manner, and as a result he was able to swing about and injure a person on the side-

walk. Hansen, the superintendent and general foreman for the company, was in the office when Spear started with the led horse, and saw what occurred. While the team in this condition was passing along the streets of the city, something disturbed the led horse, and caused him to swing toward the sidewalk and kick a little girl who was standing there. Spear's liability for the damage thus resulting stands conceded, and the question is as to the liability of his employer for his negligent act.

Upon these facts, the Holmes & Hallowell Company was not liable for the damage which resulted from the negligence of Spear. Whatever principles and reasons may have controlled the decisions of other courts, the rule of liability of a master for the torts of his servant is now so thoroughly settled in this state as to render elaborate discussions no longer necessary. It is possible that there has at times been some confused thinking, and it may be that no single principle has uniformly been stated as the controlling reason for every decision. However this may be, there is no ambiguity in the rule framed and stated by the chief justice in the recent case of *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* (Minn.) 18 L.R.A. (N.S.) 416, 117 N. W. 1047. That rule is that "a master is responsible for the torts of his servant done in the course of his employment, with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done negligently or wilfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of the master." *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19; *Larson v. Fidelity Mut. Life Asso.* 71 Minn. 101, 73 N. W. 711; *Lesch v. Great Northern R. Co.* 93 Minn. 435, 101 N. W. 965; *Crandall v. Boutell*, 95 Minn. 114, 103 N. W. 800, 5 A. & E. Ann. Cas. 122; *Merrill v. Coats*, 101 Minn. 43, 111 N. W. 836; *Anderson v. International Harvester Co.* 104 Minn. 49, 16 L.R.A. (N.S.) 440, 116 N. W. 101.

Applying the rule to the facts of the case at bar, we have but little difficulty in reaching the conclusion that the trial court properly ordered judgment to be entered in favor of the defendant company. Spear was employed by the company to deliver coal, and it was liable for his torts committed in the course of his employment with a view to the furtherance of his employer's business. But it was not liable for his torts when done for a purpose personal to himself. Spear was delivering coal for the company, but the leading of the extra horse had no connection with the performance of the duty which he owed to his employer. It was not connected in any manner with the duty of delivering

the coal. The horse belonged to Spear. The company had no control over it. It had been rented, not by the company, but by Osterman. It had been used by Osterman, and not by the company. Osterman had returned it, not to the company, but to Spear. It was in the latter's possession, and under his control, and in leading it home he was serving his own purpose solely. It is true it was attached to the team which he was using in the company's business, but not in any auxiliary capacity. If the load had proven too heavy for the team to draw, and Spear had attempted in some way to use his extra horse to assist in drawing the load, we would have had a case of acting for the furtherance of the master's business. But nothing of the kind was done. Leading the horse was an act entirely disconnected with the work Spear was doing for the company, not done or assumed to have been done with a view to aid or further that business. Spear was handling his own property, for his own purpose, in his own way, and was alone responsible for the results of the negligent manner in which he acted. This being true, the fact that Hansen stood by and did not interfere with Spear's way of tying the horse is immaterial. The extra horse did not render the vehicle which was being used in the company's business unsafe and dangerous, and with Spear's own personal business Hansen had no concern. He was, therefore, under no obligation to superintend the hitching of the horse.

But it is urged that the company became liable for the negligence of Spear because it retained him in its employ after it had knowledge of this accident. The authorities do not sustain this contention. When there is no original liability for the act of a servant, because at the time of the negligence the servant was acting in his own personal business, the master does not become liable merely by reason of the fact that he thereafter retains the servant in his employ. The rule contended for by appellant would seem to render an employer liable for every act of negligence of which he had knowledge which had been committed by the employee prior to the time when he employed him. The fact that an employee is retained after knowledge of a negligent act for which the master is already liable is sometimes important as bearing upon the right to recover exemplary damages; and this is evidently all the Wisconsin court intended to hold in *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276. This appears with reasonable clearness from the final disposition of the case on a subsequent appeal (124 Wis. 467, 102 N. W. 891), and from the cases cited (*Bass v. Chicago & N. W. R. Co.* 42 Wis. 654, 24 Am. Rep. 437; *Robinson v. 19 L.R.A. (N.S.)*

Superior Rapid Transit R. Co. 94 Wis. 345, 34 L.R.A. 205, 59 Am. St. Rep. 897, 68 N. W. 961).

Ratification may supply the want of original authority to act as the servant of another. Thus, ratification of acts which another has, without authority, performed as his servant and for his benefit will render him liable for the latter's negligent acts which were so connected with the employment that he would have been liable for them as master if the latter had been his servant when committing them. A, while delivering coal which had been ordered by B from C, carelessly broke B's window, and it was found that A was not C's agent when he broke the window, but, as the delivery of the coal by him was ratified by C, it was held that such ratification made A the agent and servant of C during the delivery of the coal, and that C was therefore responsible for his negligence. *Dempsey v. Chambers*, 154 Mass. 330, 13 L.R.A. 219, 26 Am. St. Rep. 249, 28 N. E. 279. So, in *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 22 L.R.A. 364, 39 Am. St. Rep. 467, 35 N. E. 776, it was held that an educational institution that ratified the actions of persons who had assumed to operate a ferry for it thereby became liable for personal injuries to a passenger caused by the negligence of the ferryman. Ratification may thus supply the want of authority in a person who, at the time of the negligent act, was assuming to represent a master; but the principle cannot apply to a case such as the one at bar. Spear was not assuming to act as the servant of the company when he adopted this method of taking care of his own horse. Merely retaining Spear in its employ could not in itself create liability for acts which had been done by him while engaged in his own personal business, and when not assuming to represent the company.

It is also contended that the court erred in refusing to instruct the jury, as requested, that the plaintiff might recover against the company, if Spear, having a horse tied, as this one was, to the rear of the sleigh, drove the team too close to the curb, and, by reason thereof, the plaintiff was injured. This sounds plausible, but is essentially unsound. The team that was being used in the master's business was properly driven, and the burden of liability cannot be shifted to the master because the servant, for some purpose of his own, renders the outfit unsafe under certain circumstances. The negligent manner in which Spear tied the horse to the company's sleigh, and not the driving of the team, was the proximate cause of the injury. The instruction was properly refused.

The assignments directed to the rulings

and instructions as to the right of the defendant's attorney to comment on the failure of the plaintiff's physician to testify that Spear had admitted that he was intoxicated, that an employers' liability company was the real defendant, the excluding of the insurance policy with statements therein tending to show that Spear was in the employ of the company, and the reception of certain evidence tending to show the relation of the parties, do not require consideration, as they relate to Spear's personal negligence, the extent of the injury, and other matters affecting only the amount of the recovery. They are no longer of importance after it has been decided that no liability whatever existed on the part of the company. The ultimate result, so far as liability is concerned, would have been the same had every such ruling been the other way.

Judgment affirmed.

Jaggard, J., dissenting:

I am unable to agree with the majority of the court, first, as to the correctness of the rule of law announced in the opinion; and, second, as to the applicability of that rule to the facts in this particular case.

1. The authorities cited sustain the rule that the master is responsible for the torts of his servant in the course of the employment, with a view to the furtherance of the master's business, and not for a purpose personal to himself. But the proposition that the master is not liable for the torts of his servant in the course of his employment, not done with a view to the furtherance of the master's business, but for a purpose personal to himself, does not follow from this any more than it does from the rule in *Shelley's Case*. "Bad law may be easily made by taking the converse of a legal proposition for law." Per Mr. Justice Gaynor in *Novogrucky v. Brooklyn Heights R. Co.* 125 App. Div. 715, 110 N. Y. Supp. 29. The authorities are wholly irrelevant, save only one, *Larson v. Fidelity Mut. Life Asso.* 71 Minn. 101, 73 N. W. 711. That case involved a malicious prosecution, which proceeded upon the assumption that the servant had instituted criminal proceedings to subserve a purpose personal to himself. It was therefore held that the master was not liable for this independent tort. It will subsequently be pointed out that this view of the law is not at all inconsistent with submitting the question of liability of the master in this case to the jury. The authorities cited with reference to ratification are not in point, and are, in my opinion, wholly alien to the controversy at bar. These artificial restrictions upon the master's liability which the majority opinion imposes, therefore, stand unsupported by the authorities cited. There

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are authorities which are not cited which do tend to support them, but they are opposed to the overwhelming weight of authority in general and in this state in particular. The subject is a wide one. Its proper consideration involves a review and discussion of such extent as to preclude adequate presentation within the narrow limits appropriate to a dissenting opinion. All that is feasible under the circumstances is a partial summary, which is the result of an actual and immediate examination in detail of practically all the relevant authorities on both sides of the controversy.

All authorities agree upon the obvious proposition that the master is not liable for the independent torts of his servant. The difficulty arises in determining what is and what is not an independent tort. In cases where the wrong complained of has absolutely no connection with the master's premises, instrumentalities, or facilities for doing business, the motive of a servant is a proper, and often a determining, consideration. This is particularly conspicuous in cases of false imprisonment and of malicious prosecution, as in *Larson v. Fidelity Mut. Life Asso.* supra. Even in these cases there is a manifest tendency to submit the question of the master's liability to the jury. 19 Cyc. Law & Proc. p. 328; 26 Cyc. Law & Proc. p. 19. In these cases no special duty is imposed upon the master to the person injured, for the violation of which by his servant he could properly be held responsible, by virtue of the relationship alone. If, of course, the master has in any way authorized or ratified the tort, his liability would arise, not from the fact of the relationship, but from consent, before or after the tort. Cases of this kind come fairly within the familiar principle that the master is liable for the tort of his servant acting within the scope of his authority, liberally defined. A larger liability has been recognized in all parts of this country in an increasingly large group of cases in which it is necessary, first, that the relationship of master and servant be established; and, second, that the servant's act in the course of his employment violate a duty owed by the master to the person injured. This class of cases covers an extremely wide range. It includes (1) cases in which a relation has been assumed by contract to which the common law has attached certain duties, as cases of common carriers, innkeepers, bailees for hire, proprietors of places of amusement who have charged admission, and others; (2) cases in which no duty was involved in connection with a contract, as in the group of cases in which a master has been held liable for the acts of his servants, done with a purpose personal to the servant, and whereby

a customer, actual or prospective, has been injured; (3) cases in which the master has, by means of an instrumentality not dangerous, put the servant in a position to do harm; (4) cases in which a master has "intrusted to his servant the custody of an instrumentality capable of doing harm," as an engine, or a horse and wagon, or the like; and (5) many other instances. Cases number thousands; not absolute, but substantial, unanimity.

The conclusion reached by these very many cases has been stated thus: "If the wrongful act done by the servant is done in his representative capacity, and accords with the general scheme of his employment, the master should be held responsible for the injury done, whether the wrong was committed for the benefit of the master or for the servant's own personal advantage." Wm. R. Vance, in 4 Mich. L. Rev. 210. In his note to *Mallach v. Ridley*, 24 Abb. N. C. 172. Mr. Abbott says: "A few years ago it was almost universally held in this country that an act of the employee, the motive of which appeared to be his own malice, did not render the employer liable, even though done within the scope of the employment; but all the authorities which sanction that rule are now deemed in so far overruled, and, in respect to the question of the right of action, the motive of the servant is now immaterial; and even the fact that the employer gave proper instruction and that the act was in direct violation of those instructions does not shelter the employer." In *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398, 4 L.R.A. (N.S.) 506, 45 N. E. 634, where the master was held liable for the malicious act of the servant, with intent to injure the master, in adulterating cream contrary to law, the rule was laid down that, "where a master owes to a third person the performance of some duty, as to do or not to do a particular act, and commits the performance of the duty to a servant, the master cannot escape responsibility if the servant fails to perform it, whether such failure be accidental or wilful, or whether it be the result of negligence or malice. Nor is the case altered if it appear that the malice was directed to the master." These statements may not be accurate *in toto*. None the less, they summarize the certain trend of decisions in this country on this point. It is true that in England the motive of the servant and the furtherance of the master's business are in general the determining factors, and that the earlier Massachusetts cases, taken as a whole, are in substantial, but not entire, accord. The tendency of the later Massachusetts cases is to bring the law of that state into harmony with the general American 19 L.R.A. (N.S.)

rule. None of the cases which are apparently opposed, however, involved facts not distinguishable from those at bar. Indeed, as will presently be pointed out, under the English theory, the question in this case would, I think, have been for the jury.

The rule of law as it was established by this court before the decision of this case is the one generally in force in this country, and is well illustrated in *McCord v. Western U. Teleg. Co.* 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315. In that case defendant's local agent, who was also the agent of an express company, sent a forged despatch to plaintiff, a merchant in a neighboring city, requesting plaintiff to forward money to plaintiff's agent at defendant's agent's station. The money, in good faith forwarded by plaintiff, was intercepted by defendant's agent and converted to his own use. *Vanderburgh, J.*, said: "The principal contention of defendant is, however, that the corporation is not liable for the fraudulent and tortious act of the agent in sending the message, and that the maxim *Respondet superior* does not apply in such a case, because the agent, in sending the despatch, was not acting for his master, but for himself, and about his own business, and was in fact the sender, and to be treated as having transcended his authority, and as acting outside of, and not in the course of, his employment, nor in furtherance of his master's business. But the rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest, though there are many cases which fall within that rule. . . . Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful act occasions a violation of that duty, or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract or be a common-law duty growing out of the relations of the parties. 1 Shearm. & Redf. Neg. 4th ed. §§ 149, 150, 154; Taylor, Corp. 2d ed. § 145. And it is immaterial in such case that the wrongful act of the servant is in itself wilful, malicious, or fraudulent."

2. At most, however, this was a case in which two motives were present, *viz.*, the one to deliver coal for the master in pursuance of his business, and the other to take home the servant's horse for his own purpose. Under the rule announced, and under conception of the facts adopted by the ma-

jority, the master would have been liable so far as the first of these was concerned and would not have been liable under the second. This aspect has not been considered. The great weight of authority is to the effect that, where the servant, at the time of the commission of the tort, is engaged in executing his own private purpose, but at the same time is pursuing the master's business in the matter for which he was employed, the law will not undertake to fix with precision the line which separates the act of the servant from the act of the individual. *South Covington & C. Street R. Co. v. Cleveland*, 30 Ky. L. Rep. 1072, 11 L.R.A. (N.S.) 853, 100 S. W. 283, 286; *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 443, 70 L.R.A. 627, 38 So. 210, 3 A. & E. Ann. Cas. 594. Thus in *Gracey v. Belfast Tramway Co.* [1901] Ir. 2 Q. B. 324, *Palles, C. B.*, said: "There is evidence that the servants, while riding the horses upon the road to the forge for their own amusement, ran a race upon the horses towards the forge, and in so doing rode negligently, and thereby caused the damage. Are the masters liable? If we eliminate what has been called 'the purpose of running a race,' admittedly they would be liable. In such a case the act of bringing the horses to the forge would undoubtedly have been one in the course of their employment. . . . But the ground of the masters' liability in such a case would not have been based on any such subtlety as that of a single purpose as distinguished from several purposes, but because the servants would have been doing their masters' business. . . . The act would have been done for the master. What, then, is the effect of the servants being actuated by the second purpose, that of riding a race? This second purpose was consistent with the first. . . . The basis of the case therefore is that a servant acting for two purposes, one of which is his master's and the other his own, renders the master responsible."

Here Spear was in the employ of the defendant company. He delivered coal for it. He was subject to the company's orders and in the company's pay. The master had the right and power to command and control him at the instant of his start and of the performance of the causal act. The very horse he was taking home was one used for the company's business. That title to the instrumentalities which he, or another servant, used on the company's behalf, was in himself, is not controlling, nor especially significant, so far as plaintiff is concerned. See *Standard Oil Co. v. Parkinson*, 82 C. C. A. 29, 152 Fed. 681; *Patten v. Rea*, 2 C. B. N. S. 606; *Rahn v. Singer Mfg. Co.* (C. C.) 26 Fed. 912, affirmed in 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Waters v. 10 L.R.A. (N.S.)*

Pioneer Fuel Co. 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52. As a matter of law, he had not abandoned his master's business for his own, nor had he departed from it. It was at least a question of fact whether or not his purpose was in furtherance of his master's enterprise and whether or not he was engaged in doing what his contract of service reasonably required. *Mulvehill v. Bates*, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; *Phelon v. Stiles*, 43 Conn. 426; *East St. Louis Connecting R. Co. v. Reames*, 173 Ill. 582, 51 N. E. 68. This was not a case where the servant was going on a frolic or errand of his own, without being at all on his master's business. Therefore the master was liable. *Joel v. Morrison*, 6 Car. & P. 501; *Ritchie v. Waller*, 27 L.R.A. 161, and note (63 Conn. 155, 43 Am. St. Rep. 361, 28 Atl. 29); *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 A. & E. Ann. Cas. 594; *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 302. Moreover, defendant's superintendent, Hansen, whose instructions Spear was bound to obey, says he knew that the horse was tied to the wagon, as has been stated. He made no objection nor suggestion, and gave no instruction. The permission resembled command. *Standard Steel Car Co. v. McGuire* (C. C. A.) 161 Fed. 527. And see *Fletcher v. Baltimore & P. R. Co.* 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35. On this state of facts, in England, it would seem that the master would have been held responsible. In *Patten v. Rea*, supra, it was held that, if a servant is upon his master's business when he injures a third person by driving against him, the master is liable, although the horses belonged to the servant and the servant was at the same time attending to business of his own (to visit a doctor). There, as in the case at bar, "the master knew that he was going and in what manner he was going." This servant was not, as a matter of law, acting in a capacity different from that in which he was employed, and the servant was not, as a matter of law, so far an independent contractor as to exonerate the master. The present situation is substantially the same as if a conductor of a street car, to the knowledge of the foreman of the company, should put a long pole through the right-hand window of his car to take home with him for piscatorial or other purposes. If that pole struck a person using the highway, the company would certainly be responsible, although the pole would be the conductor's private property and was being conveyed for his purely personal purpose. The question whether this master was therefore liable is not to be determined, as a matter of law, in the master's favor.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

FRANK A. CHAMPLIN

v.

ANDREW S. CHURCH, Plff. in Err.

(—N. J.—. 70 Atl. 138.)

Sale — corn — damage in transit.

Where a merchant directed another to have shipped to him corn of a certain kind and grade at a certain price over a certain railroad, the weight and grade of the corn to be evidenced by a certain official certificate, the fact that the corn, while in transit, became heated, will not excuse the vendee from payment of the purchase price.

(June 15, 1908.)

ERROR to the Supreme Court at Circuit in Essex County to review a judgment in plaintiff's favor in an action brought to recover the difference between the price realized upon the sale of corn which the defendant ordered from the plaintiff and refused to accept and the agreed price thereof. Affirmed.

The facts are stated in the opinion.

Messrs. Adrain, Silzer, & Pearce, for plaintiff in error:

Mere indorsement of a bill of lading, without delivery, will not pass title.

Buffington v. Curtis, 15 Mass. 528, 8 Am. Dec. 115; Marine Bank v. Wright, 48 N. Y. 1.

Where the goods are contracted to be sold and the terms are that they shall be paid for upon the arrival of draft, title to the goods is reserved by the consignor or seller.

6 Cyc. Law & Proc. p. 426; 5 Am. & Eng.

Headnote by MINTURN, J.

Case Note. — Loss of, or injury to, goods during shipment as affecting fulfillment of commission to purchase goods.

In the opinion in the case reported, it is pointed out that, in view of the fact that the written order so circumscribed the judgment of the one undertaking to furnish the goods that he was, in essence, a mere conduit or special agency through which the goods were to be delivered, the relation of the parties more nearly approached that of agent and principal than that of vendor and vendee. This note is therefore limited to a consideration of just what duties, with respect to the delivery of goods, arise out of such anomalous relation.

In Green v. Feil, 41 Wis. 620, it was held that one who ordered in his own name a turtle for a restaurant keeper was entitled to recover from him the amount paid therefor, even though he made such payment after he had notice from the restaurant keeper that the turtle, upon its arrival, was 19 L.R.A. (N.S.)

Enc. Law, p. 206; Alderman v. Eastern R. Co. 115 Mass. 233.

Messrs. Brown & Beecher for defendant in error.

Minturn, J., delivered the opinion of the court:

The defendant delivered to the plaintiff, a grain merchant in the city of Newark, the following order: "Please have shipped to me at South River, via N. J. Central Railroad, one car, three mixed corn, price 57. Shipment: Hurry. Terms: Arrival draft. Remarks: Western Official Certificate of weight and grade final." The plaintiff ordered the required corn from a concern at Toledo, Ohio, and it was delivered at South River, where the defendant refused to accept it upon the ground that it was damaged by heating. The plaintiff having waited a reasonable time for the defendant to accept the corn, finally sold it, after notice to defendant, and brought this action to recover the difference between the price realized upon the sale and the agreed price of the corn. The judgment of the Essex circuit court, where the case was tried without a jury, was for the plaintiff, and from that judgment this writ of error is taken.

The conspicuous feature of this case, which differentiates it from the ordinary case in the category of vendor and vendee, consists in the fact that the vendor in the case at bar was so limited and circumscribed in the exercise of judgment by the language of the written order, from which he derived his authority to purchase, that he was in essence a mere conduit or special agency, through which the goods were to be delivered. Upon the execution of the order, and substantial compliance with its requirements, his duty was performed, and

in such a sick and dying condition that it could not be used, where the evidence tended to show that he was acting merely as agent, and it appeared that the turtle was purchased on his own credit, that it was healthy and strong and in good condition when shipped, and that it is the custom of the trade for buyers to take the risk of turtles shipped to them.

Although not in point upon the question under discussion, reference may be made to the case of Rice v. Montgomery, 4 Biss. 75, Fed. Cas. No. 11,753, in which it was held, in effect, that the law will presume the place of delivery of wheat to be purchased by a commission merchant for his principal to be the place where the commission merchant does business.

For a note upon passing of title to property by delivery thereof to a carrier for transportation to consignee or vendee, see Ramsey & G. Mfg. Co. v. Kelsea, 22 L.R.A. 415.

his right to the agreed compensation was complete. *Butler v. Maples*, 9 Wall. 766, 19 L. ed. 822; *Story, Agency*, 126. It will be observed that he was not to ship, but to "have shipped," to the defendant, at a fixed price, corn of a certain quality over a certain railroad; the grade or condition of the corn to be evidenced, not by his judgment, but by a certain form of certificate which, as between him and the defendant, was to be final. "Both in morals and in law," remarks a recent writer of distinction, "one is responsible for the thing which he brings to pass, whether he employs an inanimate object to effectuate his purpose, or sets in operation the infinitely more complicated chain of causation which results from the employment of another moral agent." 2 *Street, Legal Liability*, chap. 41, p. 429.

The trial court found as a fact that the corn when shipped was in good condition, and therefore the delivery to the carrier in accordance with the specific instructions contained in this order relieved the shipper of liability for damage *in transitu*, and imposed the burden and risk of damage upon the consignee. *Dawes v. Peck*, 8 T. R. 330; *Conn v. Reed*, 73 N. J. L. 112, 62 Atl. 271; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Silvestri v. Missocchi*, 165 Mass. 337, 43 N. E. 114; *Benjamin, Sales*, § 693; *Tiffany, Sales*, 195. In the light of this status, it became a matter of slight, if any, importance whether the testimony of a conceded dealer in grain, not for the purpose of contradicting the terms of the order, but for the purpose of eliciting the meaning of a trade expression employed therein, was relevant, although, under the undeviating rule and policy of the courts in such matters, it was properly admitted. *Steward v. Scudder*, 24 N. J. L. 96; *New Jersey Zinc Co. v. Boston Franklinite Co.* 15 N. J. Eq. 418; 17 Cyc. Law & Proc. p. 685.

No error appearing in the record, the judgment is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

DANIEL W. VALENTINE, Plff. in Err.,
v.
CITY OF ENGLEWOOD et al.

(— N. J. —, 71 Atl. 344.)

Municipal corporation — board of health — liability.

1. A municipal corporation is not liable for the acts of a board of health created by public statute for the public benefit,

Headnotes by SWAYZE, J.
19 L.R.A. (N.S.)

even though its members are appointed by the municipal authorities.

Health — quarantine — personal liability.

2. The members of a board of health, acting in performance of a public duty, under a public statute, to prevent the spread of an infectious or contagious disease, are not personally liable in a civil action for damages arising out of their acts in establishing a quarantine, even where the disease does not actually exist, provided they act in good faith.

Constitutional rights — infringement — board of health.

3. Section 15 of the board of health act (Gen. Stat. 1895, p. 1638), which forbids suits against the board, its officers or agents, unless upon proof that the board acted without reasonable and probable cause to believe that the alleged cause of disease was in fact prejudicial and hazardous to the public health, does not infringe the constitutional provisions protecting private property and individual liberty.

Health — actions against board.

4. Section 15 of the board of health act (Gen. Stat. 1895, p. 1638) in effect gives an action against the board upon proof of the facts therein set forth; but in such suits the question of reasonable and probable cause is for the court.

(November 16, 1908.)

ERROR to the Bergen County Circuit of the Supreme Court to review a judgment in defendants' favor in an action brought to recover damages alleged to have been sustained by reason of the unjustifiable quarantining of plaintiff's premises. Affirmed.

Statement by Swayze, J.:

The declaration contains counts in trespass *quare clausum fregit*, for false imprisonment, and for libel. The defendants plead in justification that there were 30 cases of scarlet fever in the city of Englewood, and that the board of health had reasonable and probable cause to believe that the plaintiff's daughter was ill of the disease, and thereupon caused the plaintiff to be notified that they had declared his house quarantined, and that he had the option to place his child and her attendant in strict quarantine in a separate room, and to have the contents of the house fumigated by the board of health, or to have the entire house and occupants quarantined. The replication denied that the board of health had reasonable and probable cause to believe that the

Note. — As to personal liability of member of board of health or of health officer, see case note to *Rohn v. Osmun*, 5 L.R.A. (N.S.) 635.

plaintiff's daughter was suffering from scarlet fever, and tendered issue thereon.

At the trial, upon the plaintiff's opening that the board of health acted without any authority at all of the city, a nonsuit was ordered in favor of the city of Englewood. The case proceeded against the board of health and the individual defendants.

The evidence showed that the city physician, one of the defendants, reported to the board of health a case of scarlet fever at the plaintiff's residence; and that at a consultation between Dr. Currie, of Englewood, and Dr. Bulkley, of New York city, the two latter stated that the case was not scarlet fever; that four local physicians were of opinion, from a statement of symptoms and without seeing the patient, that the case was scarlet fever. The city physician informed the plaintiff, at first by verbal notice, that the house was to be quarantined, and apparently gave the plaintiff the option to have a strict quarantine of the whole house established, or a quarantine of his daughter and her attendant in one room of the house. The plaintiff, in order to secure proof as to who was responsible, demanded a written notice; and thereupon such a notice was served, signed by the secretary of the board of health, in which the option of having the child and her attendant quarantined in a separate room, or of having the entire house and occupants quarantined, was again given to the plaintiff. He declined to avail himself of the option, a card was placed upon his office door indicating that there was scarlet fever on the premises, and measures were taken by the board of health to fumigate the house. There seems to have been nothing further done by way of enforcing the quarantine. When the plaintiff was asked what kept him in quarantine, what was done, and who did it, his only answer was that the health inspector came and fumigated the house.

The board of health had adopted ordinances, pursuant to the statute, providing that persons affected by certain diseases, of which scarlet fever was one, should be isolated, quarantined, or removed to such a locality as the board might order and direct; and that buildings and property which might become infected should be disinfected or destroyed; and that the board might establish such separation and isolation or domestic quarantine of the sick from persons not necessary as attendants as should be needed in order to prevent the spread of the disease.

Messrs. Adolf L. Engelke, Harry B. 19 L.R.A. (N.S.)

Brockhurst, and Peter W. Stagg, for plaintiff in error:

The quarantine authorities being the servants of a municipality, that body is liable for their acts.

Sumner v. Philadelphia, 9 Phila. 408, Fed. Cas. No. 13,611.

The board of health is such a body as is capable of being sued.

Southampton & I. Floating Bridge & Roads v. Local Bd. of Health, 8 El. & Bl. 801; People ex rel. Copcutt v. Board of Health, 140 N. Y. 8, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; Sbarboro v. Health Department, 26 App. Div. 177, 40 N. Y. Supp. 1033; R. v. Davey [1899] 2 Q. B. 301; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; Newark & S. O. Horse Car R. Co. v. Hunt, 50 N. J. L. 308, 12 Atl. 697.

Where a public officer other than a judicial one does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable without proof of malice and intent to injure.

Mechem, Pub. Off. § 642; Sussex County v. Strader, 18 N. J. L. 108, 35 Am. Dec. 530; Hand v. Philadelphia, 8 Pa. Co. Ct. 214; Fowle v. Alexandria, 3 Pet. 398, 7 L. ed. 719; Thayer v. Boston, 19 Pick. 516, 31 Am. Dec. 157; Forsyth v. Canniff, 20 Ont. Rep. 478; Stanbury v. Exeter Corp. [1905] 2 K. B. 838.

The question as to reasonable and probable cause is one for the jury.

Hutton v. Camden and Sumner v. Philadelphia, supra.

Messrs. Albert O. Wall and Charles W. Hulst for defendants in error.

Swayze, J., delivered the opinion of the court:

We find it convenient to deal first with the liability of the city of Englewood.

The precise question involved is new in this court. In Kehoe v. Rutherford, 74 N. J. L. 659, 122 Am. St. Rep. 411, 65 Atl. 1048, there was active wrongdoing by the municipal authorities in collecting surface water and discharging it so that it injured the plaintiff's land, but that act was the act of the corporation itself for a special corporate purpose. A distinction is made in the cases in other jurisdictions between such acts and acts done in performance of a governmental function in execution of powers of a public and general character, delegated

to the municipality for the welfare and protection of its inhabitants or the general public. Of the numerous cases collected in 28 Cyc. Law & Proc. p. 1257, it will suffice to refer to *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397; *Colwell v. Waterbury*, 74 Conn. 568, 57 L.R.A. 218, 51 Atl. 530; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Manners v. Haverhill*, 135 Mass. 165; *Clark v. Easton*, 146 Mass. 43, 14 N. E. 795; *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468. These cases have been followed by our supreme court in *Tomlin v. Hildreth*, 65 N. J. L. 438, 47 Atl. 649. A more recent case is *Cunningham v. Seattle*, 42 Wash. 134, 84 Pac. 641, 4 L.R.A. (N.S.) 629, 7 A. & E. Ann. Cas. 805, in a note to which numerous cases as to the nonliability of a municipality for acts of its firemen are collected.

The principle has been frequently applied to the acts of boards of health. *Summers v. Daviess County*, 103 Ind. 262, 53 Am. Rep. 512, 2 N. E. 725; *Mitchell v. Rockland*, 52 Me. 118; *Nicholson v. Detroit*, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695; *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; *Lowe v. Conroy*, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341. It seems to be founded in reason.

The acts complained of by the plaintiff were in performance of a governmental function imposed upon the board of health by the legislature, under a special statute relating to boards of health, for the benefit of the public at large. The duty was quite independent of any provisions of the city charter, and was in no way for the benefit of the city in its corporate capacity, or as the owner of property. The only connection, under the statute, between the city and the board of health, is that the members of the board of health are appointed by the governing body of the city. This however, did not make them the servants or agents of the city; they were public officers, notwithstanding the method of their appointment. *Hafford v. New Bedford* and *Fisher v. Boston*, *supra*; *Murphy v. Needham*, 176 Mass. 422, 57 N. E. 689; *Maximilian v. New York*, *supra*; *Felch v. Weare*, 69 N. H. 617, 45 Atl. 591.

The city could only be held by applying the rule *respondet superior*, and that rule has no application in a case where the persons who commit the act complained of are neither the servants nor agents of the municipal corporation, nor acting in the performance of any corporate duty. So far as their act is outside the limits of the corporate duty of the municipality, it cannot

be considered the act of the municipality. 2 Dill. Mun. Corp. 3d ed. §§ 968-974. The case is not altered by the fact that the court excluded the question whether the records of the common council showed any action on their part in regard to the quarantining of the plaintiff. At that time the nonsuit had already been ordered, and nothing was said to indicate that the offer was to show anything that would conflict with the statement of plaintiff's counsel in his opening that the board of health acted without any authority from the city. It is not necessary, therefore, to consider whether the liability of the city would have been different if express authority had been shown. The evidence, moreover, becomes quite immaterial in view of other considerations to be stated.

No liability of the city was shown, and in that respect the nonsuit was right.

The statute creating the board of health authorizes it to adopt ordinances to prevent the spreading of dangerous epidemics or contagious diseases, and to maintain and enforce sufficient quarantine when it deems necessary. Gen. Stat. 1895, p. 1644, § 49. The board is required by § 13 to examine into all causes of disease injurious to the health of the inhabitants, and to cause the same to be removed and abated. Section 15 enacts that no suit shall be maintained in any of the courts of this state to recover damages against any such board, its officers or agents, on proceedings had by them to abate and remove a cause of disease, unless it shall be shown in such suit that the cause of disease did not exist, was not hazardous and prejudicial to the public health, and that the board acted without reasonable and probable cause to believe that such cause was in fact prejudicial and hazardous to the public health.

The evidence in the present case justified an inference on the part of the jury that scarlet fever did not in fact exist; and, as the trial judge nonsuited the plaintiff, his ruling cannot be vindicated, if the actual existence of the disease is essential to the justification of the defendants. The issue joined upon the pleadings was only whether there existed reasonable and probable cause to believe that the defendant's daughter was sick with scarlet fever; but it would be taking too narrow a view of the case to decide it upon this question of pleading only. We prefer to rest the decision upon broader grounds.

In the case of *American Print Works v. Lawrence*, 21 N. J. L. 248, and, on appeal, 21 N. J. L. 714, 47 Am. Dec. 190, and 23 N. J. L. 590, 57 Am. Dec. 420, it was held in the supreme court, in a very able opinion by Chief Justice Green, that the defendant,

who, as mayor of New York city, had destroyed real and personal property in order to stop the spread of a great fire, was not to be held responsible, since he acted in pursuance of a duty imposed upon him by statute, and not for private emolument or for his individual benefit. Chief Justice Green said: "It is a well-settled principle that, where a person in discharge of a public duty, not acting for private emolument, unwittingly injures another in the performance of the act, while acting with due skill and caution, he is not answerable for damages." The judgment was reversed in this court, upon the ground that the statutes of New York provided no compensation for the personal property destroyed, that the facts amounted to a taking of property for public use without compensation, and the case was therefore within the prohibition of our state Constitution. The case afterwards came before the supreme court on a demurrer to amended pleas, and the judgment there rendered in favor of the defendant was affirmed in this court. 23 N. J. L. 590, 57 Am. Dec. 420. Justice Carpenter, in the course of his opinion, took occasion to say, at page 600 of 23 N. J. L.: "A public officer, acting in good faith, upon a sudden and alarming emergency, under the sanction of a constitutional and valid law in a matter of public duty, is not to be held responsible for the unavoidable and necessary result of such act of duty. An injured party may have a right to resort to the public for satisfaction; but the law has ever held that the officer himself, not exceeding his power and not guilty of oppression or bad faith, is not personally liable." He quotes with approval what was said by Justice Nevius in *Sinnickson v. Johnson*, 17 N. J. L. 150, 34 Am. Dec. 184, where a distinction was drawn between acts done exclusively for the public interest by agents appointed by public authority, acting within the scope of that authority, and acts done for a private and individual interest. Justice Carpenter limits the exemption of public officers to acts done under the sanction of a constitutional and valid law, but, at the same time, quotes Chancellor Kent as extending the exemption to acts done under statutes which were *prima facie* good,—a view which seems to be sustained by the opinion expressed by this court in *Lang v. Bayonne*, 74 N. J. L. 455, 15 L.R.A. (N.S.) 93, 122 Am. St. Rep. 391, 68 Atl. 90. It is however, unnecessary for us to go to that extent in the present case, since we think the act constitutional for reasons to be hereafter stated. Nor is it necessary for us to go to the full extent justified by Justice Carpenter's language. He does not limit the exemption to officers acting judicial-

ly, and exercising their best judgment upon a state of facts, the conclusion from which may be doubtful or difficult.

In the discussion which arose after the decision of the famous case of *Ashby v. White*, 1 Smith, Lead. Cas. 7th Am. ed. 455, it was expressly stated in the argument prepared by the committee of the House of Lords, which was principally drawn up by the Lord Chief Justice, that fraud and malice were the gist of the action. The language quoted on page 484 is: "There is no danger to an honest officer that means to do his duty; for where there is a real doubt touching the party's right of voting, and the officer makes use of the best means to be informed, and it is plain his mistake arose from the difficulty of the case, and not from any malicious or partial design, no jury will find an officer guilty in such case, nor can any court direct them to do it, for it is the fraud and the malice that entitles the party to the action." In that case fraud and malice were averred in the declaration. Some American courts have gone so far as to hold that the officer is exempt even in a case of corruption and malice. *Spalding v. Vilas*, 161 U. S. 483, 493, et seq., 40 L. ed. 780, 784, 16 Sup. Ct. Rep. 631, which was an action against the Postmaster General; *Weaver v. Devendorf*, 3 Denio, 117, which was an action against an assessor for loss caused by an illegal assessment. Where there is no fraud or malice, the overwhelming weight of authority is in favor of the exemption of the public officer from civil action; and the cases are not limited to officers acting in a judicial capacity, but reach the case of all who are called upon in behalf of the public to exercise their judgment. Thus, it was held in *Otis v. Watkins*, 9 Cranch, 339, 3 L. ed. 752, that a collector of a port detaining a vessel under the embargo law of 1808 (act Cong. April 25, 1808, chap. 66, 2 Stat. at L. 499) need not show that his opinion that the vessel was about to violate the law was correct, nor that he used reasonable care and diligence in ascertaining the facts upon which his opinion was formed. It was said to be enough that he honestly entertained the opinion upon which he acted; and, although Chief Justice Marshall dissented, he did not question this general principle, but placed his dissent upon entirely different grounds. The same view was expressed in *Kendall v. Stokes*, 3 How. 87, 11 L. ed. 506. In New York, it was held, in *Williams v. Weaver*, 75 N. Y. 30, that assessors were not liable in a civil action for an unlawful levy. The court said: "That class of public officials is charged with duties which require the exercise of judicial functions, and, when they are called upon thus to act, they are protected from the

consequences which may flow from any error they may commit. Surrounded as these officers are by great difficulties in the discharge of their official duties, the law shields them when acting within their jurisdiction. In order to establish an individual liability, it must be made to appear against the assessors, not only that the assessment was erroneous, but that such assessors had no jurisdiction whatever in laying the tax." The case subsequently went to the Supreme Court of the United States (100 U. S. 547, 25 L. ed. 708), and Justice Miller said, in speaking of the decision of the court of appeals of New York upon this point: "Whether that court decided that question correctly or not, it is not a Federal question, but one of general municipal law, to be governed either by the common law or the statute law of the state. In either case it presents no question on which this court is authorized to review the judgment of a state court." This case was decided in 1880, long after the discussion arising out of the 14th Amendment had become familiar; and it is, therefore, not only authority for the exemption of public officers, but for the proposition that such exemption does not contravene the 14th Amendment.

The principle was held applicable in *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352, to the case of a postmaster who assumed to charge letter postage on a newspaper; but it was held in that particular case that the postmaster did not act in a judicial capacity. The rule has been applied in the case of health officers. *Whidden v. Cheever*, 69 N. H. 142, 76 Am. St. Rep. 154, 44 Atl. 908.

The exemption of officers from liability extends only to matters in which they have jurisdiction under the statutes; and it may be said that the board of health has no jurisdiction unless a cause of disease actually exists. This view is too narrow. The principle which was adopted by this court, and vindicated in an able opinion of Chief Justice Beasley in *Grove v. Van Duyn*, 44 N. J. L. 654, 42 Am. Rep. 648, note, is applicable. It is enough if the matter is colorably, though not really, within their jurisdiction.

A different view has been expressed in *Massachusetts v. Miller v. Horton*, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100, which was followed in *Pearson v. Zehr*, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854, and in *Lowe v. Conroy*, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341. The reasons are well stated by Mr. Justice Holmes, but are combated with equal force by Justice Devens, and the case is weakened as an authority by the fact that it was decided 19 L.R.A. (N.S.)

cided by a bare majority of the court. Upon principle, we cannot distinguish the case from those above cited, where administrative officers were held exempt when called upon to act judicially. If a postmaster general, or a postmaster, or a collector of a port, or an assessor of taxes is to be immune when his error in judgment causes the loss of another's liberty or property, we think a board of health is entitled to a like immunity. A justice of the peace is immune if he acts in a matter colorably within his jurisdiction. The underlying reason is not the judicial character of the officer, but the judicial character of the act, and the public necessity that public agents engaged in the performance of a public duty, in obedience to the command of a statute, should not suffer personally for an error of judgment which the wisest and most circumspect cannot avoid. It is not quite accurate to say that in such cases a man is deprived of liberty or property without compensation. As Justice Devens pointed out, "the individual is presumed to be compensated by the benefit which such regulations confer upon the community of which he is a member, or by which his property is protected." The case may, however, be looked at in another light. The board of health is acting for the public in the exercise of the police power of the state. For an error in the exercise of that power, no doubt the state ought to answer. Just as in an action for malicious prosecution, the principal who instigates the prosecution may be held although the justice and the constable are immune, so in a case of an error in judgment by the board of health it is the state which ought to answer for the default of its agent, acting in obedience to its statutory command. The state does not, it is true, answer in an ordinary action at law in this or any other case, but there is the same remedy in all cases,—an appeal to the justice of the state. A different view from that of the *Massachusetts* court prevailed in *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3, and in *Beeks v. Dickinson County*, 131 Iowa, 244, 6 L.R.A. (N.S.) 831, 108 N. W. 311, 9 A. & E. Ann. Cas. 812, a case decided after the cases last cited.

Miller v. Horton was decided in the absence of a statute such as ours, forbidding an action against the board unless lack of reasonable and probable cause can be shown. The same distinguished court has vindicated the right of the legislature to require all imported rags to be put through a disinfecting process at the expense of the owner, whether actually infected or not (*Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929), upon the ground that the legislature had the power

to pronounce imported rags, not yet disinfected, nuisances in themselves, or, as Justice Holmes said in the later case, because the danger was too great to permit discrimination. What our legislature has done in the health act is, in substance, to say that anything which may possibly be a cause of disease is subject to the regulations of the board of health, when that board has reasonable and probable cause to think it to be in fact a cause of disease. Under such a statute, the cases above cited from Massachusetts, Illinois, and Wisconsin are not in point, and there is no reason why the ordinary rule exempting public officers from private action should not be applied. The board of health was acting for the benefit of the public at large, and pursuant to a duty imposed upon it by a public statute. There is not only no proof of malice, but the board acted with care, and not hastily, for it decided only after a conference between its own physician, a reputable physician of Englewood called in by the plaintiff, and a specialist from the city of New York. The doctors disagreed, at least in a measure; and the board of health was called upon to decide. They may have decided erroneously, but the matter was colorably within their jurisdiction.

The only difficulty which arises is that caused by the first opinion of this court in *American Print Works v. Lawrence*. We there held that the mayor and aldermen of New York could not be exempted from civil liability where their act resulted in what this court held to be a taking of private property for public use, contrary to our Constitution. In view of the subsequent opinion of the court in that case, and the eminence of the judges of the supreme court, whose opinion was reversed in the first case, we think that although we are bound by the actual decision of this court reported in 21 N. J. L. 248, we ought not to extend it further than the exact point decided requires. It was limited to a case where private property was taken for public use; and it was held that destruction to prevent the spread of a conflagration was such a taking. In the present case there was no taking of private property for public use. The acts of the defendant amounted to a mere trespass. It is urged, however, that the same principle ought to be applied because of the 14th Amendment to the Federal Constitution, which prohibits a state from depriving a citizen of liberty without due process of law. To this we think there are two answers: In fact, the plaintiff was not deprived of his liberty; and the conduct of the defendants constituted due process of law, as that term is used in cases of this character. He was not de-

prived of his liberty, because the option was given to him to quarantine his daughter in a room of the house, if he so chose. He elected the alternative of having the whole house quarantined, but that was his voluntary choice; and there seems to have been no show of force to prevent his going and coming as he chose. Whatever may be argued as to the imprisonment of his daughter, that is not now in question. His personal liberty does not seem to have been restrained. We were careful to say in *Hebrew v. Pulis*, 73 N. J. L. 621, 7 L.R.A. (N.S.) 580, 118 Am. St. Rep. 716, 64 Atl. 121, that, although constraint might be caused by threats, as well as by actual force, the words or conduct must be such as to induce a reasonable apprehension of force, and the means of coercion must be at hand. The latter element is lacking in the present case. The real injury of which the plaintiff complains is the destruction of his business by posting upon his office door a notice that there was scarlet fever in the house. This, if false, was a libel, but it was not a deprivation of liberty.

Again, in cases affecting the public health, due process of law does not always require notice and a hearing. *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320. Where the board of health is required to act upon an emergency, due process of law requires only that they should be liable to an action in case they act wrongfully; but the action to which they are liable is only such action as the law gives. In this case the common law, as we have already shown, gave no right of action if the matter upon which the board decided was colorably within its jurisdiction. The object of the 14th Amendment was not to give parties remedies which did not exist at the common law, but to protect them against hostile action by the state depriving them of the existing remedies. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

There is nothing in *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203, inconsistent with our view. The alleged nuisance in that case consisted in the fact that the defendants' lot lay below the grade of the street, so that water collected there, and the order of the board of health was to fill the lot to grade. Obviously, this presented no such emergency as required immediate action. There was opportunity for notice and a hearing. That case was a suit by the city to recover the cost of filling the lot to grade; and a distinction is to be made between the adjudication of the board of health as a defense to civil liability on their part, and as the basis of an action against the party alleged to maintain a nuisance.

If the action had been by Hutton against the board or health, or their employees, for trespass in filling the lot up to grade, the case would have been similar to the present. This distinction is carefully pointed out by the supreme court of Massachusetts in *Sallem v. Eastern R. Co.* 98 Mass. 431, at page 449, 96 Am. Dec. 650, where the court said: "When there appears to have been no notice to the parties to be affected, and no opportunity afforded them to be heard in defense of their rights, whatever operation the adjudication may have upon the *res*, and however conclusive it may be held for the protection of those who act, or derive rights, under it, the adjudication itself can have no valid operation against parties who may be named in the proceedings. If it proceeds to declare any obligation, or impose any liability, upon such parties, they may, in any subsequent suit to enforce it, deny the validity of the judgment, and controvert the facts upon which it was based."

Hutton v. Camden was a case where it was attempted to make the adjudication of the board of health that a nuisance existed final and conclusive, not only for the protection of the board against an action of trespass, but as basis of a legal liability of the landowner. In the present case the legislature has itself undertaken in effect to make a nuisance of what the board of health shall, upon reasonable and probable cause, determine to be a cause of disease. It is unnecessary to cite the numerous cases decided by the United States Supreme Court justifying such a legislative exercise of the police power. In *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, a statute declaring all places in which intoxicating liquors are manufactured, sold, bartered, or given away to be common nuisances was sustained, although the effect was to destroy the value of property. In *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, the eight-hour law of Utah was sustained, although it interfered with the freedom of contract. In *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, the compulsory vaccination act of Massachusetts was sustained, although it interfered with a man's personal liberty. These cases are but illustrations of the extent to which the highest tribunal has gone in vindication of the principle that the individual must yield somewhat of his personal rights to society in return for the benefits of society which he enjoys. We think it not unreasonable to require him, in a case like the present, to depend for redress upon the sense of justice of the public, rather than upon a right of action against

public officers who have acted as they thought for the public weal in a matter of public duty.

The common-law rights of the plaintiff are protected by the Constitution, but the legislature has, by the health act, given the plaintiff a right of action against the board as such where he can show that the cause of disease did not exist, that it was not hazardous and prejudicial to the public health, and that the board acted without reasonable and probable cause to believe that it was in fact prejudicial and hazardous to the public health. Gen. Stat. 1895, p. 1638, § 15. Although the language of the section is in form that no suit shall be maintained against the board of health unless these facts are established, the necessary implication is that, if the facts are established, a suit may be maintained.

In giving this action, the legislature had the right to determine what facts should be necessary to sustain it. They imposed no novel or unreasonable condition. The provision requiring that the plaintiff should show that the board of health acted without reasonable or probable cause is in line with the existing common law in cases of this character. By common law an officer was justified, in certain cases, in making an arrest, where he had reasonable and probable cause for belief in the guilt of the person detained; and, in actions for libel, a communication, fairly made by a person in the discharge of some public or private duty, whether legal or moral, is privileged, in the absence of proof of malice. The principle underlying these cases is applicable to the present case. By the act of March 24, 1903 (P. L. p. 96), it is made a crime for any person, having reason to believe that he is affected with scarlet fever, to appear in any public place, and for any person knowingly to subject another, without the latter's knowledge, to exposure to the infection of any such disease. We do not mean to say that this statute reaches the present case; but it can hardly be libelous for the board of health, in good faith, to give notice of the existence of scarlet fever, when it is a crime for one who has reason to believe that he is affected with the disease to appear in public; and it must be within the power of the legislature to give the right of restraint, amounting to imprisonment, to public officers who have reasonable and probable cause to believe that the crime denounced by the act of 1903 has been, or is likely to be, committed. It is, at any rate, enough for the present purpose that, in providing for this action, the legislature has made the want of reasonable and probable cause essential to the maintenance of the action.

The question remains whether a case is made out under this statute against any of the defendants. As to the board of health, it is clear that they acted upon the advice of their own physician, supported by the report made to them of the opinion of four other local physicians. We think that they were not bound to accept the opinion of the physician called by the plaintiff, and the specialist called from New York, but were justified in relying upon the advice of their own officer.

The case as to the physician himself is somewhat different. Prior to establishing the quarantine he had, at the conference with the other physicians, expressed himself as satisfied with their diagnosis, and it may be that this evidence would be sufficient to carry the case to a jury as to Dr. Bradner, if the question were properly a jury question. At the time this statute was adopted, the words "reasonable and probable cause" were a familiar expression in the law, arising most frequently in actions for malicious prosecution; and, however anomalous the rule may be, it was well established that the question of existence of reasonable and probable cause, in an action for malicious prosecution, was a question for the court, where, as in this case, the facts are undisputed. *McFadden v. Lane*, 71 N. J. L. 624, 60 Atl. 365, citing with approval *Bell v. Atlantic City R. Co.* 58 N. J. L. 227, 33 Atl. 211; *Magowan v. Rickey*, 64 N. J. L. 402, 45 Atl. 804. In our judgment the case failed to establish a want of reasonable and probable cause as against Dr. Bradner. The evidence of what Bulkley said to him, or what Currie said as to the antecedent family history of the patient, would not change this result, and its exclusion was not injurious error. Dr. Bradner seems to have been a reputable physician, acting according to his best light, in a case which four of his fellow physicians, to whom the symptoms were described, pronounced to be scarlet fever. Whether it was so or not, he had reasonable and probable cause to think it so.

In an action for false imprisonment, where the arrest is justified on the ground of reasonable and probable cause, the question is for the court, where the facts are not disputed. *Lister v. Perryman*, L. R. 4 H. L. 521, 39 L. J. Exch. N. S. 177.

Middleton, the inspector, seems to have acted only in carrying out the order of the board whose servant he was, and comes within the words of the statute exempting officers or agents of the board from suit.

For the reasons stated, we think the trial judge was right in directing a nonsuit, and the judgment should be affirmed, with costs. 19 L.R.A. (N.S.)

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

RUSHMORE

v.

MANHATTAN SCREW & STAMPING WORKS, Appt.

(— C. C. A. —, 163 Fed. 939.)

Trademark — ordinary words.

1. The one first putting a flaring front on a lamp shell of his design is not entitled to a monopoly on the words "flare front" in connection with lamps, in the absence of anything to show that the words have acquired a secondary meaning.

Unfair trade — copying designs.

2. The maker of an automobile search light inclosed in a shell of graceful but unpatented design may maintain a suit for injunction, damages, and profits against another who sells similar lights inclosed in similar shells, although they are prominently marked with the maker's name, and have never been represented to be those of complainant, where, notwithstanding these facts, intending purchasers may mistakenly purchase defendant's lamps for those of complainant.

(Noyes, Circuit Judge, dissents.)

(July 27, 1908.)

Case Note. — Right to protection against use by rival of similar design, shell, or pattern not protected by patent.

Aside from the cases cited in *RUSHMORE v. MANHATTAN SCREW & STAMPING WORKS*, but few cases are to be found upon the question suggested in the above title, except such as are gathered in a note to *Bender v. Enterprise Mfg. Co.* 17 L.R.A. (N.S.) 448, wherein was considered the right to manufacture the identical article of another not protected by patent. The two questions are to a great extent analogous, and depend upon the same general principle that unfair competition is not established by proof of similarity in form, dimensions, or general appearance alone,—especially where it appears to result from an effort to comply with the physical requirements essential to commercial success, and not from a design to misrepresent the origin of the article. The doctrine enunciated and applied in the cases considered in that note, to the effect that the doctrine of unfair competition cannot be successfully invoked to abridge the freedom of trade competition, where the similarity complained of is with reference to necessary functional characteristics of the article in question equally applies to the question here under consideration. The cases reviewed in that note will not be considered herein. Neither will the question be considered as to the right of one manufacturer to simulate the dress or package of similar goods of an-

A PPEAL by defendant from an order of the Circuit Court of the United States for the Southern District of New York granting a preliminary injunction enjoining the use of a lamp of certain design. Modified and affirmed.

Statement by Coxe, Circuit Judge:

On appeal from an order granting a preliminary injunction enjoining the defendant, its officers, employees, and agents, "not to manufacture, sell or use, exhibit or advertise, any automobile lamp or lamps having inclosing cases or shells made in imitation of, or resembling, or a colorable variation of, the Rushmore 'Flare Front' search-light lamp, exhibited to this court herein, and of which a sample has been offered, marked 'exhibit A,' except in so far as such lamps may be the genuine lamps made by complainant, and not to use, in connection with any lamp made in imitation of, or resembling, or a colorable variation of, said exhibit A Rushmore lamp, the words, 'flare front,' and not to print or publish, or have printed or published, in catalogues or advertisements or elsewhere, any cut or representation of any lamp in imitation of, or similar to, said exhibit A Rushmore lamp, and not to print or publish, in any catalogue or advertisement or elsewhere, the words 'flare front' or similar

words in connection with the representation of any lamp made in imitation of or similar to said exhibit A lamp, except in so far as such representation and such words may be used to advertise, or in connection with, genuine Rushmore lamps made by complainant."

Argued before Coxe and Noyes, Circuit Judges, and Adams, District Judge.

Mr. Arthur v. Briesen, with Mr. Hans v. Briesen, for appellant.

Mr. Alfred Wilkinson for appellee.

Coxe, Circuit Judge, delivered the opinion of the court:

In December, 1905, the complainant adopted a design for the shell of an automobile lamp, and in the following January exhibited it at the exhibition of automobiles at Madison Square Garden, New York. This is the complainant's lamp in controversy. Its exterior is pleasing to the eye, and it is unquestionably a high-grade lamp, but there is nothing strikingly novel or ornamental about it. In general contour it resembles the search light which has for years been in use upon excursion boats and vessels of war, the principal difference being in the addition, by the complainant, of the so-called "flare front;" the glass front of the lamp being larger in

other. Cases wherein that question was considered will be found in a note to *George G. Fox Co. v. Glynn*, 9 L.R.A.(N.S.) 1096.

The ground upon which the decision of the court in *RUSHMORE v. MANHATTAN SCREW & STAMPING WORKS* is based is not entirely clear in the opinion itself, as it is not entirely clear whether the shell of the lamp simulated or imitated was a necessary and functional part of the lamp itself, so that such a shell was necessary to the commercial success of the lamp as an automobile lamp. It is therefore uncertain just how far the court, in holding the defendant guilty of unfair competition in imitating the shell of complainant's lamp, intended to carry that doctrine, although it said that, in reaching its conclusion, the doctrine of unfair competition was thereby being extended to its utmost limit.

The cases of *Enterprise Mfg. Co. v. Landers*, 65 C. C. A. 587, 131 Fed. 240, and *Yale & T. Mfg. Co. v. Alder*, 83 C. C. A. 149, 154 Fed. 37, which the court treated as decisive of the question, were, according to the opinions therein, clearly cases of unnecessary simulation of nonfunctional parts of the articles involved; and the doctrine enunciated in those cases is in harmony with the doctrine heretofore stated. In addition to the cases included in the note in 17 L.R.A.(N.S.) 448, the doctrine therein enunciated also finds support in other cases which were not strictly within the scope of that note, because the article,

while imitating the article of another, was not identical therewith.

Thus, in *Marvel Co. v. Pearl*, 66 C. C. A. 226, 133 Fed. 160, it was held that proof of similarity in form, dimensions, or general appearance, alone, would not establish unfair competition if such similarity was characteristic of the article in question, or resulted from an effort to comply with the physical requirements essential to its successful operation, rather than for the purpose of deceiving the public as to the origin of the article.

This doctrine was also applied to sectional bookcases in *Globe-Wernicke Co. v. Fred Macey Co.* 56 C. C. A. 304, 119 Fed. 696, wherein it was said that to admit the claim of the appellant would create a monopoly of such proportions that it would practically engross the business of manufacturing sectional bookcases; that the public have the right to make bookcases of any size; and, from the nature of the requirements, they must have resemblance in form, dimensions, and appearance; so no one can have the exclusive privilege of locating them in sections, one above another, or end to end, nor of making them of any kind of wood or metal that he chooses, nor of the style or finish of his work, unless it is peculiar and out of the ordinary. Continuing, the court says: "Upon the claim made for the appellant, it would be impossible, without invading complainant's right, to construct and sell a bookcase having the

diameter than the body of the lamp except as it flares out near the front to meet and inclose the glass. No patent has been granted to Rushmore either for a combination, for a new article of manufacture, or for a design for the shell of the lamp. It is possible that, had application been made, a design patent might have been granted and sustained. In *West Disinfecting Co. v. Frank*, 79 C. C. A. 359, 149 Fed. 423, this court recently held valid a design patent for a somewhat similar structure.

The defendant is manufacturing a lamp which, though differing in several details of construction, unquestionably resembles in external appearance the Rushmore lamp. If a valid design patent had been issued to the complainant we have no doubt that the defendant's lamp would infringe, and, believing as we do that the points of difference are unimportant, we will consider the question involved upon the theory that the shells of the two lamps are substantially identical.

The defendant has adopted "Phoebus" as its trademark, and its lamp is known to the trade as the Phoebus lamp. All of its lamps have conspicuously displayed on the top thereof a name plate with a black background inscribed "Phoebus, the lamp of Quality, Model 601, Manhattan Screw & Stamping Works, N. Y." The officers of

most desirable characteristics. Nor is it competent for one person to appropriate to his own purposes any common and general characteristics of the goods he manufactures to such an extent that another shall be impeded or embarrassed in his free right to use such characteristics in his own business."

The same conclusion was reached in *Diamond Match Co. v. Saginaw Match Co.* 74 C. C. A. 59, 142 Fed. 727, as to matches having a tip of the same color, the court saying that the characteristic of the tip was specific, and not general, and properly applied to all tip matches. There was no claim in this case, however, that there was any simulation of the packages in which the matches were inclosed and sold; in fact, the contrary was shown to be the case.

Where, however, there is an obvious attempt at unnecessary simulation, such simulation will be restrained on the ground that it is unfair competition. Thus, in *George Frost Co. v. E. B. Estes & Sons*, 156 Fed. 677, a manufacturer of a rubber button, to be used as a part of a hose supporter, was protected against simulation of the rubber button by a rival who manufactured a wooden button to be used in the same connection, and who colored it to imitate rubber, and made the whole button in imitation of complainant's.

To the same effect is *H. Mueller Mfg. Co. v. A. Y. McDonaly & M. Mfg. Co.* 104 Fed. 1001, as to the right of a rival to simulate the form, shape, and size of waste

the defendant deny that they, or anyone connected with the defendant, have ever in any way represented their lamps as those of the complainant. There are allegations in the bill, made upon information and belief, that the defendant has palmed off its lamps upon innocent purchasers as the Rushmore lamps, but there is nothing in the affidavits worthy of the name of evidence to establish these allegations. The affidavits, in our judgment, also fail to establish an exclusive right to the use of the name "Flare Front." The complainant says in his affidavit, "I am aware that what might be called 'flaring fronts' have been used on other forms of lamps entirely different in appearance from my exhibit A lamp, for instance, the old carriage lamps; but I am positive that I am the first who has ever used these flare fronts on any lamp similar in appearance to my exhibit A." Assuming the correctness of this statement, we do not think the fact that complainant was the first to put a flaring front on a shell of his design entitles him to a monopoly of these words. We regard them as descriptive merely and are of the opinion that an injunction should not issue, at least until proof more cogent than anything which now appears in the record is presented showing that they have acquired a secondary meaning. So far, then, as the prayer

stops and waste cocks and similar plumbers' supplies. In this case it was recognized that defendant had a right to use the essential form or shape and size of a cap and handle for its goods. But it was held that the exact size, form, outward appearance, or dress of the cap and handle were not essential features of the device. That the outward form in dress or appearance was purely arbitrary and fanciful; and its simulation by another would, therefore, amount to unfair competition.

A case which seems to go to the extreme in applying the doctrine of protection on the ground of unfair competition is *Edison Mfg. Co. v. Gladstone* (N. J. Ch.) 58 Atl. 391. In this case certain copper and zinc plates not protected by patent were so formed as to fit in a frame forming part of a battery to generate electricity, the battery in question was called the Edison battery, and the company manufacturing it also made copper and zinc plates of a shape, size, and form to fit in a frame which was a part of the battery. A rival manufacturer of plates of the same shape and size, and made to be used in these batteries, as well as other batteries, was restrained from following the same shape, size, and form, unless distinguishing marks were used which would prevent the public from being misled. It does not, however, clearly appear whether the change required by the court, in order to prevent deception of the public, was so radical that the defendant's plates would not fit complainant's batteries.

for an injunction is based upon the use of the name "Flare Front" and the allegation that the defendant has actually deceived purchasers by representing that its lamps were made by the complainant, the most that can be said is that the questions are involved in doubt. This court has uniformly held that an injunction should not issue in a doubtful case. *Hall Signal Co. v. General R. Signal Co.* 82 C. C. A. 653, 153 Fed. 907; *Cleveland Foundry Co. v. Silver*, 68 C. C. A. 87, 134 Fed. 591; *Hildreth v. Norton* (Feb. 11, 1908) 86 C. C. A. 408, 159 Fed. 428.

As we read the opinion of the judge of the circuit court, he finds no actual fraud and no evidence that the defendant is now using the words "flare front." He says: "Assuming that at the present time the defendant is not using the words 'flare front,' is not selling its product as Rushmore lamps, and is not using in any way either of these words or phrases, the question is whether plaintiff is entitled to be protected from unnecessary imitation of nonfunctional parts of his well-known lamp. It seems to me that, under the cases of *Enterprise Mfg. Co. v. Landers*, 65 C. C. A. 587, 131 Fed. 240, and *Marvel Co. v. Pearl*, 66 C. C. A. 226, 133 Fed. 160, he is so entitled." We are thus confronted with the naked question of law: Can one who manufactures and sells a well-known article of commerce, like an automobile search light inclosed in a shell of graceful but unpatented design, maintain a bill for an injunction, profits, and damages against a defendant who sells automobile search lights inclosed in a similar shell, with his name prominently appearing thereon as the maker, and who has never represented that his lamps were made by the complainant? We feel constrained to answer this question in the affirmative upon the authority of *Enterprise Mfg. Co. v. Landers*, *supra*, and *Yale & T. Mfg. Co. v. Alder*, 83 C. C. A. 149, 154 Fed. 37. Both of these cases were decided by this court, and we see no way to distinguish them, on principle, from the case at bar. We are of the opinion, however, that to answer this question in favor of the complainant carries the doctrine of unfair competition to its utmost limit. If it be pushed much farther those engaged in trade will be encouraged to run to the courts with trivial complaints over the petty details of business, and thus will grow up a judicial paternalism which in time may become intolerable.

This cause, or one involving the question at issue, may be easily brought here on appeal from final decree, and heard at the next term. After the witnesses have been cross-examined, we may be able to tell with 19 L.R.A. (N.S.)

much greater certainty whether the competition of which the complainant complains is produced by the similarity of the shells of the two devices, or by the fact that defendant is selling its lamps at a much lower price. It appears from the record that purchasers of automobiles belong to the wealthy class, who are not particular about the price paid so long as they secure durable and efficient machines. They are not the class of buyers who might purchase a padlock, for instance, after a casual inspection; and it is not easy to understand how such fastidious buyers with the Phœbus name plate before them can be deceived into thinking that they are purchasing the Rushmore lamp. If it should appear, after full hearing, that the effect of the injunction will be to stifle legitimate competition rather than to punish unfair competition, we will not hesitate to dissolve it; but, upon the affidavits now before us, the majority of the court is of the opinion that the case is controlled by the former decisions of this court.

The order should be modified by excluding from its provisions the prohibition against the use of the name "Flare Front," and, as so modified, is affirmed.

Noyes, Circuit Judge, dissenting:

I cannot concur in the opinion of the majority of the court. The complainant manufactures an automobile lamp of a particular shape, bearing his name, and known as the "Rushmore lamp." The defendant manufactures a lamp of a similar shape, with its name conspicuously displayed upon it, which is known as the "Phœbus lamp." The complainant has no design patent, and his case must stand, if at all, as a case of unfair trading, in which the essential element is deception,—the palming off of one's goods as those of another. But how a purchaser could be deceived into buying an automobile lamp plainly marked with the name and trademark of the defendant, in the belief that it was the complainant's lamp, is more than I can comprehend. The mere similarity in the shape of the lamps, in my opinion, is not sufficient to produce such a result. The majority, however, in view of earlier decisions of the court, are of the opinion that the similarity in itself establishes a case of unfair competition. But, whatever view may be taken of those decisions, I think the complainant, upon the proof as it stands, has failed to bring himself within them. Certainly they do not hold that, when the shape of an unpatented article possesses advantages from the viewpoint of mechanical utility, it is unfair or unlawful to imitate it. Possibly upon full hearing the complainant may be able to show unnecessary imitation of nonfunctional

parts, but I am not satisfied from the affidavits that he has yet done so.

In my opinion the order granting the preliminary injunction should be reversed.

NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA, Resp't.,
v.

MOSES MINOR, Appt.

(— N. D. —, 117 N. W. 528.)

Malicious mischief — malice.

1. The word "maliciously," as used in § 9315, Rev. Codes 1905, relating to the crime of "malicious mischief," is to be given a restricted meaning, and imports that the act to which it relates must have resulted from actual ill-will or revenge. It implies an intent to vex and annoy the owner of the property injured.

Same — necessity of.

2. Malice is an essential ingredient of the crime of malicious mischief, and a conviction cannot be sustained in the absence of any evidence disclosing such malice.

Same — evidence.

3. Evidence examined, and held not sufficient to warrant the conviction of appellant.

(September 10, 1908.)

Headnotes by FISK, J.

Case Note. — Definition of "malice" as a requisite of the offense of malicious mischief.

Many of the cases involving the criminal offense known as "malicious mischief" turn upon this point, viz., whether the "malice" necessary to the crime must be directed against the owner of the property injured, or whether malice against the property itself is sufficient. In general it may be said that such authorities do not attempt any definition of "malice" as used in the statutes covering malicious mischief, and they have been excluded from this note with one or two exceptions.

A study of the cases has suggested the desirability of attempting some classification, and those decisions holding in harmony with *STATE v. MINOR*, that actual malice is necessary to constitute the offense, have been grouped together. A majority of the cases seem to consider constructive malice sufficient, and in a few instances the decisions do not draw satisfactory distinctions.

The wilful doing of an unlawful act, which is ordinarily sufficient to establish criminal malice, is not sufficient under statutes defining "malicious mischief." To constitute this offense, an injury must not only be wilful, but it must, in addition, be malicious in the sense that it was done out of a spirit of cruelty, hostility, or revenge. *Com. v. Wil-*
19 L.R.A. (N.S.)

A PPEAL by defendant from a judgment of the District Court for Williams County convicting him of malicious mischief. Reversed.

The facts are stated in the opinion.

Messrs. Engerud, Holt, & Frame, with Messrs. Palda & Burke, for appellant:

To bring the act within the purview of the law against malicious mischief, it must appear that the mischief is done intentionally.

State v. Flynn, 28 Iowa, 26; *Sattler v. People*, 59 Ill. 68; *State v. Newkirk*, 49 Mo. 84; *State v. Hause*, 71 N. C. 518; *Goforth v. State*, 8 Humph. 37; *Palmer v. State*, 45 Ind. 388; *R. v. Langford*, Car. & M. 602; *Barlow v. State*, 120 Ind. 56, 22 N. E. 88.

Messrs. T. F. McCue, Attorney General, R. N. Stevens, and Van R. Brown, for respondent:

The accepted legal meaning of "malice," when used in a criminal statute, is: "An unlawful act intentionally done, without just cause or excuse."

State v. Grassle, 74 Mo. App. 313.

"Malicious" imports nothing more than a wicked or perverse disposition with which a party committed the act.

Com. v. York, 9 Met. 93, 43 Am. Dec. 373.

"Malicious mischief" is defined to be any malicious or mischievous physical injury to the rights of another.

State v. Foote, 71 Conn. 737, 43 Atl. 488.

liams, 110 Mass. 401, and to the same effect, see *State v. Tarlton* (S. D.) 118 N. W. 706.

To bring an act within the meaning of "malice," as used to define malicious mischief, it must be done unlawfully, and "wilfully or purposely" to injure another. *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131.

In *Folwell v. State*, 49 N. J. L. 31, 6 Atl. 619, it was held that, to support an indictment for "wilfully and maliciously" doing an act in violation of the statute, there must have existed an evil mind; and that without this the act could not be malicious.

To find a defendant guilty of malicious mischief, the jury must be satisfied that the offense was committed in a spirit of wanton cruelty or wicked revenge. *Com. v. Walden*, 3 Cush. 558.

"Malice" as defined in *Johnson v. State*, 61 Ala. 9, means, with ill-will, malevolence, grudge, spite, wicked intention, enmity.

The malice necessary to constitute the offense of malicious mischief is something more than the malice which is ordinarily inferred from the wilful doing of an unlawful act without excuse. The statutes punishing such offense are devised to reach that class of cases where the act is done with a deliberate intention to injure. *State v. Johnson*, 7 Wyo. 615, 54 Pac. 502.

State v. Robinson, 20 N. C. 120 (3 Dev. & B. L. 130), 32 Am. Dec. 661, holds that

54 Pac. 502; *Rose v. State*, 19 Tex. App. 470; *State v. Flynn*, 28 Iowa, 26; *Barlow v. State*, 120 Ind. 56, 22 N. E. 88.

Applying the above rule of construction to the evidence in this case, we are required to hold that the state wholly failed to establish the charge contained in the information, and we therefore conclude that the judgment appealed from must be reversed, and a new trial ordered.

All concur.

OREGON SUPREME COURT.

J. S. McLEOD et al., Respts.,

v.

NANCY E. DESPAIN, Impleaded, etc., et al., Appts.,

(49 Or. 536, 90 Pac. 492.)

Contract — trustee — notice.

1. The word "trustee," added to the payee's name in a written instrument, is sufficient to put a purchaser upon inquiry as to all the terms and conditions under which it may have been executed, and, in the absence of such inquiry, knowledge thereof will be presumed.

Trust — collection by trustee — effect on beneficiary.

2. Persons furnishing money to purchase a mortgage, which, together with the note which it secures, is assigned to the cashier of a bank as trustee, new notes for the amounts furnished by the respective parties being executed to him and indorsed to them with his guaranty, under the agreement that the trustee shall collect the rents and receive all sums paid on principal, executing releases of the mortgaged property as payments are made, are bound by his act of receiving money; and, in case he becomes insolvent without paying it over, cannot compel a second payment by the mortgagor.

Mortgage — application of payment — duty of mortgagor.

3. The mortgagor, in making payments to the trustee, need not see that they are properly applied, where several persons furnish money to purchase a mortgage, which, together with the note which it secures, is assigned to a trustee, who is to collect rents and receive payments on the principal and apply them in satisfaction of the debt, the share of each contributor being shown by a new note executed to the trustee and indorsed with a guaranty to the contributor.

Note. — As to use of word "trustee" as affecting negotiability, or as notice of rights of parties to negotiable paper, see case note to *Ford v. First Nat. Bank*, 1 L.R.A.(N.S.) 188. 19 L.R.A.(N.S.)

On Petition for Rehearing.

Principal — acts of agent — repudiation.

4. Buyers of a mortgage, who have left it and the notes secured by it in the hands of a trustee to receive the rents on the mortgaged property and payments on the indebtedness, cannot take advantage of his acts so far as they are advantageous to them and repudiate collections made by him which he failed to turn over prior to his insolvency.

Contract — absence of writing — performance.

5. Absence of writing will not defeat, under the statute of frauds, an agreement between mortgagor, the purchaser of the mortgage, and a trustee, to hold it and collect the rents and payments of principal and make application thereof, after the agreement has been performed.

Party — defendant — affirmative relief — estoppel.

6. That the holder of one of the new notes representing the respective interests of the purchasers of a mortgage does not originate a suit to foreclose the mortgage to secure its payment, but is made defendant therein, does not prevent the application against him of the rule that he cannot treat the original note as existing for the purpose of upholding the mortgage and repudiate it for other purposes, where he seeks affirmative relief in his answer, by way of foreclosure of the mortgage, to secure the sum due on his note.

Evidence — entries against interest.

7. Entries in a trustee's account showing payments on indebtedness due the beneficiaries are admissions against interest, which are proper evidence to show that the payments were made, in a controversy between the mortgagor and the beneficiaries of the trust.

Trust — collections by trustee.

8. That one constituted trustee to hold a mortgage and note secured thereby, collect rents and payments on the indebtedness, and release portions of the property as payments were made, himself purchases a tract of the mortgaged land and credits the trust account with the purchase price, does not throw upon the mortgagor the duty of seeing that the payment is properly applied; but the beneficiaries for whom he holds the mortgage are chargeable with his neglect to apply the proceeds upon the indebtedness.

(June 11, 1907.)

A PPEAL by a portion of the defendants from a decree of the Circuit Court for Umatilla County in favor of plaintiff and one of the defendants in a suit to foreclose certain mortgages. Reversed.

Statement by King, C.:

This is a suit in equity by J. S. McLeod to foreclose three mortgages executed by

Nancy E. Despain, Florence L. Berkeley, Bernice C. Dickson, Albert M. Despain, Edith Geraldine (Despain) Berkeley, together with Louise B. Despain, Eleanor M. Despain, and Constance A. Despain, minors, by their guardian, Nancy E. Despain, who, with Norborne Berkeley, H. Dickson, and Charles C. Berkeley, constitute the appellants herein. These mortgages were given to J. N. Teal to secure a note for \$28,000, dated March 28, 1898, payable five years after date, with interest at the rate of 8 per cent per annum, and, together with the note, were assigned to C. B. Wade, trustee, to secure certain other notes thereafter executed to him as such trustee, one of which was assigned to plaintiff, McLeod, and one to Lina H. Sturgis, who constitute the respondents herein. The remainder of the notes so executed were indorsed by Wade to other persons not parties to this suit. Lina H. Sturgis was made a party defendant and answered, asserting her claim in the mortgage to the extent of her interest therein, as evidenced by her note. Wade was made a nominal party defendant; but, not having been served with summons, made no appearance. Various other persons, not involved here, were also made defendants on account of interests claimed by them in the after-acquired mortgaged property. McLeod demands a decree foreclosing the mortgages to satisfy the sum of \$7,000, with unpaid interest, while Sturgis prays a decree of foreclosure for an alleged unpaid balance of \$1,157.45, with interest. Appellants, by their answer, allege that all of the notes and mortgages were paid in full to Wade as agent and trustee of respondents, and ask a decree dismissing the suit, together, with affirmative relief to the effect that all the notes referred to be declared paid and the mortgages canceled of record. A trial was had before the court, resulting in a decree in favor of the respondents, as prayed for, from which decree this appeal is taken.

Messrs. Wirt Minor, Charles Harrison Carter, and Thomas Griffin Halley for appellants.

Messrs. McCourt & Phelps, for respondent McLeod.

The word "trustee" is merely descriptive.

Bush v. Peckard, 3 Harr. (Del.) 385; Speelman v. Culbertson, 15 Ind. 441; Powell v. Morrison, 35 Mo. 244; Hatley v. Pike, 162 Ill. 241, 53 Am. St. Rep. 304, 44 N. E. 441.

Mr. James A. Fee for respondent Sturgis.

King, C., delivered the opinion of the court:

The facts leading up to this suit, as we 19 L.R.A. (N.S.)

gather them from the record, are substantially as follows: In March, 1898, appellants borrowed \$28,000 from J. N. Teal, of Portland, Oregon, executing their promissory note therefor, payable to his order five years after its date at the Pendleton Savings Bank, Pendleton, Oregon, with interest at the rate of 8 per cent per annum. To secure the payment of this note, three mortgages were also executed and duly recorded, covering certain lands in Umatilla county, Oregon. In June of the same year appellants, desiring to reduce the rate of interest and in order to sell their lands and apply the proceeds upon the indebtedness, wanted the privilege of paying the principal and interest before due, and, as Teal would not accede to these terms, but was willing to receive the full amount at any time, they made application for a loan to C. B. Wade, then cashier of the First National Bank, of Pendleton, Oregon. Norborne Berkeley testified that, as their agent, he made the application, and that the first time he spoke to Wade concerning the loan he answered: "We haven't got the money now, but can probably let you have it later;" that during the same week he renewed the request, and Wade replied: "I think we can get the money now, and will let you have it." After talking the matter over, he told Wade that, if he would buy the Teal note and hold it and allow them to pay it off in such sums as they could, it would suit them better than as it was, since they wanted to sell certain ranches and apply the proceeds on their obligation. Wade was to give them a lower rate of interest, and for his services in the transaction would charge \$1,500, all of which was agreed to; and, after learning that Wade had received the note and mortgages from Teal, appellants executed eight promissory notes, made payable to "C. B. Wade, trustee," dated June 29, 1898, with interest at the rate of 7 per cent per annum, payable semiannually, "on or before five years from date." The notes aggregated \$29,500, as follows: Two for \$7,000 each, and two for \$2,500, two for \$1,500, one for \$3,500, and one for \$4,000. One of the \$1,500 notes represented the bonus to Wade. All the signatures of the new notes were procured within a short time after Wade received the Teal note and mortgages duly assigned. The new notes were accordingly turned over to him, and, with the exception of the bonus note, were duly assigned to the parties advancing the money.

As a part of the transaction, appellants and Wade entered into an agreement concerning the payment and disbursement of rents to be received on the property, which, on June 30, 1898, was reduced to writing, and, omitting the signatures, is as follows: "This agree-

ment. made and entered into this 30th day of June, 1898, by and between N. E. Despain, Florence L. Berkeley and Norborne Berkeley, Jr., her husband, Bernice Dickson, and Haldane Dickson, her husband, Albert M. Despain, Edith G. Despain, and N. E. Despain as guardian of the persons and estates of Louise B. Despain, Eleanor Despain, and Constance A. Despain, minors, parties of the first part, and C. B. Wade, trustee, party of the second part, witnesseth: That, whereas the first parties have borrowed of C. B. Wade, trustee, party of the second part, twenty-eight thousand dollars (\$28,000), payable on or before five years, and bearing interest at the rate of 7 per cent per annum, said loan being secured by a note and mortgage for \$28,000, which note is secured by a real-estate mortgage on certain city property in the city of Pendleton, and farm lands in Umatilla county, Oregon, same having been duly executed and delivered to J. N. Teal, of Portland, Oregon, by said first parties, and by said J. N. Teal duly assigned to second party hereunto, therefore, in consideration of the premises, and for the further security of said C. B. Wade, trustee, said first parties hereto do sell, transfer, set over, and assign to C. B. Wade, trustee, all the rents and profits of the property in the city of Pendleton, described in said mortgage, from said first parties to J. N. Teal, for the period of five years, unless said sum of twenty eight thousand dollars (\$28,000), and interest thereon, shall have been sooner paid to said second party. First parties do further agree that they will, without expense to said second party, collect and deposit in the First National Bank, of Pendleton, Oregon, to the credit of the second party, the rents and profits of mortgaged property within limits of the city of Pendleton. And said second party agrees (1) that of moneys so deposited by said first parties, if same be sufficient therefor, he will pay or cause to be paid to N. E. Despain the sum of one hundred fifty dollars (\$150) per month; (2) that he will pay interest on said loan semiannually; (3) that he will pay premiums on such fire insurance policies as may be procured, subject to approval of second party, by said first parties on property in city of Pendleton material to this agreement; and (4) that if, after such payments as hereinbefore set forth are paid, there remains any balance of such rents and profits, the same shall be paid on principal of said loan of twenty-eight thousand dollars (\$28,000); provided, however, that, if first parties shall be unable to pay taxes assessed against said property, the party of first part may pay such taxes from such balance, if any there be." It appears that,

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after receiving the application, Wade spoke to McLeod, Sturgis, and others concerning it, explaining the time, terms, and conditions desired, and suggested that they advance the necessary money, indicating it would be a safe investment, for the reason he would procure an assignment of the note and mortgages from Teal to himself, as trustee; and, as an additional safeguard, he would arrange to have all rents from the property, together with receipts of sales of lands, if sold, paid to him, during the period of the loan, which he would apply in payment of the interest, when due, and credit the excess upon the principal. With this understanding, McLeod furnished \$7,000, Lina H. Sturgis a like sum, while the balance of the funds was advanced by other parties not involved here. The money advanced, being sufficient for the desired purpose, amounting to \$28,000, was paid over to Wade, who, with full knowledge, consent, and request of all concerned, paid the same to Teal. The assignment was in the usual form, dated June 29, 1898, and executed to "C. B. Wade, trustee;" the note being indorsed, "without recourse, to J. N. Teal."

The new notes were given for the purpose of indicating and specifying in writing the terms of payment of the obligation represented by the Teal note and mortgages, as well as to indicate the interest each of the parties advancing the money might have in the entire indebtedness and mortgage security, including the additional \$1,500 bonus note given. These notes were executed, assigned, and accepted with the full knowledge and understanding of all the parties concerned that Wade, as trustee, was to hold the Teal note and mortgages, and neither the note nor mortgages should be deemed discharged until the amounts specified in the new notes should be fully paid. Wade accordingly entered upon his trust, retained possession of the Teal note and mortgages, received all rents and other proceeds from time to time, and, after paying the amounts excepted under the contract, credited the excess on the new notes until the \$29,500, with interest, was paid, except the sums involved in this suit, all of which were paid to him to apply on the notes; but the money for which a decree is here demanded was neither credited thereon nor paid to the respondents. He so continued under the trust, without his right to do so being questioned, until September 8, 1903, when he became insolvent. After the execution of the new notes, they were indorsed by Wade to the various persons entitled thereto. McLeod retained his note in his possession, while the Sturgis note was held by Hartman as her agent; but all credits on these notes were placed there by

Wade, who was given the notes by the holders for that purpose as the money was paid to them. Prior to the date Wade's insolvency became known, tracts of the mortgaged land were sold from time to time, and releases duly executed by Wade, as trustee, and the moneys received therefor in accordance with the understanding and agreement between the parties concerned. During all this time and for many years prior thereto, Wade was cashier of the First National Bank of Pendleton, Oregon, and plaintiff, McLeod, was a director and stockholder only. The money was deposited in this bank as received, and entered on its books under the account of "Wade-Despain Trust." As payments were made to the holders of the notes, checks were given by Wade, signed "Wade-Despain Trust." Like checks were given for all other disbursements made by him under the written agreement. In this manner Wade kept a memorandum of moneys received and paid on the notes, as well as of all disbursements under the contract. When the notes were assigned to McLeod and Sturgis, Wade guaranteed the payment thereof in the following language, indorsed on the back of each note: "This note is secured by a note of \$28,000, signed by the same parties, which is secured by real-estate mortgages assigned to C. B. Wade, trustee. For value received, I hereby guarantee payment of this note and waive protest, demand, notice of nonpayment thereof. C. B. Wade, Trustee."

It is urged by counsel for respondents that, during the entire transaction, and until his insolvency, Wade was the agent only of appellants, and that respondents are bona fide purchasers of the new notes, and that, by operation of law, these notes carry with them the Teal mortgages; that the new notes were intended to be substituted for the old, and, by oral agreement, these mortgages were to secure their payment; that this oral agreement is supplemented by the statement indorsed on the new notes given: "This note is secured by a note of \$28,000, signed by the same parties, which is secured by real-estate mortgages assigned to C. B. Wade, trustee." Appellants' counsel insist that Wade was only respondents' trustee and agent, and that sufficient money having been paid him to cover the entire claim growing out of the deal, they were released from any further obligations. It appears that appellants' object in procuring the money with which to take up the Teal note and mortgages was for the purpose, first, of reducing the rate of interest from 8 per cent per annum to 7 per cent; second, to secure the privilege of paying the principal and interest at any time, and in order that the realty could be sold and 19 L.R.A. (N.S.)

mortgages released as sales were made, thereby enabling the indebtedness to be extinguished as soon as practicable. To accomplish these objects they were willing to pay a \$1,500 bonus, and were not only willing to pay this additional sum, but consented to, and did enter into the agreement whereby all the rents and proceeds from sales should be paid to the holder of the mortgage security. With notice of these conditions, consisting of both actual and constructive knowledge, respondents advanced the money with which to purchase the Teal note and mortgages, and, as a means of segregating and evidencing the respective interests therein of each of the several persons advancing the money, as well as to show a change in the terms of payment and rate of interest, the new notes were given. The transaction was, in effect, the same as if all the new terms and conditions of payment were indorsed on the old note and mortgage, the difference being, under the method adopted, that each person, if desired, might hold the written instrument evidencing his or her interest, while leaving the security in Wade's possession, thereby making it more convenient for all, in that Wade could act as agent and trustee for each party represented. In this way the sales were to be facilitated as well as the payment of the indebtedness insured, and thereby carrying into effect one of the main objects in changing creditors. It is clearly apparent that the new notes were given and the negotiations perfected in this manner, and with this object in view. As evidence that there should be but the one debt, and that neither the Teal note nor mortgages should be deemed paid or canceled, all were assigned to Wade as trustee; and, to make certain that the note and mortgages should be kept alive, this fact was stamped on the back of the new notes, as executed. For the purpose of assuring the payment of the \$1,500 promised him, Wade not only consented to act as trustee for the holders of the notes, but was willing to guarantee payment of the notes held by respondents, and accordingly indorsed the notes as guarantor, and, as such indorser, was personally bound, notwithstanding the fact that the word "trustee" was added to his name. *Ogden R. Co. v. Wright*, 31 Or. 150, 49 Pac. 975.

The date of the written agreement executed to Wade, as trustee, by appellants, is immaterial, as the transaction must be considered as a whole, even though it consumed more than one day. While there is no direct testimony that Sturgis had actual knowledge of such understanding, it does appear that McLeod relied upon an agreement to that effect.

On this point McLeod testified:

Q. Did he [Wade] tell you anything about having these other notes further secured by having the city rents turned over to him?

A. I asked him [Wade] how he was to pay the interest on these notes. He said the rents was to come to him, and, if any of the property was sold, they would apply it on these notes. That is the reason he gave on or before five years after date so that they could have a chance to sell it.

Q. He also told you he would have these rents assigned to him to apply on the notes?

A. He said he could pay the interest because he was getting the rents.

Q. They hadn't been going to him prior to that time, had they?

A. I don't know.

Q. As I understood you on direct examination, you said Mr. Wade told you he was collecting the rents; are you entirely correct in that?

A. Yes, sir; he said he was getting their rents.

Q. Didn't he tell you he would have these rents turned over to him so they could be applied on the interest?

A. Yes, sir; that is what he said, he was getting the rents.

Q. On his explanation to you of how this \$28,000 note was assigned to him and held as security for the payment of the amount due on these others, you felt it was safe and you put up your money?

A. I thought so or I would not have done it.

Mr. Hartman, the agent of Sturgis, testified:

Q. He [Wade] was to hold that \$28,000 note and mortgage to secure the payment of this?

A. Yes, sir.

Q. That was the agreement at the time?

A. Yes, sir; to be assigned by Despain and secured by this \$28,000 mortgage.

Q. Wade was to hold it as trustee?

A. He was to hold it as security for this note.

Q. Do you know whether or not Mr. Wade collected the rents from this property?

A. I so understood it.

This testimony, taken together with the fact which is testified to by both McLeod and Hartman, that all the interest and moneys paid and credited on the notes came through Wade's hands and were indorsed thereon by him; that appellants' property was sold from time to time, and the mortgages released, with the full knowledge of both McLeod and the agent of Sturgis, and that all money received on the notes came 19 L.R.A. (N.S.)

from such sales and rents; that such sales were made and releases executed without objection on their part, and apparently with their approval, they receiving their portions of the money as applied in payment of interest, etc.,—all furnish strong evidence tending to show full knowledge and notice of all the conditions and terms under which the notes were executed.

But, if it be assumed, as contended by respondents' counsel, that the new notes were executed with the object of thereafter being indorsed and sold by Wade for the purpose of raising the money with which to take up the Teal note and mortgage, it must then be conceded that, for the purpose of making this sale and applying the proceeds as agreed, Wade for the time being was the agent of the Despains, and, in that respect, their trustee, and continued as such until the consummation of the sale of the notes and application of the proceeds as directed. It would then follow that the word "trustee" was added that it might be known there was a *cestui que trust*, and that conditions were to be performed by the trustee for the beneficiaries. Then would not this word attached to the payee's name impart notice, or at least be sufficient to put the purchaser upon inquiry, as to the terms and conditions under which the trust was created? In *Wills v. Wilson*, 3 Or. 310, the court states the rule to be that, "when the circumstances are such as would excite suspicion and naturally attract the attention, a party will be presumed to have been put upon inquiry, and, if he does not inquire, he will be presumed to have known the facts." To the same effect are *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825, and *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. In the case at bar respondents concede that they entered into a combination with several other parties to furnish the money with which to take up the \$28,000 note and mortgages securing it. It clearly appears from the evidence that, in order to do so safely and satisfactorily to all concerned, many conditions were involved. The old note with mortgages securing it was to be assigned to Wade as trustee, to be held to secure the assignees of the new notes which were to be given. He was to receive notes, specifying the various interests of each, with new terms included, and assign them to the various parties advancing the money, as their interest would appear. All the money so furnished was to pass through Wade's hands. In brief, Wade was to be the "go-between" for all parties until the transaction was completed. He became agent for Teal in holding the note and mortgages until the money was paid,

and, under respondents' contention, agent for appellants in procuring the funds to pay Teal, as well as agent for respondents to invest their money. These circumstances, taken together with the word "trustee" added to his name in the notes, were certainly sufficient to attract attention and cause an average business man to closely scrutinize all the terms and conditions under which the entire deal was consummated.

In *Shaw v. Spencer*, supra, Mr. Justice Foster, in discussing this question, says: "Notice of the existence of a trust is, by all the authorities, held to impose the duty of inquiry as to its character and limitations; and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry might have led." Among authorities to the same effect are: *Randolph*, Com. Paper, 1st ed. § 444; *Dan. Neg. Inst.* 5th ed. § 271; *Prather v. Weissinger*, 10 Bush, 117; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98; *Duncan v. Jaudon*, 15 Wall. 165, 175, 21 L. ed. 142, 145; *Union P. R. Co. v. Durant*, 95 U. S. 576, 577, 24 L. ed. 391, 392; *Central Nat. Bank v. Connecticut Mut. L. Insurance Co.* 104 U. S. 54, 26 L. ed. 693; 34 Cent. L. J. 45; *Smith v. Burgess*, 133 Mass. 511; *Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304. A few states appear to hold to the contrary rule. *Indiana* and *Missouri* are cited as holding that words of this nature affixed to the name of a payee are merely *descriptio personæ*. *Speelman v. Culbertson*, 15 Ind. 441; *Powell v. Morrison*, 35 Mo. 244. The consideration and criticism of these cases by subsequent decisions weaken them as precedents. In *Speelman v. Culbertson*, supra, the words, "administrators of the estate of John Babcock, deceased," appeared after the names of the payees; while in *Powell v. Morrison*, supra, the note was payable to one "James Castello, sheriff of St. Louis County." The court in announcing the opinion manifests much doubt as to the correctness of its position, while one of their number dissents. In discussing this question in *Payne v. First Nat. Bank*, 43 Mo. App. 377, Mr. Justice Biggs, speaking for the court, says: "There is a class of cases in this state which hold that a note, payable to a person as executor, guardian, agent, or sheriff, is prima facie the payee's individual property; that the words 'executor,' 'guardian,' etc., are merely *descriptio personæ*; and that such words are not sufficient within themselves to put a purchaser of such a note on inquiry as to the conditions or limitations (if any) of the payee's power to pledge or sell [citing authorities of that state]. The doctrine of the foregoing cases has for its

foundation the reason that, in the execution of such trusts, the law contemplates that it will be necessary to collect or sell the trust property. Upon this reason, the prima facie right of such payee to make any kind of disposition of the note is predicated. But, in our opinion, these cases are not applicable when the negotiation of instruments, or the sale of other property held by a trustee, is involved, and the instrument upon its face discloses the beneficial interest of another." This authority, after quoting with approval from *Shaw v. Spencer* and *Duncan v. Jaudon*, supra, adds: "These authorities are sufficient to show that the powers of a trustee as to the disposition of trust property are quite the reverse of those of an executor, guardian, or sheriff." The appellate court of Missouri, in *Sparrow v. State Exch. Bank*, 103 Mo. App. 347, 77 S. W. 170, also observes: "It must be confessed that the rule declared by the Supreme Court of the United States in *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* supra, and the cases in which it has been followed by that court, cannot be reconciled with that declared in the Missouri cases already alluded to. If the question here had not been authoritatively ruled by our own supreme court, we should be inclined to adopt that declared by the Supreme Court of the United States, since the reasoning in those cases by that great court in favor of the rule therein announced, it seems, are of the most cogent and persuasive nature."

We find on examination of the cases sustaining respondents' contention on this point that most of the authorities upholding that view manifest some doubt as to the soundness of their position. This point has not heretofore been directly before this court; but we find the great weight of authority, as well as the better reasoning, supports the rule that the word "trustee," added to a payee's name in a written instrument, is sufficient to put the purchaser upon inquiry as to all the terms and conditions under which it may have been executed, and, in the absence of such inquiry, knowledge thereof will be presumed. We also deem a recognition of this rule necessary to properly protect the beneficiaries of such trusts; otherwise, under the claim of being a bona fide purchaser through the neglect of the assignee of an instrument to make inquiry, the *cestuis que trust* in many instances would, without fault on their part, suffer great loss. The adoption of the rule here recognized protects the innocent without hardship to investors; while the contrary doctrine offers an inducement to purchasers of this kind of property to neglect making inquiry as to the import of the word "trustee," by which the innocent must often suf-

thority, defendant was liable. On appeal, this decision was reversed, the court holding that, as plaintiff left the bond and mortgage with Purdy for safekeeping, and evidently permitted it to remain for other purposes, allowed payments to be made upon it to Purdy, received the amount of these payments from him and suffered him to indorse them upon the bond, it would be deemed from these facts, coupled with the circumstances attending the origin of the bond and mortgage, that authority to Purdy to receive payments was implied; and observes: "I do not perceive that, if the defendant had taken the precaution to call for the production of the papers whenever he made a payment, he would have strengthened this implication. The authority is implied from the possession of the papers and the continued receipt of money upon them, which are facts, and not from the exhibition of the papers by the agent, which is only the evidence of the facts. . . . To have called for the bond and mortgage under the circumstances of this case would have been a very prudent and proper precaution, but it would have been only a precaution. It would have enabled the defendant to verify the authority of Purdy, but it would have been no more than verifying it."

After a careful consideration of the evidence, as disclosed by the record and law applicable thereto, we can reach no other conclusion than that Wade was the agent of respondents with full authority to collect the sums represented by the notes given, and so collected the money which was paid to him in trust for the benefit of respondents with their full knowledge and assent; and that sufficient having been paid to him in that capacity to cancel the principal and interest of all the notes given, they, together with the mortgages, should be canceled. The prayer of the answers to that effect should, therefore, be granted.

The decree of the court below should be reversed, and one entered here in accordance with these views.

A petition for rehearing having been filed, King, C., on December 31, 1907, handed down the following additional opinion:

Respondents, in their petition for rehearing, contend that we were in error in the statement in our former opinion to the effect that the signatures to the eight promissory notes, made payable to the order of C. B. Wade, trustee, were procured, and notes delivered, after he received the Teal note and mortgages duly assigned to him. It is true that the assignment of the Teal instruments, as well as of the new notes, are dated June 20, 1898, and the written agreement between Wade and appellants is dated the day

following; and, while the \$28,000 draft may have been forwarded to Teal by the Pendleton Savings Bank on July 1st, the money was actually paid to the bank for that purpose, and assignment of note and mortgages recorded, June 30, 1898. It is evident that respondents' counsel make no distinction between the dates as they appear on the instruments in evidence, and the actual time when the various steps were taken, and that they overlook the governing feature that the various transactions, although requiring several days for completion, must be considered as a whole.

On these points various facts and circumstances sustain the conclusion heretofore reached, an instance of which we quote from the testimony of Norborne Berkeley as follows:

Q. At the time this transaction was made, in what capacity, if any, were you acting for Mrs. Despain and the other defendants?

A. I was acting as their agent in handling the affairs of the Despain estate.

Q. Tell the court how it occurred.

A. We owed Mr. Teal, or rather Mr. D. P. Thompson, I think, by a note made to J. N. Teal, \$28,000. I thought there was an understanding we could pay part of it off, and I wrote to Teal and asked if we could sell a ranch and apply the money, and he said, "No." I thought that possibly we might get the money somewhere else, and I went to Mr. Wade. The first time I asked him if he could let us have \$28,000, he said: "No, we haven't got the money now, but can probably let you have it later." And, probably during the same week, I went back to ask him about it, and he said: "Yes, I think we can get the money now, and will let you have it." I told him: "If you will buy this note and hold it and allow us to pay it off in such sums as we can, it will suit us better, as we want to sell certain ranches and apply it whenever we can." He was to give us a lower rate of interest. We were paying 8 per cent, and he agreed to let us have it for 7, for which he would charge us \$1,500. When Mr. Wade told me they had the money, I went down there, and he had some notes prepared in the bank, aggregating \$29,500. The understanding was the first one of the notes paid was to be the bonus note paid to get the money, and get the concession of interest, and to be allowed to pay the matter off as we wanted to. We had been informed that Mr. Teal had sent his note and assignment of his mortgage to the savings bank, so Wade informed me when we went in there. We went down, and he took up the note and assignment of the mortgage, and when we got back he showed me he had this note in his possession. I sur-

rendered him the \$29,500 note, or notes, with the understanding they should be kept together.

Q. Were you acting for them as agent in this transaction?

A. Yes, sir.

Q. You knew those notes were to raise that money to pay off that loan of Teal's?

A. No, I didn't know that they really owed the money before he got the notes; that is, he had the Teal assignment and Teal note before the notes were delivered to him.

Q. You say he had the money when the assignment was delivered to him. How do you know that?

A. I didn't say he had the money. I said he had the \$28,000 note and assignment of mortgage when the notes were delivered to him.

It is argued that McLeod received his note June 29, 1898, and our attention is directed to certain testimony in support of this contention; but the answers cited do not support this theory, nor do we find anything in the record to that effect. True, it is disclosed that McLeod gave a check to Wade on that date for \$7,000, for which he was to receive a note to be executed by appellants; but he does not state that the note was turned over at that time, and it is clear, from the record, that all the money necessary for taking up the Teal note and mortgages was advanced to Wade, and that the Teal instruments had been assigned to and were held by him as trustee when this was done. All of this is consistent with Berkeley's statement to the effect that, when Wade told him he had the money, the notes were then prepared, and, on learning he had the assignment of the \$28,000 note and mortgages, the new notes were then delivered to him. McLeod's check, dated, June 29th, is shown by the stamp of the bank thereon to have been cashed the following day. The testimony of both McLeod and Hartman indicates that it was the understanding between all the parties that the new notes should be secured by an assignment of the Teal note and mortgages to Wade, as trustee, and should be held by him in that capacity; the legal title to remain in him until the \$29,500 consideration expressed in the new instruments should be paid in full, during all of which time the old note and mortgages should continue in full force and effect. By mutual consent he thereby became the holder and owner of the legal title to the indebtedness, as well as the party with whom defendants were expected to deal and to whom they were to make their payments. The claim of \$29,500 was, accordingly, represented by the various instruments in the aggregate, and, as formerly stated, 19 L.R.A. (N.S.)

was in the same position as if the contents, conditions, and effect of all the new instruments and agreements had been written across, or attached to, the old note, and securities and made a part thereof, though the method adopted was more convenient by reason of the separate notes representing and distinguishing their respective interests, etc. It is, accordingly, immaterial whether the signatures of the new notes were secured before or after June 29th, as they were of no binding effect until the entire transaction, including the assignment of the Teal note and mortgages, became complete, which, by relation, antedates the delivery of the notes, and which fact respondents are estopped to question, since the new notes, on which a decree is here sought, contained the indorsement: "This note is secured by a note of \$28,000, signed by same parties, which is secured by real-estate mortgages assigned to C. B. Wade, trustee." It is conceded that this indorsement was upon these notes at the time of their delivery. In fact, it is through this indorsement that respondents maintain their rights to foreclose the Teal mortgages.

It is also necessarily conceded that the old note and mortgages remained in force at least until the new notes were executed, which being true, it follows that, when the new notes were delivered, the Teal note and mortgages, by reason thereof, were either paid or not paid. If not paid, they then remained in full force and effect until the entire indebtedness was liquidated, and, Wade having been made their custodian, and it having been required, as a part of the conditions upon which the money was advanced, that he should hold the same for respondents, it cannot be seriously questioned but that the payments made under such circumstances were made to the party authorized to receive them, and respondents would be bound accordingly. In that event, it would become a purchase outright, concerning which respondents would necessarily be bound by Wade's acts; as much so as if the money advanced had been furnished without the execution and receipt of the new instruments. On the other hand, if the execution of the new notes paid the old debt, it would follow that the former note and mortgages became extinguished, and, while the new notes contain the indorsement that they are secured by the Teal instruments, yet, if paid and extinguished, this fact could be admissible only for the purpose of proving an oral agreement to execute a mortgage to secure the payment of the money advanced, or, what is its equivalent, an oral agreement to revive a mortgage that has been fully paid, to include not only the canceled claim, but an

additional note of \$1,500. Whether such agreement could be enforced in equity is not necessary to a determination of this suit. It is sufficient to observe that respondents do not seek a specific performance of such contract, nor is an issue to that effect disclosed by the pleadings.

But it appears here that the mortgages and note were duly assigned to Wade, and that Teal was paid in full by him with funds advanced by respondents for that purpose, thereby, up to that point, making it a purchase outright. Then, as evidence of the fact that neither the mortgages nor the note were deemed canceled, it was expressly understood and agreed, and so stamped upon each note issued, that it was secured by the old note and mortgages, thus clearly indicating that each was to remain in force and effect, to be available at any time there should be a default in the payment of any portion thereof, in accordance with the terms of the new notes, which not only secured the interest of each of the parties advancing the money with which the Teal note and mortgages were purchased, but contained the additional terms in reference to the interest and the time of payment granted to appellants. We thus find them retaining and using the old note and mortgages through Wade, as holder of the legal title, with which to secure the indebtedness represented by the new instrument. The illustration given by Sturgis's counsel, where a party may be made a trustee by mere operation of law to protect innocent holders of negotiable instruments, is not applicable to the case at bar. The notes here involved are held by persons who, in law as well as in fact, are parties to the agreement whereby Wade was made their trustee, and where, by express agreement stamped on the notes, it is provided that the old instruments shall secure the payment thereof, and that this security was to be held by this expressly created trustee. In the one instance the trustee is created by operation of law, and, in the other, by an express and implied agreement of all concerned. The act of Wade (in his effort to perfect the deal and thereby make certain the \$1,500 bonus, which he would otherwise have lost), in guaranteeing the payment of some of the notes, is not in any manner inconsistent with his position as agent for respondents during the transaction as well as after it became complete. Nor are we aware of any rule precluding an agent from guaranteeing to his principal the payment of claims handled by him for such principal, especially, as in this case, where the agent was to be one of the beneficiaries in conjunction with the parties whom he was to and did represent. In this case, it appears that he

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was not only willing to guarantee the payment of some of the notes, but also consented to retain the old note and mortgage security, and that he received moneys from time to time, all of which constituted a means of aiding and insuring the payment of not only the full amount of money advanced, with interest, to the parties furnishing it, but his bonus as well, in proportion to the respective interests of each, thereby furnishing additional security to respondents for the money advanced by them. It is hardly possible, nor is it reasonable, to assume that Wade was acting in any other capacity than as their agent, or to assume that, after the transaction was completed, he was agent for appellants in reference to matters here involved, for to do so would be to accept the conclusion that respondents adopted an extremely unbusinesslike method in this instance by retaining only the new notes, and through Wade, as appellants' agent, permitting the payors and mortgagors to retain the mortgage security. The mere statement of this theory is sufficient for its answer.

It is also urged that there is nothing in the evidence of either of the parties indicating any agreement to the effect that the proceeds of the sale of the lands should be paid to Wade, and by him applied on the mortgage indebtedness; it being insisted that the proceeds received from the rent only could be thus considered. After a re-examination of the testimony, we find that the conclusion reached on this point in our former opinion is not only clearly deducible from the proceedings taken as a whole, but is manifest from the testimony of McLeod, as well as of Hartman, Sturgis's agent.

McLeod, after stating that Wade was to hold the old note and mortgage as security for the notes, was asked:

Q. Did he tell you anything about having these other notes further secured by having the city rents turned over to him?

A. I asked how he was to pay the interest on these notes. He said the rents was to come to him, and, if any of the property was sold, they would apply it on these notes. That is the reason he gave on or before five years after date, so they could have a chance to sell it.

Q. He also told you he would have these rents assigned to him to apply on the notes?

A. He said he could pay the interest because he was getting the rents.

Q. How did you get your interest payments you have on there? How was it paid to you and by whom?

A. He gave that credit on the back of them, and he made a memorandum of it always and held it, and always gave me credit on the back for it.

Q. Then you would bring in the note, and he would indorse the amount on the back?

A. Yes, sir.

That McLeod knew of the transactions going on, and received the benefits, without objection, is manifested by the following question propounded to him, and his answer thereto: "Did you ask him (Wade) about any releases of mortgages he had made at any time? A. He said he was releasing property." That Sturgis knew of the transactions, and with such knowledge recognized Wade as her agent and received the benefits thereof during all of this time, clearly appears from the various facts and circumstances disclosed by the record, for example: She authorized Wade to draw \$7,000 from her bank account with which to procure the Teal note and mortgages securing the same. Both she and McLeod understood that Wade should collect and receive the rents of the mortgaged property, that the debt should be paid in instalments, and that Wade would hold the Teal mortgages as security for respondents' notes. They were largely interested in the bank in which he was cashier and trusted him with the money.

They went to him for their payments, and never approached the appellants, or any of them, and, in addition to these circumstances, Mr. Hartman, the agent of Sturgis, says:

Q. Tell us what Mr. Wade told you about that note.

A. He said he was taking it up,—this large note of Teal's for \$28,000,—and wanted to handle it here at a reduced rate of interest, so that when the rents were collected, and any property sold, it could be applied on the payment of the notes in partial payments.

Here we have the purpose made known to Hartman before the deal was consummated, which, being followed with the making of Wade trustee for all, and acceptance of the note with statement indorsed thereon, through which she, with others interested, seek this foreclosure, makes the conclusion inevitable that Sturgis, with other respondents, in law, as well as in fact, recognized Wade as her agent; and, while Wade, during the transaction until its completion, was the pivot around which all the parties to the deal were acting, and to whom they looked for its proper consummation, his relationship with appellants, so far as the questions here involved were concerned, was at an end on its completion, and he thereafter continued as the agent of respondents only. He was made the custodian of, and held the legal title to, the Teal note and mortgages on which appellants, by agreement, oral and written, were bound to pay 19 L.R.A. (N.S.)

all rents and proceeds of sales to him, and, in accordance therewith, all payments were made to him, which acts respondents, to say the least, impliedly approved and did not question so long as they received the benefits, but seek to avoid that part of the arrangements, thus made and recognized, which may appear to be to their injury. It is settled that such cannot be sanctioned by courts of equity. Respondents, under such circumstances, are estopped from questioning Wade's authority to receive payments from defendants on this indebtedness, and that he was acting as their agent throughout the proceeding. It is too well settled to admit of serious discussion that the principal must adopt or reject the act of his agent as an entirety, and cannot receive the benefit of such agency without bearing its burdens. *Coleman v. Stark*, 1 Or. 116; *La Grande Nat. Bank v. Blum*, 27 Or. 215, 41 Pac. 659.

We are quoted, in effect, as saying that all oral agreements between the parties were subsequently reduced to writing. In this deduction counsel are in error; our statement being that, as a part of the transaction, an agreement was entered into concerning the collection and disbursement of rents, which was afterwards reduced to writing, being the instrument there quoted. But we neither said, nor meant to say, that all the transactions were included in the written contract, as many took place afterwards. Nor was it necessary, under the status of the parties at the time suit was brought, that the written instruments should have included all dealings between them. Lands were sold and mortgages released, and the proceeds thereof having been accepted, and the oral agreements executed and acted upon, is sufficient to take the case out of the statute of frauds. In fact, it is too well settled to admit of serious doubt that agreements, whether oral or partly oral only, when once executed, are binding on all parties thereto. As formerly stated, the old note, although in Wade's possession, is treated and recognized, not as evidence merely, but as having sufficient life to continue the mortgages in force and to entitle respondents to maintain this suit for their foreclosure, but for all other purposes is treated as extinguished, for, if available only as evidence of the existence and effect of the mortgages, it is to no purpose, as it could only tend to prove an intent to revive a canceled instrument, for which purpose it would be insufficient. In this connection, it must be remembered that this is not an action on the notes, but a suit to foreclose the mortgages.

It is urged by counsel for Mrs. Sturgis that, as she did not file this suit, the statement in our former opinion to the above

effect, to use counsel's language, "has been washed away by an avalanche from the record itself." True, she did not bring this suit, and appears only as one of the defendants; but, notwithstanding that feature, she has no interest in common with appellants, and was made a defendant only because of having an interest in the subject-matter involved, and by reason of refusing to join as one of the plaintiffs. Although a defendant, she affirmatively pleads and formally sets up her interests, and makes similar averments and seeks the same relief as the plaintiffs. From this, it follows that, whether she be termed a plaintiff or defendant, or whether she joined in the filing of the suit, or subsequently saw proper to move and assert similar rights in the same manner through the same source, it is immaterial, and, to say the most in favor of counsel's contention in this respect, is what might be termed a "distinction without a difference." The inconsistency of her position is manifest, whether we say, "for the purpose of bringing this suit," etc., or adjust our statement to what is, in effect, counsel's position on this point, and say, "for the purpose of seeking a decree of foreclosure in her favor, she recognizes the old note as having sufficient life to entitle her to foreclose the mortgages for which she recognizes Wade as her trustee, but considers the note extinguished, and denies Wade's trusteeship for any other purpose."

The transactions shown in this case clearly bring it within the principles announced and recognized in *Wills v. Wilson*, 3 Or. 308; *Coleman v. Stark and La Grande Nat. Bank v. Blum*, supra; *Swegle v. Wells*, 7 Or. 222. And these decisions on the points here involved are in harmony with the great weight of cases in this country, many of which are cited in our former opinion. As is in effect clearly held in *Swegle v. Wells*, supra, "the ordinary rules relating to commercial paper," referred to by counsel for McLeod, cannot apply to such cases; nor can it make any difference that the verdict of the jury in that case, to which our attention is directed, was left undisturbed, as the conclusion here reached is in harmony with the result there, both as to the law and the facts under consideration.

Other points upon the merits are urged by counsel for respondents, but all of them, like some we have here re-examined, are discussed in our former opinion, and sufficient reasons are not advanced to entitle them to further consideration. Our attention, however, has been especially directed to the moneys paid to Wade by appellants, concerning which it is maintained that his receipts are insufficient to cancel the indebtedness. In this connection, our attention is

called to the "Wade-Despain trust account," by reason of which it is claimed that an agency is shown between Wade and defendants; that it shows a deposit to the credit of that account of \$46,313.78 and a payment to the owners of the new notes of but \$18,650; that this account discloses \$7,000 yet due on the McLeod note, and \$1,157.45 on the Sturgis note; and that the balance of the deposits was applied in payment of interest on the notes, taxes, and insurance for defendants, including moneys paid to the Berkeleys and Despains and in the cancellation of a certain note and mortgage on defendants' property in Union county, showing disbursements from this fund of \$1,501 more than received. The fallacy in this contention lies in assuming that appellants are bound by everything shown by the books and checks relative to the Wade-Despain trust account. This account was adopted by Wade after he had entered upon his duties as trustee for the holders of the new notes, and was merely a method adopted for his own convenience, over which appellants had no control. The money was paid to Wade, out of which certain sums were to be first paid, such as the \$150 per month to Mrs. Despain and payment of taxes, etc., in accordance with the understanding of all; but it was immaterial to her, as well as to the other appellants, as to how the account was kept in the bank after having been paid to the party entitled to receive it. All in excess of the sums to be expended under the written agreement was paid to him for the purpose of reducing the principal and interest on the indebtedness covered by the mortgages, and was under the control of Wade only. He held the mortgages and original note, neither of which was extinguished until fully paid. Appellants, accordingly, paid the money to the holder of the legal title thereof, and it was not incumbent upon them to see that it was credited on the proper instrument. *Swegle v. Wells*, supra; *Hatfield v. Reynolds*, 34 Barb. 612. The question as to the application of moneys received on the debt when collected by Wade became a matter between him and respondents only, and, if applied as it should have been, the debt was canceled, while, if not so applied, the effect, so far as the same may affect appellants, must be determined according to, and under, the well-known maxim that "equity looks upon that as done which should have been done," which would entitle the notes and mortgages to cancellation. In respect therefore to this account, it was opened by Wade as a trustee, and he thereby became the depositor, and, as such, alone had authority to draw upon it. A large part of the money deposited to the credit of this account is shown to have been

paid to him by check, which checks were made payable to his order as trustee. The money therefore paid to, and received by, him was received in his trust capacity, and, so far as any part thereof was paid to appellants or disbursed on expenses of the trust, they are properly chargeable, but, so far as not thus paid, are chargeable against respondents. The books, statements, etc., showing the condition of the account, constitute admissions against his interest as trustee. and, as such, was properly admitted in evidence for the purpose of showing the payments to him to be applied on appellants' indebtedness, for which they are accordingly entitled to credit thereon to the full amount of the sums shown by this account, as well as those disclosed by any other statements or receipts to have been received by him, in excess of disbursements made to and for them under their agreement. The moneys therefore drawn from this account, which are properly chargeable to the appellants, are the sums paid to Mrs. Despain for her support, to the Berkeleys for collecting rents, and for taxes, insurance, repairs, etc., amounting to \$17,756.50.

After a careful re-examination of the accounts, statements, deposit books, etc., showing receipts and disbursements by Wade, under his trust, we find the sums for which respondents are chargeable to be as follows: June 29, 1898, eight notes payable to Wade, as trustee, aggregating \$29,500; interest on same to December 30, 1904, date of last credit, \$13,422.50; aggregate amount paid to N. E. Despain, \$8,500; amount paid to Norborne Berkeley, \$1,470.75; amount paid to C. Berkeley, \$129.35; amount paid for insurance, taxes, repairs, etc., \$4,644.04; aggregate interest on last four sums (approximate), \$3,425,—total, \$61,091.64. Moneys received by Wade, as trustee, from appellants and their agents, are as follows: Between July 29, 1898, and September 11, 1903, cash from Snyder, \$13,685.69; July 18, 1898, cash from La Fontaine, \$5,500; March 7, 1899, paid to C. B. Wade from sale of Grande Ronde ranch, \$8,000; March 30, 1899, from sale of other property, \$3,500; September 4, 1899, cash from Campbell from sale of land, \$302; September 8, 1903, cash from Florence Berkeley, \$1,408; December 8, 1903, cash from Peringer, \$1,050.84; aggregate amount of interest on these payments from date of each thereof, \$11,414.80; total amount of rents collected, \$17,756.50,—total credits, \$62,617.83. It will be observed, therefore, from the statements, books, etc., introduced in evidence, that Wade, as trustee, received from appellants and for respondents, to be applied in the payment of the instruments secured by the

mortgages, about \$1,200 more than sufficient for the cancellation thereof.

It is urged, however, that the item of \$3,500 was a loan to Wade by appellants, and that they should not be credited with this item; but we find nothing in the record to justify this inference, nor is there anything in the statement made by Berkeley to Hartman, testified to, when considered in connection with Berkeley's explanation thereof, to justify such conclusion. In fact, the receipt itself, which it is conceded was given for the money, is sufficient to rebut counsel's theory; it being as follows:

Pendleton, Oregon, Mch. 30, 1899.

Received from the Despain estate on account of Wade trustee mortgage, against the estate property, thirty-five hundred dollars to be applied on notes in final settlement—interest in accordance with terms of mortgage.

C. B. Wade, Trustee.

It is also contended that the \$8,000 received from the sale of the Grande Ronde ranch should not be applied on respondents' claim. This again overlooks the legal effect of the agreement by which Wade was made the holder of the legal title to the Teal note and mortgages, which were not to be deemed canceled until the entire amount represented therein should be paid. The evidence discloses that this land was sold and deeded to Wade by the Despains for the consideration of \$8,000 over and above the mortgage liens thereon, under an express agreement that this sum should be applied on the mortgage indebtedness held by him against them, and that the deposit books of the Wade-Despain trust account show that he received this money from them, placing it to the credit of this fund. This transaction was the same in effect as if the Despains had sold the farm, subject to the mortgage, to any other person, and paid the \$8,000 received therefor to Wade on the mortgages, and he, in place of paying it to respondents under his trust, had loaned it to the purchaser, or to any other person with which either to cancel the lien on the farm sold or for any other purpose. In short, the question as to what he may have done with this or any other fund received from appellants for application on the mortgage indebtedness became, under the record herein, a matter for adjustment between the respondents and Wade, as their agent, and could not, as a matter of law, concern appellants.

Under any construction that may reasonably be applied to the evidence, as well as from any inference that may logically be deduced from the record, it appears that more than sufficient funds have been paid to the

Esq., now cashier of the Exchange National Bank of Pittsburgh, Pennsylvania, J. M. Brownson, Esq., now in the employment of Messrs. Shoenberger, Speir and Co., of Pittsburgh, Pennsylvania, and Anthony J. Antello, Esq., of Philadelphia, Pennsylvania, as co-executors of this my last will and testament, for all that portion of my estate, real and personal, and effects and interests in the states of Pennsylvania, Ohio, Kentucky and Illinois, and of any property that may be transferred to them upon the close of the administration of my estate in the state of New York by my executors hereinbefore appointed by me for that state." The entire personal estate of the decedent remaining after the provision for his wife, together with the proceeds of his real estate, which he directed his Pennsylvania executors to convert into money, passed into their hands. They filed nine accounts in the court below; the last involving nothing but the residuary estate. All of the pecuniary legacies, except those given in the residuary clause, were paid on the adjudications of the prior accounts; the eighth having been adjudicated on December 10, 1897. At that time there was a balance of \$81,332.39, and it was directed to be held for a further account. It is concluded in the last account, showing a fund in the hands of the accountants of \$272,276.63, out of which they are directed to pay to the appellant a bequest of \$250,000.

Though the bulk of the personal estate of the testator, including the proceeds of the sale of the real estate, passed into the hands of the Pennsylvania executors, the commonwealth made no claim for collateral-inheritance tax on the legacies heretofore paid by them, amounting to \$1,326,000. In October, 1891, a collateral-inheritance tax of \$25,750 was paid "as per compromise" on \$515,000, the appraised value of testator's real estate situated in this state, and, on the final distribution of the residuary estate, the court below deducted \$12,500, or 5 per cent, from the bequest to the appellant, holding that, though the commonwealth had not been entitled to the tax of \$25,750 paid on the real estate, the appellant's legacy of \$250,000 was liable to tax under Lewis's Estate, 203 Pa. 211, 52 Atl. 205, and deducted the same from it. to the relief of the final distributees of the residuary estate. The single question before us is the correctness of this ruling. From all that appears, the collateral-inheritance tax of \$25,750 may have been paid upon the real estate of the testator, which he specifically devised; but, assuming it to have been upon that sold by the executors, the learned judge of the orphans' court correctly held that the commonwealth was not entitled to collateral-inheritance tax upon it 19 L.R.A. (N.S.)

(Coleman's Estate, 169 Pa. 231, 28 Atl. 137), and, this being so, Lewis's Estate is not authority for relieving the final distributees at the expense of the appellant.

The final distributees of the residuary estate having permitted the tax of \$25,750 to be paid to the commonwealth, they cannot now ask that \$12,500 be deducted from appellant's legacy, to their relief. They ought to have protected themselves at the proper time. Even if the tax had been properly paid, there is no reason why appellant's legacy should bear the burden of nearly half of it, instead of its just proportion, as one of many legacies amounting in the aggregate to more than \$1,500,000.

The liability of the property of a decedent to collateral-inheritance tax is to be determined by its situs at the time of his death. The words of our collateral-inheritance tax act of May 6, 1887 (P. L. 79), are: "All estates, real, personal, and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seised thereof be domiciled within or out of this state, and all such estates situated in another state, territory, or country, when the person or persons dying seised thereof shall have their domicile within this commonwealth, passing from any person who may die seised or possessed of such estates, either by will, or under the intestate laws of this state, or any part of such estate, or estates, or interest therein, transferred by deed, grant, bargain, or sale, made or intended to take effect in possession or enjoyment, after the death of the grantor or bargainor,* to any person or persons, or to bodies corporate or politic, in trust or otherwise, other than to or for the use of father, mother, husband, wife, children, and lineal descendants born in lawful wedlock, or the wife or widow of the son of the person dying seised or possessed thereof, shall be and they are hereby made subject to a tax of \$5 on every \$100 of the clear value of such estate or estates." The situs of the personal property of this testator at the time of his death was in New York, for it was all actually "situated" there, except the proceeds of the real estate which he directed to be converted into money; and this must be regarded as part of his personal estate situated in his domicile, for the status of property at the instant of death must govern the question of tax. *Re Handley*, 181 Pa. 339, 37 Atl. 587. At the instant of the testator's death, his real estate, which he had directed to be converted into money, became, by operation of law, so converted, and all of the personal estate belonging to him was therefore either actually or by legal fiction within the state of New York. None of it having been "situated" here at the time of his death, the

commonwealth had no claim upon it for collateral-inheritance tax. The domicile of the testator, at the time of his death, was the situs of his personal estate, and that situs, and not what he directed to be done with his estate, is the sole test of the right of this sovereignty to tax it. The state taxes, and can tax, only what is within it at the time of the death of the owner of it. *Lewis's Estate*—not a convincing authority—was decided upon its own peculiar facts, and is not to be stretched, as it manifestly was by the court below, in extending it to the present case. The actual situs of the property of Harriet E. Lewis, which she directed to be distributed among collateral legatees, was at the time of her death, and had been for many years prior thereto, within this state, in the custody and control of her agents here, empowered to invest and reinvest it, and the executor, legatees, and foreign creditors requested that there should be in Luzerne county, through its orphans' court, "a complete administration and distribution of the whole estate comprehended in the account." No such situation is presented here, and there is not even the analogy which the learned judge below seemed to think existed of "the legatee now coming, by counsel, before the court and asking for payment in full." The appellant did not even appear before the adjudicating judge to claim the legacy, according to the appearances noted by him. Its first appearance by counsel, so far as can be gathered from the record, was before the court in banc on exceptions to the adjudication, to resist the attempt of the appellees to have \$12,500 deducted from its legacy.

The decree of the court below is reversed, the exceptions to the adjudication are overruled, and the same is confirmed; the costs on this appeal to be paid by the appellees.

PENNSYLVANIA SUPREME COURT.

RE ESTATE OF WILLIAM R. LINE, Deceased.

APPEAL OF LUTE A. LINE.

(221 Pa. 374, 70 Atl. 791.)

Wills — half-brother — rights.

1. A half-brother takes no interest in testator's real estate under a will directing the estate to be divided among testator's heirs according to the intestate laws, where such laws permit persons of half blood to share in personalty but not in realty, although the will refers to him as "my brother," and a codicil gives him certain stock in addition to what has been given him as heir or distributee under the will.

Same — heirs — meaning.

2. The word "heirs" in a will may be 19 L.R.A. (N.S.)

held to refer to those who should participate in personalty as well as in realty, where the intention was to dispose of the whole property; and an interpretation which would exclude them from sharing in personalty would result in intestacy as to the major part of the estate.

(May 11, 1908.)

APPEAL by exceptant from a decree of the Orphans' Court for Cumberland County dismissing exceptions to the report of the auditor appointed to distribute the fund in the hands of the executors of William R. Line, deceased, which refused to recognize exceptant's right to share in decedent's realty. Affirmed.

The facts are stated in the opinion.

Mr. E. M. Biddle, Jr., for appellant:

The intention of a testator, expressed in his will, and fairly drawn from it, must govern the construction of it.

Graham v. Graham, 3 Clark (Pa.) 216; *Baker's Appeal*, 115 Pa. 593, 8 Atl. 630; *Ashburner's Estate*, 159 Pa. 545, 28 Atl. 361; *Wright v. Brotherton*, 2 Rawle, 133;

Note. — Research has disclosed no other case in which the effect of a reference to a brother or sister of the half blood as a "brother" or "sister," upon the right to take under a devise or bequest to "heirs" or "next of kin," has been considered. The question is, of course, purely one of the testator's intention; and instances are not wanting in which reference to a person not properly belonging in a class, as being a member of that class, has been held to entitle him to take under a subsequent gift to the class. See, for example, the case of *Hall v. Wiggint*, 67 N. H. 89, 29 Atl. 671, in which the testator, after making provision for his wife, went on to provide that at her decease or marriage his estate should "descend and be distributed among nearest relations as follows;" thereupon giving various amounts to his brothers and sisters, half-brothers and half-sisters, and to a sister-in-law; and further provided that, if the estate should amount to more than the legacies given, "the surplus shall be equally divided among my nearest relations . . . share and share alike." It was held that the will plainly expressed an intention of the testator that the surplus should be divided among all the persons to whom the legacies were given; the court saying: "There is nothing indicating that the testator used the words 'nearest relations,' in the clause disposing of the surplus, as embracing different persons from those named by him as nearest relations in the preceding clause in making the bequests. The persons there intended by the words 'nearest relations' are specifically named. Having designated who were his nearest relations, it is not to be assumed that the testator used the phrase with a different intention in the next clause of the will."

The learned counsel for the appellant very properly concedes that parol evidence was not competent to explain the will or show the intention of the testator. The will is sufficiently definite, and speaks for itself. It may be, as claimed by the appellant's counsel, that the testator intended that his half-brother should receive the share of a brother of the whole blood, but he has not so clearly manifested such intention as to warrant the court in declaring it.

The assignments of error are overruled, and the decree of the court below is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

UNITED STATES EXPRESS COMPANY,
Plff. in Err.,
v.
KRAFT.

(— C. C. A. —, 161 Fed. 300.)

Street railway — collision with obstruction — negligence.

That a person chose to board a street car after it was in motion, and was therefore on the running board looking for a seat when the car reached an obstruction near the track, which was in plain view, when he might have boarded the car before it started and gained a seat inside the car, or might have stopped the car and gained one, was not negligence as matter of law, so as to preclude his holding the person responsible for the obstruction liable for the injury resulting from collision therewith; but the question of his negligence was for the jury.

(May 13, 1908.)

ERROR to the Circuit Court of the United States for the Middle District of Pennsylvania to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Note. — As to duty of street car company to a passenger on running board, see case note to *Gregory v. Elmira Water, Light, & R. Co.* 18 L.R.A.(N.S.) 160.

As to contributory negligence of passenger in riding or standing on running board of street car, see case notes to *Burns v. Johnstown Pass. R. Co.* 2 L.R.A.(N.S.) 1191, and *Harding v. Philadelphia Rapid Transit Co.* 10 L.R.A.(N.S.) 352.

Riding on platform of street car as negligence, see case note to *Capital Traction Co. v. Brown*, 12 L.R.A.(N.S.) 831.

Riding on platform as affecting right to recover for injury through accident to train or car, see case note to *Miller v. Chicago, St. P. M. & O. R. Co.* 17 L.R.A.(N.S.) 158, 19 L.R.A.(N.S.)

Argued before Dallas, Gray, and Buffington, Circuit Judges.

Mr. J. J. Woodward for plaintiff in error.

Mr. John M. Gorman for defendant in error.

Dallas, Circuit Judge, delivered the opinion of the court:

This was an action by the defendant in error, hereinafter called the plaintiff, to recover damages for personal injuries sustained by him, which he alleged were caused by negligence of the plaintiff in error, hereinafter called the defendant; and the latter concedes that "the sole question before this court is whether the plaintiff was guilty of contributory negligence which precluded recovery."

During the afternoon of June 4, 1906, the plaintiff boarded a moving street car, which had just left the beginning of its route at the corner of Broad and South Wyoming streets, in the city of Hazleton. It was an open car, with cross seats and a running board on the side. It was somewhat crowded, but the plaintiff believed he could get a seat inside, and intended and attempted to do so, although he was still wholly or partly on the running board, when, after the car had gone about 127 feet, a point opposite to the place of business of the defendant was reached. There one of its express wagons, with horse attached, was standing between the track and the curb, and the shaft of this wagon struck the plaintiff, threw him from the car, and seriously hurt him. It is probable that the projection of the shaft over the running board of the car resulted from some immediate movement of the horse; but whether it did or did not is unimportant, for in either case it might have been prevented by due care in placing the wagon and securing the horse, and the plaintiff had a right to assume that such care had been taken.

The learned judge dealt with the subject of contributory negligence in a manner quite as favorable to the defendant as it had any right to expect. He told the jury that "everyone is called upon to exercise the best judgment he can, by using his eyes and his senses, to keep out of danger;" and this he said with express reference to the claim of the defendant that "the plaintiff could see the obstruction in the street there, that it was in plain view when he was getting on the car, . . . while the car was moving, and that he ought to have noticed it and avoided putting himself in that way in a place of danger." And he added: "If

this accident really is the fault of the plaintiff, because he put himself in a place of danger, he cannot recover; but, if he exercised the care that anyone would, any person of judgment,—all the care that could reasonably be expected of him,—and the defendant is found to have been negligent, then a complete case would be made out here, which would entitle him to a verdict.”

And this statement, in substance, was reiterated in answering the points submitted by counsel, as, for instance, in saying: “You must find that the defendant was negligent. If you at the same time find that the plaintiff was negligent, also, your verdict would be for the defendant. You have got to find both those points in favor of the plaintiff before he is entitled to your verdict.”

Thus the question of contributory negligence was clearly and correctly submitted to the jury, and we cannot assent to the proposition that the court erred in refusing to decide that, upon the defendant's hypothesis of fact, negligence *per se* on the part of the plaintiff had been shown. Assuming “that the plaintiff chose to board a moving car when he might have got a seat before it started, or have stopped the car and got a seat after it had started, and would then have been safe, and the obstacle which struck him while on the running board was in plain view,” yet it was for the jury to say whether these incidents, taken in connection with all the circumstances, did or did not constitute negligence in fact. They did not establish its existence as matter of law. It is true that, where contributory negligence of either class is so conclusively proven that a verdict for the plaintiff, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. But the rule generally applicable, and which was rightly applied to this case, is that, as the question of negligence on the part of the defendant is one of fact for the jury to determine, under all the circumstances of the case and under proper instructions from the court, so, also, is the question of whether there was negligence on the part of the plaintiff, which was the proximate cause of the injury. *Randall v. Baltimore & O. R. Co.* 109 U. S. 482, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Washington & G. R. Co. v. Harmon* (*Washington & G. R. Co. v. Tobriner*) 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557.

The judgment of the Circuit Court is affirmed.

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UTAH SUPREME COURT.

STATE OF UTAH, Respt.,
v.

J. E. BAYER et al., Appts.,

(— Utah, —, 97 Pac. 129.)

Commerce — license — validity.

1. A statute forbidding, without license, the canvassing for or selling by sample of goods made in another state, after they have been shipped into the state passing the statute, while permitting such canvassing for domestic goods, violates the commerce clause of the Federal Constitution.

License — discrimination.

2. A state cannot impose a tax on the right to sell to users and consumers by sample goods shipped into the state, and permit sales of such goods to merchants and persons not users and consumers without license.

Commerce — license — canvassers.

3. The state may make the license tax on the right to sell certain classes of goods by sample to consumers by canvassing from house to house apply to goods shipped from foreign states, when it applies equally to those of domestic origin.

License — inequality — validity.

4. A state statute imposing a heavy license tax upon the right to canvass from house to house for a certain limited number of articles not produced or manufactured within the state, and not injurious to health or morals, for the apparent purpose of favoring resident merchants with established places of business, violates the provisions of the Federal Constitution against abridging the privileges or immunities of citizens of the United States, and denying equal protection of the laws.

(August 14, 1908.)

Case Note. — License or occupation tax on hawkers and peddlers, and persons engaged in soliciting orders by sample or otherwise, as a violation of the commerce clause.

The decision in *STATE v. BAYER* that a statute requiring a license to be obtained to canvass for goods not of domestic manufacture after they have been shipped into the state, but permitting the canvassing for domestic goods without a license, is not constitutional, while in conformity with the long-established principle that any discrimination against goods because of their extra-state origin constitutes a burden upon interstate commerce, appears to be a novel application of such principle.

Historically viewed, the cases bearing upon the question stated present a number of series of decisions, each series involving some particular feature of the general question, usually culminating in a pronouncement of the United States Supreme Court, and tailing off into applications of the Su-

APPEAL by defendants from a judgment of the District Court for Davis County imposing a fine upon them for violating the statute requiring a license of persons canvassing for certain manufactured articles. Reversed.

The facts are stated in the opinion.

Messrs. Arthur C. Lyon, Van Cott, Allison, & Riter, and J. R. Haas, for appellants:

A state statute which prohibits by its express terms or by its necessary operation the taking of orders by nonresidents for lawful subjects of commerce in other states, or which imposes a license tax upon drummers or agents selling goods by sample or otherwise, or soliciting trade, or taking orders therefor, is a regulation of commerce, and is unconstitutional and invalid.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leloup v. Mobile, 127

U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Corson v. Maryland, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Re White, 11 L.R.A. 184, 3 Inters. Com. Rep. 531, 43 Fed. 913; Re Spain, 14 L.R.A. 97, 3 Inters. Com. Rep. 738, 47 Fed. 208; Ex parte Loeb, 72 Fed. 657; Re Bergen, 115 Fed. 339; Julius Kessler & Co. v. Perilloux, 127 Fed. 1011; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; Ex parte Massey, 49 Tex. Crim.

preme Court decision in various cases, whereby its principle becomes thoroughly incorporated into the body of our jurisprudence. The decisions herein set forth are arranged with reference to the various points that have come under discussion, rather than with reference to the particular occupation upon which it was sought to impose a license or tax; and decisions which have so clearly been rendered obsolete that their statement herein at length would be without present value will be merely referred to in passing for the purpose of characterizing them as such.

Discrimination against manufactures or products of other states.

The view that a state may constitutionally discriminate, in imposing license and occupation taxes, in favor of its own manufactures or products, which was adopted in Seymour v. State, 51 Ala. 52, on the ground that the state has power to encourage manufactures within its own borders, failed to meet with the approval of the United States Supreme Court.

The first case in that court involving the point was Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449, in which it was contended that a statute prohibiting the sale, within a certain district of the state, of goods other than agricultural products and articles manufactured in the state, by persons not residents in the state, without first obtaining a license, was repugnant to the commerce clause. The case, however, was decided upon the ground that the statute was repugnant to the constitutional provision that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; Mr. Justice Bradley filing a separate opinion in which he said that he thought such statute violated the commerce clause, and would do so although it imposed upon residents the same burden for selling goods by sample as is imposed on

nonresidents, and therefore dissented from any expression in the opinion of the court which in any way implies that such a burden, whether in the shape of a tax or penalty, if made equally upon residents and nonresidents, would be constitutional.

The question was squarely met and disposed of in Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347, reversing 55 Mo. 288, in which it was held that a statute requiring the payment of a license tax by persons who deal in the sale of goods, wares, and merchandise which are not the growth, product, or manufacture of the state, by going from place to place to sell the same in the state, and requiring no such license tax from persons selling in a similar way goods which are the growth, product, or manufacture of the state, was in conflict with the power vested in Congress to regulate commerce.

And in Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565, reversing 33 Gratt. 898, it was held that a statute imposing a license tax on any person who shall sell, or offer for sale, the manufactured articles or machines of other states or territories, unless he is the owner thereof and taxed as a merchant, or take orders therefor, on commission or otherwise; and declaring that all persons other than resident manufacturers or their agents, selling articles manufactured in the state, shall pay a license tax, was held to amount to a regulation of interstate commerce; the court saying: "Here there is a clear discrimination in favor of home manufacturers, and against the manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and, if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the state, it is to that extent a regulation of commerce in the articles between the states. It matters not whether the tax be laid directly upon the

Rep. 60, 122 Am. St. Rep. 784, 92 S. W. 1086; Clements v. Casper, 4 Wyo. 494, 35 Pac. 472; State ex rel. Selliger v. O'Connor, 5 N. D. 629, 67 N. W. 824; Ex parte Rosenblatt, 19 Nev. 439, 3 Am. St. Rep. 901, 14 Pac. 298; Ft. Scott v. Pelton, 39 Kan. 764, 18 Pac. 954; Martin v. Rosedale, 130 Ind. 109. 29 N. E. 410; Bloomington v. Bourland, 137 Ill. 534, 3 Inters. Com. Rep. 667, 31 Am. St. Rep. 382, 27 N. E. 692; Wrought Iron Range Co. v. Johnson, 84 Ga. 754, 8 L.R.A. 273, 3 Inters. Com. Rep. 140, 11 S. E. 233; Ex parte Murray, 93 Ala. 78, 3 Inters. Com. Rep. 574, 8 So. 868.

A state statute is unconstitutional and invalid which expressly gives a preference to goods manufactured within the state, or which makes a discrimination against non-residents, or against goods manufactured or grown outside the state.

Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Welton v. Missouri, 91 U. S. 275, 23

articles sold or in the form of licenses for their sale. If, by reason of their foreign character, the state can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several states."

In Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, reversing 53 Mich. 264, 18 N. W. 807, it was held that a state law imposing a specific tax on persons engaged in the business of selling liquors at wholesale, or of soliciting or taking orders for such liquors to be shipped into the state, not having their principal place of business in the state, without imposing a like tax upon persons engaged in the like business in reference to liquors manufactured in the state, was unconstitutional as discriminating unfavorably against the citizens and products of other states, and therefore being a regulation of commerce.

In accordance with the doctrine enunciated in the foregoing decisions, the following statutes and ordinances have been held unconstitutional as violating the commerce clause:

In Re Watson, 15 Fed. 511, a Vermont statute requiring peddlers to obtain a license, and providing that no person should be deemed a peddler by reason of selling articles of goods, wares, or merchandise which are the manufacture of the state, except plated or gilded wares, jewelry, clocks, and watches.

In Vines v. State, 67 Ala. 73, a statute requiring licenses for certain occupations to be obtained, which, by its terms, did not

L. ed. 347; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Re Watson. 16 Fed. 511; Re Schechter, 4 Inters. Com. Rep. 849, 63 Fed. 695; Rodgers v. McCoy, 6 Dak. 238, 44 N. W. 990; State v. Pratt, 59 Vt. 590, 1 Inters. Com. Rep. 299, 9 Atl. 556; Vines v. State, 67 Ala. 73; Sipe v. Murphy, 49 Ohio St. 536, 17 L.R.A. 184, 31 N. E. 884; Ames v. People, 25 Colo. 508, 55 Pac. 725; Brooks v. Mangan, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633; State v. McGinnis, 37 Ark. 362; Marshalltown v. Blum, 58 Iowa, 184, 43 Am. Rep. 116, 12 N. W. 266; Com. v. Caldwell, 190 Mass. 355, 112 Am. St. Rep. 334, 76 N. E. 955, 5 A. & E. Ann. Cas. 879; State v. Furbush, 72 Me. 493; Com. v. Myer, 92 Va. 809, 31 L.R.A. 379, 23 S. E. 915; Sayre v. Phillips, 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76; Re Jarvis, 66 Kan. 329, 71 Pac. 576; Fecheimer v. Louisville, 84

apply to peddlers of any articles produced or manufactured in the state.

In State v. McGinnis, 37 Ark. 362, a statute requiring peddlers engaged in selling goods, wares, or merchandise other than the growth, products, or manufactures of the state to obtain a license.

In Ex parte Thomas, 71 Cal. 204, 12 Pac. 53, an ordinance of a board of supervisors imposing a license tax upon every traveling merchant, hawker, or peddler who vends goods, wares, or merchandise of any kind other than manufactures or products of the state.

In Ames v. People, 25 Colo. 508, 55 Pac. 725, a statute requiring peddlers to obtain a license, but providing that such statute should not extend to persons who sell commodities manufactured or raised by themselves in the state.

In Rodgers v. McCoy, 6 Dak. 238, 44 N. W. 990, a statute requiring peddlers of merchandise not manufactured within the limits of the territory to pay a license tax, as tending to discriminate in the sale of goods, wares, and merchandise manufactured in other states and territories.

In Marshalltown v. Blum, 58 Iowa, 184, 43 Am. Rep. 116, 12 N. W. 266, an ordinance requiring a license to be obtained by any person whose business it is to sell at retail any goods, wares, or merchandise among or upon the public streets or grounds, or from house to house, but exempting from its operation persons retailing their own productions or goods of their own manufacture, if they reside in and the goods are manufactured in the county.

In State v. Furbush, 72 Me. 493, a statute allowing goods manufactured in the state to be peddled free, but exacting a license fee from those who peddle similar goods which are manufactured out of the state.

In Com. v. Caldwell, 190 Mass. 355, 112 Am. St. Rep. 334, 76 N. E. 955, 5 A. & E. Ann. Cas. 879, a statute providing for the

Ky. 306, 2 S. W. 65; *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030; *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721, 7 A. & E. Ann. Cas. 589; *Ex parte Thomas*, 71 Cal. 204, 12 Pac. 53; *Com. v. Hana*, 195 Mass. 202, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 A. & E. Ann. Cas. 514; *Clements v. Casper and Bloomington v. Bourland*, supra; *Chaddock v. Day*, 75 Mich. 527, 4 L.R.A. 809, 13 Am. St. Rep. 468, 42 N. W. 977; *Brennan v. Titusville and Re White*, supra; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The statute is unconstitutional and void because police-power regulation and supervision cannot be allowed to amount to prohibition of the sale of lawful subjects of interstate commerce.

Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Ex parte*

Scott, 66 Fed. 45; *Re McAllister*, 51 Fed. 282; *Re Ware*, 53 Fed. 783; *Stubbs v. People*, 40 Colo. 414, 11 L.R.A.(N.S.) 1071, 122 Am. St. Rep. 1068, 90 Pac. 1114; *Re Worthen*, 4 Inters. Com. Rep. 484, 58 Fed. 467.

The statute deprives citizens of their property without due process of law within the meaning of the 14th Amendment.

Re Quong Woo, 13 Fed. 229; *Laundry License Cases*, 22 Fed. 701; *Philadelphia v. Western U. Teleg. Co.* 40 Fed. 615; *La Junta v. Heath*, 38 Colo. 372, 88 Pac. 459; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Messrs. M. A. Breeden, Attorney General, and George Halverson, for respondent:

The commerce clause of the Federal Constitution does not prohibit state taxation when the goods have become a part of its general mass of property.

Emert v. Missouri, 156 U. S. 296, 39 L.

licensing of peddlers, discriminating between agricultural products of the United States and agricultural products of other countries, in reference to the requirement of a license to peddle them.

In *Com. v. Simons*, 15 Pa. Co. Ct. 550, a statute and a municipal ordinance passed thereunder, forbidding the hawking or peddling, without a license, of any fish, fruit, or vegetables in any city of the first class, which provided that nothing contained in the act should prevent any citizen of the commonwealth from vending, hawking, or peddling the products of his farm or garden.

In *State v. Pratt*, 59 Vt. 590, 1 Inters. Com. Rep. 299, 9 Atl. 556, a statute requiring a person going from town to town, or from place to place in the same town, carrying to sell or exposing for sale, goods, wares, or merchandise, the growth or manufacture of a foreign country, to obtain a license.

In *Ex parte Rollins*, 80 Va. 314, a statute imposing a privilege tax upon any person, other than a licensed merchant, who shall receive subscriptions for, or shall in any manner furnish, newspapers, books, maps, prints, pamphlets, or periodicals, printed or published beyond the limits of the state, was held unconstitutional as contravening the commerce clause, because discriminating in favor of publishers in the state, and in effect imposing a tax on publications of other states.

In *Van Buren v. Downing*, 41 Wis. 122, a statute requiring hawkers and peddlers to obtain a license was held unconstitutional as discriminating against articles manufactured in other states, in providing that nothing contained in it should be so construed as to prevent any manufacturer, mechanic, or nurseryman having a legal residence in the state from selling his own works or productions manufactured or grown in the state, in any manner, without a license. 19 L.R.A.(N.S.)

In *State v. Browning*, 62 Mo. 591, the decision in *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347, as to the invalidity of the Missouri statute, was followed without discussion as a binding authority.

On the other hand, statutes imposing license and occupation taxes of the sort under discussion have been held in a number of cases to be free from any discrimination obnoxious to the commerce clause.

In *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, affirming 9 Baxt. 518, it was held that a state tax on peddlers of sewing machines, which applied alike to sewing machines manufactured in the state and out of it, was valid.

In *Re Rudolph*, 6 Sawy. 295, 2 Fed. 65, a statute providing that every traveling merchant, agent, drummer, or other person, selling or offering for sale any goods, wares, or merchandise of any kind to be delivered at some future time, or carrying samples, and selling, or offering to sell, merchandise of any kind similar to such samples, delivered at some future time, should obtain a license, was held not to be an unlawful regulation of commerce, there being no discrimination against the goods of other states in favor of the products of the state enacting the statute.

In *Ex parte Hanson*, 28 Fed. 127, an ordinance requiring drummers and commercial travelers to pay a license tax, which on its face made no discrimination between the products of the state and those of any other state or county, but required a license from all persons engaged in the business of going about from place to place within the city soliciting the purchase of goods, without any reference to the place of their production or manufacture, was held not to be a regulation of interstate commerce, although it may have had the effect to impose a tax upon the products of other states, or because nonresident concerns were more likely

ed. 430. 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; State v. Emert, 103 Mo. 241, 11 L.R.A. 219. 3 Inters. Com. Rep. 527, 23 Am. St. Rep. 874. 15 S. W. 81; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Kehrler v. Stewart, 197 U. S. 60, 49 L. ed. 683, 25 Sup. Ct. Rep. 403; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Territory v. Russell (N. M.) 86 Pac. 551; Re Pringle, 67 Kan. 364, 72 Pac. 864; Re Abel, 10 Idaho, 288, 77 Pac. 621; Re Kinyon, 9 Idaho, 642, 75 Pac. 268, 2 A. & E. Ann. Cas. 609; South Bend v. Martin, 142 Ind. 31, 29 L.R.A. 531, 41 N. E. 315; Com. v. Ober, 12 Cush. 493.

The tax levied is upon an occupation, under the taxing power of the state.

Ogden City v. Crossman, 17 Utah, 66, 53 Pac. 985; Salt Lake City v. Christensen Co. (Utah) 17 L.R.A. (N.S.) 808, 95 Pac. 523; McCray v. United States, 195 U. S. 27, 47 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E.

Ann. Cas. 561; 25 Cyc. Law & Proc. p. 604; St. Louis v. Sternberg, 69 Mo. 289.

Straup, J., delivered the opinion of the court:

This appeal involves the validity and construction of §§ 1710x and 1710x1 of title 61, Comp. Laws 1907, which are as follows:

"No person, firm, or corporation, as principal or agent, shall peddle out, hawk, or, after shipment to this state, canvass, by going from house to house or from place to place, and sell or offer for sale, by sample, to users or consumers, clocks, agricultural implements, tools or machinery, stoves or ranges, wagons, buggies, carriages, surreys, or other similar vehicles, washing machines, churns, pictures, enlarged pictures, or picture frames, lightning rods, spectacles, jewelry, sewing machines, books or musical instruments, within this state, without previously obtaining a license therefor, as herein provided.

to make their sales in that manner than were residents.

In American Harrow Co. v. Shaffer, 5 Inters. Com. Rep. 336, 68 Fed. 750, a Virginia statute imposing a license tax upon a person who sells, or offers for sale, manufactured implements or machines by retail, unless he is the owner thereof and duly licensed as a merchant, or takes orders therefor on commission or otherwise, was held not to create a regulation of interstate commerce,—distinguishing Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565, upon the ground that the statute therein involved fixed the license tax for the sale, by an agent, of manufactured articles of other states or territories at a rate different from that fixed for the sale of articles manufactured in the state.

In Carrollton v. Bazzette, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837, it was held that an ordinance prohibiting the business of itinerant merchants to be carried on without a license is not invalid as a regulation of interstate commerce as applied to one who purchases bankrupt stocks wherever he can obtain them at the best advantage, and sometimes buys them in other states, when it makes no discrimination between merchants whose goods are imported into the state and those whose goods are manufactured or purchased in the state, and does not impose any burden on sales in original packages brought into the state.

In Territory v. Russell (N. M.) 86 Pac. 551, a statute forbidding, under penalty, the sale, by persons engaged in itinerant trade, by sample, or otherwise, at retail to individual purchasers who were not dealers in the articles sold, of all articles except maps, books, newspapers, fuel, fruits, and domestic machinery, unless the persons so selling shall obtain a peddler's license; but which made no distinction between articles produced in the territory and those produced

elsewhere,—was held not to violate the commerce clause of the Federal Constitution.

In State v. Long, 95 N. C. 582, 59 Am. Rep. 263, a statute imposing a license tax on drummers was held not to conflict with the Federal Constitution, although dealers paying a drummer's tax were allowed a rebate of that amount on their purchase tax; such a provision for a rebate neither in form nor in practical operation amounting to a discrimination against merchants residing out of the state and sending their traveling agents into the state.

In Wrought Iron Range Co. v. Carver, 118 N. C. 328, 24 S. E. 352, a privilege tax imposed on peddlers was held to be constitutional with respect to the agent of a foreign corporation, where the statute made no discrimination in favor of citizens of the state.

Validity as an exercise of the police power.

While the validity of the various statutes and ordinances as an exercise of the police power is an element present in nearly every decision upon the general question here under consideration, the following cases tend especially to show the extent to which the police power may be relied upon to sustain the requirement of a license; but, for instances in which the police power has been held not to warrant statutory requirements, reference must be made to the other cases throughout this note.

So far as a general rule may be stated, it is that a statute requiring a license to be obtained by persons engaged in itinerant trade, where performing the legitimate office of a police regulation, will be valid, though it may incidentally affect interstate commerce.

In State v. Wheelock, 95 Iowa, 577, 30 L.R.A. 429, 58 Am. St. Rep. 442, 64 N. W. 620, it was held that a reasonable license fee

"No person, firm, or corporation, as principal or agent, shall engage in or conduct, as an itinerant vender, peddler, hawker, or traveling merchant, the business of peddling, selling, or bartering, or, after shipment to this state, canvassing or selling by sample, clocks, agricultural implements, tools or machinery, stoves or ranges, wagons, buggies, carriages, surreys, or other similar vehicles, washing machines, or churns, pictures, enlarged pictures, or picture frames, sewing machines, books, lightning rods, spectacles, jewelry, or musical instruments, within this state, without previously obtaining a license therefor, as herein provided."

In the complaint filed against the appellants it is alleged that they, "after shipment into the state of Utah of certain bug-

gies and carriages, did then and there unlawfully and wilfully engage in and conduct, as itinerant venders, peddlers, hawkers, and traveling merchants, the business of peddling, selling, bartering, canvassing, and selling the same, by sample, without previously obtaining a license therefor." The cause was submitted to the court on an agreed statement of facts, which, in substance, is: That the Spaulding Manufacturing Company, a copartnership, is engaged in the business of manufacturing wagons and carriages at Grinnell, in the state of Iowa. That all the members of the copartnership are citizens and residents of that state. The appellants Bayer and Bacon are residents and citizens of Iowa, and appellants Stayner and Eckhart are citizens and residents of Utah.

charged upon itinerant venders of drugs or articles intended for the treatment of diseases who publicly profess to cure or treat disease is not an unconstitutional interference with interstate commerce, although the medicines sold are in original packages brought from another state; but that the requirement of such a license is a reasonable exercise of the police power.

In *West v. Mt. Sterling*, 23 Ky. L. Rep. 1670, 65 S. W. 120, it was held that a municipal ordinance imposing upon peddlers and itinerant retailers of goods a license tax of \$15 per day was not an unconstitutional interference with interstate commerce, being essentially a police regulation.

In *Com. v. Newhall*, 164 Mass. 338, 41 N. E. 647, a statute requiring itinerant venders to obtain a license was held constitutional, even as applied to persons in the employ of a foreign company and engaged in the sale of imported goods in the original packages, where purporting to be passed under the police power of the commonwealth, for the purpose of preventing and punishing fraud in sales by itinerant venders; and an examination of the statutes showed that such was its real design, and that the provisions for state and local licenses are merely incidental means of compensating the state and the localities in which the itinerant venders ply their business, for the expenses of necessary state and local supervision.

In *State v. Smithson*, 106 Mo. 149, 17 S. W. 221, it was held that a statute requiring persons dealing in the selling of patents and patent rights, patent or other medicines, lightning rods, goods, wares, or merchandise, except books, charts, maps, and stationery, by going from place to place, to sell the same, to take out a license, was open to no constitutional objections.

In *Kolb v. Boonton*, 64 N. J. L. 163, 44 Atl. 873, a town ordinance requiring hawkers, peddlers, and itinerant venders of merchandise to obtain a license was held valid, even though incidentally affecting interstate commerce.

In *Wynne v. Wright*, 18 N. C. (1 Dev. & B. L.) 19, it was held that a license tax 19 L.R.A. (N.S.)

imposed on peddlers of jewelry was not unconstitutional, although it may have been imported from another state.

In *Com. v. Gardner*, 133 Pa. 284, 7 L.R.A. 666, 19 Am. St. Rep. 645, 19 Atl. 550, it was held that a state statute prohibiting the sale of goods by hawkers or peddlers is not void as a regulation of commerce, where there is no discrimination against nonresidents, or goods from out of the state.

In *Com. v. Dunham*, 191 Pa. 73, 43 Atl. 84, it was held that the act of April 17, 1846 (P. L. 364), relating to hawking and peddling, being a proper exercise of the police power, was not unconstitutional as interfering with interstate commerce.

In *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12, a statute making it a penal offense for any person to travel from place to place for the purpose of carrying to sell, or exposing to sale, any goods, wares, and merchandise, unless such a person has a license as a hawker and peddler, was held to be a mere police regulation, and not a regulation of commerce, as it does not restrict nonresidents from selling their wares in the state at fixed places of business. The case was, however, reversed in 154 U. S. 626, Appx. 23 L. ed. 1009, 14 Sup. Ct. Rep. 1206, upon the authority of *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347, on account of a provision of the statute that nothing contained in it should be so construed as to prevent any manufacturer, mechanic, or nurseryman, having a legal residence in the state, from selling his works or productions manufactured or grown in the state, in any manner, without a license.

But in *Sayre v. Phillips*, 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76, it was held that a borough ordinance which discriminates against nonresidents by prohibiting all persons from peddling or selling goods from house to house without a license, which is fixed at so high a figure that it amounts to prohibition, but which excepts residents of the borough from its provisions, is not within the police power, and is void.

As to limit of amount of license fee which

That the appellants were employed by the Spaulding Manufacturing Company as salesmen. "That said defendants, while so employed as salesmen by said company and in the discharge of their duty, after shipment into this state of a car load of carriages and buggies, engaged in the pursuit or business of canvassing and selling by sample and otherwise certain buggies or carriages to people residing in the county of Davis and state of Utah. That said defendants canvassed the towns of Farmington and Centerville, in said county, with samples, and exhibited on or about November 15, 1907, samples of buggies and carriages to Charles O. Rollings, and sold to him a certain carriage, and agreed to deliver a carriage similar in all respects to the sample thus ex-

hibited to the said purchaser within thirty days thereafter, and thereafter, within such stipulated time, did deliver a carriage similar to the sample aforesaid, and during the times mentioned in said complaint the procedure aforesaid was repeated. That said defendants during the times mentioned in said complaint, and in said Davis county, trailed vehicles through said Davis county, in some instances selling and thereupon delivering such trailed vehicles, and in some instances said trailed vehicles were sold and there was taken in exchange other vehicles, which were trailed for a distance and then again sold. all of the aforesaid matters occurring in said Davis county and during the times mentioned in said complaint. That said vehicles so sold to the said purchasers were

may be imposed. see note to State ex rel. *Toi v. French*, 30 L.R.A. 415.

Validity as an exercise of the taxing power.

It may likewise be stated, in connection with this point, that cases involving it may be found throughout the note, those here segregated being only those in which special prominence was given to it.

In *Ex parte Robinson*, 12 Nev. 263, 28 Am. Rep. 794, a statute imposing a tax upon drummers and traveling merchants who go from place to place soliciting orders was held to be a revenue law, and not in contravention of the commerce clause, the provisions of the act being general in their character and applying as well to citizens of the state as to citizens of other states, and to the fruits and agricultural products of other states as well as of the state enacting the statute; the court saying: "To pronounce such a law unconstitutional because it might in some imaginable manner affect the operation of commerce would be to surrender the principle that a state has the right, for its support, to impose a tax upon citizens who are conducting business within its jurisdiction." In view of later decisions of the United States Supreme Court, this case appears to be of doubtful authority.

In *Speer v. Com.* 23 Gratt. 935, 14 Am. Rep. 164, it was held that a statute requiring persons to obtain a license in order to sell, or offer to sell, by sample, being purely a revenue law, and not designed to regulate commerce, was not in conflict with the commerce clause of the Federal Constitution. The comment made upon the foregoing case is also here applicable.

But in *Com. ex rel. Overfield v. Walker*, 14 Pa. Co. Ct. 586, it was held that a borough license tax imposed for revenue purposes only, upon hawkers and peddlers, could not constitutionally be applied to one making sales for a firm in another state, whose business was not of such a character as to be subject to police regulation. It does not appear from the report of the case whether the sales were of goods to be imported into the state, but, unless such was

the fact, the court would appear to have misconceived the case of *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, upon which the decision purports to be based.

Interstate character of transaction generally.

By far the greater number of decisions upon the subject annotated turn upon the point whether the transaction to which the statute or ordinance is sought to be applied is within the protection of the commerce clause. These decisions are herein grouped, so far as possible, with reference to the nature of the transaction in question.

In *Sears v. Warren County*, 36 Ind. 267, 10 Am. Rep. 62, it was held that a statute requiring traveling merchants and peddlers not residents of the state to obtain a license to vend foreign merchandise was not repugnant to the commerce clause, upon the ground that it related to internal and domestic rather than interstate commerce. But this view seems now to have been discarded. See cases under title, "Discrimination against manufactures or products of other states," *supra*.

In *Re Lipschitz*, 14 N. D. 622, 95 N. W. 157, it was held that a statute providing that "it shall be unlawful for any person to travel from place to place in any county of this state for the purpose of carrying to sell, or exposing or offering to sell, barter, or exchange any goods, wares, merchandise, or any other property whatever, without first obtaining a license therefor," was not open to objection as placing a tax or burden upon interstate commerce; but that it relates entirely to commerce within the state. The difference between this act, which does not include persons soliciting sales of goods by sample for future delivery, and the act held unconstitutional in *State ex rel. Selliger v. O'Connor*, 5 N. D. 629, 67 N. W. 824, was pointed out.

In *Com. v. Ober*, 12 Cush. 493, it was held that a statute requiring "every hawker, peddler, or petty chapman, or other person, going from town to town, or from place to place, or from dwelling house to dwelling house, in the same town, either on foot, or

manufactured by said company at its factory in Grinnell, state of Iowa, with the exceptions aforesaid, and the vehicles so sold and delivered belonged to and were the property of said company, and were sold for and on its behalf, and the said vehicles so manufactured in Grinnell, Iowa, were sent from there to Davis county, Utah, for the purpose of being sold, and for no other purpose. That such vehicles were not out of the possession of said company or its agents from the time of their receipt within the state of Utah until the same were sold and delivered as aforesaid." Upon such facts, the defendants were found guilty and adjudged to pay a fine.

On appeal they urge that the enactment contravenes § 8, art. 1, U. S. Const. relating

with one or more horses, or otherwise carrying for sale or exposing to sale, any goods," to obtain a license, was not unconstitutional, being applicable wholly to internal commerce.

See also, in this connection, *Carrollton v. Bazzette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837, *supra*, under the heading "Discrimination against manufactures or products of other states;" and also cases under the specific heads following.

Solicitation of orders, by sample or otherwise, as interstate commerce.

Although there are earlier cases in which statutes providing for an occupation tax upon persons engaged in soliciting orders for goods to be delivered at a future time were held to be constitutional as applied to persons engaged in obtaining orders for goods to be shipped from another state (*Ex parte Thornton*, 4 Hughes, 220, 12 Fed. 538; *Territory v. Farnsworth*, 5 Mont. 303, 5 Pac. 869), it is now thoroughly settled that a statute or ordinance which is not indubitably an exercise of the police power, and which in its operation imposes a burden upon the negotiation of sales of goods to be imported from another state, is obnoxious to the commerce clause.

To this general rule there is an exception, created by the Wilson act, in the case of intoxicating liquors. See *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733, *infra*.

It is held to make no difference in the interstate character of the sale, that the goods are delivered through an agent or shipped in bulk to him for delivery, where the transaction to which the statute or ordinance relates is in fact between a vendor in one state and a purchaser in another.

In *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, reversing 13 Lea, 303, it was held that a statute imposing a privilege tax upon all drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale, or sell-

ing, goods, wares, or merchandise therein, by sample, was unconstitutional, the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, being interstate commerce, and not subject to state taxation, even though there is no discrimination between it and domestic commerce.

In *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1, reversing 23 Tex. App. 662, 50 Am. Rep. 783, 5 S. W. 91, it was held that the law of Texas requiring every commercial traveler or drummer, salesman or solicitor of trade, by sample or otherwise, to obtain a license and to pay a tax therefor, was, when applied to citizens of other states soliciting trade in Texas, void as contravening the commerce clause.

In *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256, affirming 5 Mackey, 489, a statute imposing a license on persons whose business it is, as agents, to offer for sale goods, wares, and merchandise by sample, catalogue, or otherwise, was held to constitute a regulation of interstate commerce so far as applicable to persons soliciting the sale of goods on behalf of individuals or firms doing business outside the District of Columbia.

In *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, reversing 143 Pa. 642, 14 L.R.A. 100, 3 Inters. Com. Rep. 735, 24 Am. St. Rep. 580, 22 Atl. 893, an ordinance requiring a license to be obtained by all persons canvassing or soliciting, within the city, orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited; but providing that it should not apply to persons selling by sample to manufacturers or licensed merchants or dealers residing and doing business in the city,—was held to be clearly not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but a direct charge and burden upon that business. The court said: "It is

manufactured or produced without the state, or otherwise interferes with interstate commerce, it is unconstitutional. It is well established that a tax upon the seller of goods is a tax upon the goods themselves. It is also well settled that state laws laying occupation, business, and privilege taxes contravene the Federal Constitution in so far as they impose a tax on persons engaged in taking orders for goods by sample or otherwise to be filled from stocks not within the state at the time the sales are made. It is equally well settled that, where the goods are shipped into the state and stored in advance of the sales, and the orders taken are filled therefrom, the business is not interstate but local commerce; and therefore the business of agents soliciting orders for

such goods is not protected by the provisions of the Federal Constitution where the agents are in possession of the goods at the time the sales are made, and not only solicit the orders, but complete the sales by delivering at one and the same time. In notes to the case of *Re Kinyon*, reported in 2 A. & E. Ann. Cas. pages 701-703, may be found a citation and collection of nearly all the cases bearing upon the question. To what extent these statements need modification or are applicable, when the goods offered for sale in such manner are in original packages in which they were imported, need not now be considered.

The act in question makes it unlawful, without first obtaining a license, to peddle or hawk the goods enumerated in the stat-

true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but, if the state can tax for the privilege of selling to one class, it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two states. It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce. It must be borne in mind that the goods which the defendant was engaged in selling, to wit, pictures and picture frames, are open to no condemnation, and are unchallenged subjects of commerce. There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to the health, morals, or general welfare of the community. It must also be borne in mind that the ordinance is not one designed to protect from imposition and wrong either minors, habitual drunkards, or persons under any other affliction or disability. There is no discrimination except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and, unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it cannot be to tax for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made. It is as much within the scope of the police power to restrain parties from going to a store or manufactory as from going to a dwelling house for the purposes of making a sale. We do not mean to say that none of these matters to which we have referred are within the reach of the police power; but simply that the conditions on the one side are no more within its reach than those on the other, so 19 L.R.A. (N.S.)

that if, under the excuse of an exercise of the police power, this ordinance can be sustained, and sales in the manner therein named be restricted, by an equally legitimate exercise of that power, almost any sale could be prevented."

In *Ex parte Stockton*, 33 Fed. 95, a Texas statute requiring every commercial traveler soliciting trade by sample or otherwise to pay an annual occupation tax was held to be an unconstitutional interference with interstate commerce as applied to the citizens of another state having no goods in the state, but selling by sample.

In *Re Kimmel*, 3 Inters. Com. Rep. 114, 41 Fed. 775, a municipal ordinance requiring all persons engaged in going from house to house and selling, or taking orders for, any merchandise not of their own manufacture, to take out a license, was held to be repugnant to the commerce clause, as applied to an agent engaged in selling goods to be shipped into the state from another state.

In *Re Houston*, 14 L.R.A. 719, 47 Fed. 539, it was said that the mere solicitation of orders to be filled from another state is within the protection of the commerce clause of the Federal Constitution.

In *Re Flinn*, 57 Fed. 496, it was said that, if a state statute was susceptible of construction as authorizing legal process to be issued for the collection of a penalty for the nonpayment of taxes on sales by sample of goods not then within the state, then the act was a regulation of interstate commerce.

In *Re Mitchell*, 4 Inters. Com. Rep. 767, 62 Fed. 576, a Wisconsin statute imposing a license tax upon persons traveling from place to place for the sale of goods, "at retail or to consumers," by sample or otherwise, was held unlawfully to interfere with interstate commerce when attempted to be enforced against agents soliciting orders by sample, for goods, on behalf of a resident of another state and to be delivered therefrom, and which were legitimate and proper articles of commerce.

In *Ex parte Hough*, 5 Inters. Com. Rep. 327, 69 Fed. 330, a North Carolina statute imposing a license tax upon every person,

ute, or to engage in or conduct as an itinerant vender, peddler, hawker, or traveling merchant the business of peddling, selling, or bartering any such goods. This part of the act applies to all persons, regardless of their residence, and to all of the enumerated articles, whether manufactured or produced within or without the state. To this extent the act does not appear to make any discrimination adversely to persons or property of other states, and does not, for that reason, affect or interfere with interstate commerce. The act further provides that, after shipment to this state, it shall be unlawful, without first obtaining a license, to canvass by going from house to house or from place to place, and sell or offer for sale by sample to users or consumers any of the enumer-

ated articles, or to engage in or conduct, after shipment to this state, the business of canvassing or selling by sample any such goods. That is to say, after any of the enumerated articles are shipped into the state, it shall not be lawful, without first obtaining a license, to canvass or sell by sample any of them, though they have not yet been mingled with, nor become a part of, the common mass of property within the state, nor otherwise lost their character as articles of interstate commerce. The mere fact that they may have been shipped into the state is not alone conclusive that they have lost such character, for, as said by Mr. Justice Field in the case of *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347: "The commercial power continues until the com-

pany, or manufacturer who shall engage in the business of selling pianos or organs by sample, list, or otherwise, in the state, was held unconstitutional as a regulation of interstate commerce, as applied to the selling by sample for a manufacturer and dealer located in another state.

In *Hofschulte v. Doe*, 78 Fed. 436, it was said that a municipal ordinance imposing a license tax upon every person, firm, or corporation who solicits orders for and sells to the inhabitants of the town, at retail, any books, goods, wares, or merchandise to be delivered by [to?] those who may purchase from said person, firm, or corporation, at a time subsequent to the taking of said order, was invalid as being in contravention of the commerce clause.

In *Re Tinsman*, 95 Fed. 648, a municipal ordinance requiring persons engaged in the hawking, peddling, itinerant vending, or soliciting the sale or purchase of books, maps, or pictures, to take out a license and pay a tax, was held unconstitutional when enforced against a person or firm soliciting orders for a manufacturer of goods in another state, being an exercise, not of the police power, but of the taxing power.

In *Cottam v. Oregon City*, 98 Fed. 570, it was said that a municipal ordinance requiring all persons selling goods, or soliciting the sale of goods, to pay a license tax therefor, so far as it applies to persons soliciting the sale of goods in behalf of those doing business in another state, is a regulation of interstate commerce and void; but that such ordinance is not void if the solicitor carries his goods with him and thereby becomes a peddler, and so comes within reach of the general or police power of the state.

In *Ex parte Green*, 114 Fed. 959, a municipal ordinance imposing a license tax on "each itinerant person or peddler traveling from residence to residence soliciting orders for, or selling directly or indirectly, goods, wares, or merchandise to the consumer," was held unconstitutional where applied to one engaged in soliciting orders on behalf of a principal in another state, who, after accepting them, shipped from such other

state merchandise direct to the purchaser, the ordinance not being one which involves the mere exercise of the police power for the protection of the morals or health of the community, but a direct tax upon interstate commerce itself.

In *State v. Agee*, 83 Ala. 110, 2 Inters. Com. Rep. 21, 3 So. 856, a statute imposing a license tax on itinerant peddlers of fruit trees, vines, shrubs, etc., was held, as applied to one selling by sample goods on behalf of an employer in another state, to be unconstitutional as interfering with interstate commerce.

In *State ex rel. Sellinger v. O'Connor*, 5 N. D. 629, 67 N. W. 824, a statute providing: "It shall be unlawful for any person to travel from place to place in any county within this state for the purpose of carrying to sell or exposing or offering for sale, barter, or exchange at retail, any goods, wares, merchandise, notions, or other articles of trade whatsoever, except as hereinafter provided, whether by sample or otherwise, and whether such goods, wares, merchandise, notions or other articles of trade whatsoever are delivered at the time of sale, or to be delivered at some future time, unless such person shall have first obtained a license as a peddler as hereinafter provided,"—was held to be, so far as it assumes to tax those who sell by sample goods to be shipped in from another state and thereafter delivered, an unlawful interference with the exclusive authority of Congress to regulate interstate commerce; and the unconstitutional portion of the act was held to be so inseparably interwoven with its other provisions as to render it wholly inoperative.

In *State v. Rankin*, 11 S. D. 144, 76 N. W. 299, a statute imposing a license tax upon each peddler or solicitor taking orders for groceries, cloth, hardware, or other mercantile establishments was held to be unconstitutional as applied to persons soliciting orders for a concern in another state, as imposing a burden upon interstate commerce.

In *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754, 8 L.R.A. 273, 3 Inters. Com.

modity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin." The effect of the legislation is to forbid, without license, the canvassing or selling by sample any of the goods specified in the statute and which have been shipped into this state, and permits, without license, canvassing and selling in such manner the same kind of goods manufactured or produced within the state. "A law," says Mr. Justice Swayne, in the case of *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, "which requires a license to be taken out by peddlers who sell articles not produced in the state, and requires no such license

with respect to those who sell in the same way articles which are produced in the state, is in conflict with the power of Congress to regulate commerce with foreign nations and among the several states." That portion of the act which requires a license to canvass or sell by sample goods shipped into the state, and permits, without a license, the canvassing or selling in such manner goods not shipped into the state, violates the commerce clause of the Federal Constitution, and is therefore void. Such a conclusion was also reached by the supreme court of Washington in the case of *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721, 7 A. & E. Ann. Cas. 589, upon a similar statute.

This portion of the statute is further an illegal regulation of commerce, in that it

Rep. 146, 11 S. E. 233, it was held that one going from place to place with a sample stove, soliciting orders therefor, which were filled by shipment from another state, was protected by the commerce clause of the Federal Constitution against a state statute requiring a license to peddle.

In accordance with the foregoing decision, it was held in *McClelland v. Marietta*, 96 Ga. 749, 22 S. E. 329, that a city ordinance requiring a license to be obtained by persons soliciting orders within the corporate limits was unconstitutional as applied to a solicitor of orders on behalf of a nonresident corporation, which were filled from the home office.

In *Re Kinyon*, 9 Idaho, 642, 75 Pac. 268, 2 A. & E. Ann. Cas. 699, it was held that a statute providing for the licensing of peddlers, hawkers, and solicitors taking orders for goods is unconstitutional and an unwarranted interference with interstate commerce in so far as it attempts to impose such a burden upon the authorized solicitors and agents of citizens of other states trying to introduce and sell their goods in the state; but that a distinction might be made where the goods or property, at the time of the sale, are within the state and under the control of the agent or solicitor.

In *Bloomington v. Bourland*, 137 Ill. 534, 3 Inters. Com. Rep. 667, 13 Am. St. Rep. 382, 27 N. E. 692, a municipal charter authorizing, and an ordinance imposing, a license tax upon hawkers, peddlers, and canvassers, was held, so far as operative upon persons soliciting orders for goods for a principal in another state, to violate the interstate commerce clause.

In *Martin v. Rosedale*, 130 Ind. 109, 29 N. E. 410, an ordinance making it unlawful for any traveling peddler to ply his avocation within the corporate limits of the town without first procuring a license was held, when applied to merchandise not in the state, owned by citizens of another state and sold in the state by sample, to be an interference with interstate commerce.

In *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848, 2 So. 592, it was held that a statute requiring that "all traveling

agents offering any species of merchandise in this state for sale, or selling the same by sample, or otherwise, shall pay . . . a license of \$50," was repugnant to the commerce clause, the negotiation of sales of goods which are in another state being interstate commerce.

In *People v. Bunker*, 128 Mich. 160, 87 N. W. 90, a municipal ordinance imposing a license fee on persons going about from place to place carrying with them any goods, wares, supplies, or property, or samples of the same, and selling or offering for sale the same, either by sample or otherwise, was held to be an unconstitutional interference with interstate commerce as applied to one soliciting orders for goods to be shipped into the state by a nonresident manufacturer.

In *Ex parte Rosenblatt*, 19 Nev. 439, 3 Am. St. Rep. 901, 14 Pac. 298, a statute providing for the licensing of traveling merchants, and merchants doing business through soliciting agents commonly known as drummers, was held unconstitutional, for repugnancy to the commerce clause, as applied to one engaged in soliciting orders for goods to be delivered at a future time, from another state, by his principals, residents of that state.

In *State v. Bracco*, 103 N. C. 349, 9 S. E. 404, a statute requiring drummers to obtain a license was held unconstitutional, in so far as it applies to nonresident drummers and all persons nonresident selling goods, wares, and merchandise by wholesale, or by sample in the state.

In *Port Clinton v. Shafer*, 5 Pa. Dist. R. 583, it was held that an ordinance requiring all peddlers and persons canvassing from house to house for the purpose of selling goods, to take out a license, was not rendered unobjectionable, as not imposing a restraint on interstate commerce, by the proviso that the ordinance should not be applicable to persons soliciting orders for the manufacture of goods manufactured beyond the boundaries of the state; the proviso not being wide enough in its scope to include all articles of interstate commerce.

In *Talbutt v. State*, 39 Tex. Crim. Rep.

not even injurious to health or morals of the community—and required an annual fee or tax of \$500 to be paid to peddle any of them, while the business of peddling and hawking of all other goods and articles, including those which are injurious to health and morals, and which affect the security of the lives, limbs, and comfort of the people, may be carried on with perfect freedom and without license. That is to say, under the act one may peddle shotguns and bowie knives, dynamite, and gunpowder, celery compound and cocaine, tobacco and opium, and many other things (whether harmful or harmless) without license and with impunity; but to peddle the Holy Bible or any other book, wagons, buggies, stoves, sewing machines, and a few other articles enumer-

ated in the statute an annual fee or tax of \$500 is exacted. Now, it is apparent that, under the pretense of exercising a police power, or of adopting a revenue measure, the legislature passed the act for the mere benefit of local and domestic dealers. Of a similar act passed by the legislature of the state of Washington, the Federal court, in the case of *Spaulding v. Evenson* (C. C.) 149 Fed. 913, said: "In 1903 an act was passed by the legislature of this state . . . which undertook to prohibit the sale of vehicles, stoves, ranges, pianos, or other merchandise without a license, and the license fee was fixed at \$10 per day, but with the proviso that the act should not apply to any person selling any of said articles from his regularly maintained stock or estab-

there would be no doubt that they would then have been included in the general mass of the property of the state, subject to taxation.

In *Overton v. Vicksburg*, 70 Miss. 558, 13 So. 226, a city ordinance requiring all transient peddlers to pay a privilege tax and to procure a license was held unconstitutional, so far as it is applied to an agent selling goods by sample for a principal in another state, who, upon receipt of the order, ships the goods to the agent for delivery to the purchaser, from whom the agent collects the first instalment of the purchase money, which is applied as a part of his commission for making the sale.

In *Wrought Iron Range Co. v. Campen*, 135 N. C. 506, 47 S. E. 658, it was held that the exaction of a license tax imposed on every itinerant person peddling ranges, as a prerequisite to the exercise by a nonresident corporation of the right to sell its ranges in the state, was a violation of the commerce clause, where the sales were made by sample and the goods were manufactured in another state, shipped into the state, and delivered by the seller's agent in the original package.

In *Hurford v. State*, 91 Tenn. 669, 20 S. W. 201, a statute imposing a privilege tax upon the occupation of "sample sellers and solicitors" was held to be an unlawful regulation of interstate commerce so far as applied to nonresidents engaged in taking orders for goods to be shipped to the buyer from a nonresident principal, whether such goods were shipped by mail, registered letter, or by express, or delivered by the agent in person.

In *State ex rel. South Bend v. Glasby*, 50 Wash. 598, 97 Pac. 734, a municipal ordinance requiring a license fee to be paid by every person canvassing or taking orders for pictures, clothes, clothing, groceries, or any other merchandise, either for immediate or future delivery, was held invalid, as a regulation of interstate commerce, as to a traveling agent and solicitor for orders for groceries, which he transmits to his principals in another state, who are at liberty to accept and fill only such orders as they

choose, whereupon the goods are shipped and delivered to the respective parties in unbroken packages by persons other than the traveling agents and solicitors securing the orders.

In *Chicago Portrait Co. v. Macon*, 147 Fed. 967, a municipal ordinance imposing a license tax upon "peddlers or hawkers, meaning those who sell any article of merchandise, books, etc., or from house to house solicit orders therefor, whether sold direct or delivered at a later period," was held unlawfully to interfere with interstate commerce where enforced against the agents of a nonresident corporation engaged in delivering completed pictures for which orders had been taken, sent to them for that purpose only.

In *Ex parte Hull*, 153 Fed. 459, a statute imposing a license tax upon each person, firm, or corporation soliciting orders for the enlargement of photographs of any character, or for picture frames, was held invalid as applied to an agent of a foreign corporation who delivered pictures in frames, and collected the money due, on orders previously taken by another agent and sent to the corporation outside the state to be filled.

—as affected by shipment in bulk to agent.

In *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229, an ordinance requiring a license fee from persons engaged in selling or delivering picture frames or pictures was held invalid as an attempt to interfere with and regulate interstate commerce, as applied to an agent of a nonresident portrait company, who received from such company pictures and frames manufactured by it to fill orders previously obtained, and, after breaking bulk and placing each picture in the frame designed for it, delivered them to the respective purchasers. The court said: "The selection of the frame was as much a part of the purchase and sale as the selection of the picture. Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vender at

lished place of business, when such stock had been maintained in the county for a period of six months. This act was several times held discriminative and void by superior judges of the state of well-recognized ability, but did not apparently reach the supreme court; those decisions being generally acquiesced in. While it has been suggested by affidavit that complainants are carrying on business in violation of this law, it was not referred to in argument, and it may be assumed that counsel do not rely upon that point. In 1905 an act was passed to meet the objections to that of 1903.

. . . It provides that every person, firm, or corporation who peddles out after shipment to the state, canvasses, or sells by sample, etc., shall pay in advance an annual

license tax of \$200. This act was recently declared void by the state supreme court. [Bacon v. Locke, 42 Wash. 215, 83 Pac. 721, 7 A. & E. Ann. Cas. 589.] It is a matter of common notoriety that this legislation was enacted at the suggestion and for the benefit of local dealers. The amount fixed for license by the legislature was intended to be prohibitive of competition by peddlers. Shortly after the decision holding the act of 1905 unconstitutional, we find the dealers who had attempted to put the peddlers out of business by legislation resorting to the very ingenious scheme which has been here disclosed. It is proposed now to accomplish by subterfuge that which the courts of the state have repeatedly held cannot be done directly." In the case of Robbins v.

Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vender used two instead of one agency in the delivery. It would seem evident that, if the vender had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vender himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate."

In *Racine Iron Co. v. McCommons*, 111 Ga. 536, 51 L.R.A. 134, 36 S. E. 866, it was held that the interstate commerce clause of the Federal Constitution does not operate to prevent a state from imposing, for the purpose of raising revenue, a license tax under a statute providing for such a tax "upon each peddler of clocks or smoothing irons," upon persons who, as traveling agents for principals residing in other states, make executory contracts for the sale of goods; and who, when the same are shipped into the state imposing the tax, receive them in bulk, break the original packages in which they are contained, and distribute them among the customers with whom such contracts have been made.

The doctrine of the foregoing case was, however, overthrown by the decision of the United States Supreme Court in *Caldwell v. North Carolina*, supra; and it was accordingly held in *Stone v. State*, 117 Ga. 292, 43 S. E. 740, that a statute making it a misdemeanor for any peddler or itinerant trader, except such as are exempted by law, to sell any goods, wares, or merchandise without a license from the proper authority, was prevented by the interstate commerce clause from being operative against one who, as the representative of a principal residing in another state, takes orders for the purchase of goods held in such other state; and who, when the goods are shipped

by his principal, receives them, breaks the original packages in which they are contained, and distributes them among the customers from whom the orders were obtained, receiving from them the price of the goods.

In *Huntington v. Mahan*, 142 Ind. 695, 51 Am. St. Rep. 200, 42 N. E. 463, it was held that a state ordinance prohibiting peddling without a license was an unconstitutional interference with interstate commerce where applied to a salaried agent of a publishing firm in another state, engaged in distributing to various purchasers books ordered through another agent, which had been shipped, in response to such orders, to a central point in the state, where they were repacked in parcels to suit the orders from various localities, to which they were reshipped for distribution.

In *Turner v. State*, 41 Tex. Crim. Rep. 545, 55 S. W. 834, a statute imposing a tax upon the occupation of a traveling person engaged in selling patent and other medicines was held unconstitutional as applied to one employed by a nonresident concern, on salary, to sell goods by sample, the orders secured being transmitted to the employer, subject to his approval, to be filled, whereupon the goods were shipped consigned to the employer, and delivered direct from the car, though the packages were not marked with the name of each purchaser.

In *Re Spain*, 14 L.R.A. 97, 3 Inters. Com. Rep. 738, 47 Fed. 208, a statute imposing a license tax on peddlers was held to be an unconstitutional regulation of interstate commerce, as applied to persons engaged in showing samples of goods manufactured by their principal in another state, and in taking orders for such goods, which are transmitted to the principal to be filled, even though in filling such orders the articles are sent in bulk to the agent, to be distributed by him.

In *Menke v. State*, 70 Neb. 669, 97 N. W. 1020, it was held that an agent soliciting orders for groceries, and sending such orders to a nonresident corporation in another state to fill, such corporation thereupon putting up the several items of goods named

Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, it was also said: "This kind of taxation is usually imposed at the instance and solicitation of domestic dealers as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax." While ordinarily we are not permitted to inquire into the motive of the legislature, yet, as said by the court in the case of *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133: "It is impossible for us

to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes

in each order separately, shipping the same in a large box to its order, the agent receiving the same and delivering the goods therein contained to the persons from whom orders had been taken, receiving the money therefor, was engaged in interstate commerce within the meaning of the Federal Constitution, and therefore could not be subjected to a peddler's license tax.

In *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159, it was held that interstate commerce is unlawfully burdened by a municipal ordinance exacting a license fee from a person employed by a foreign corporation to solicit, within the municipality, orders for groceries which the company fills by shipping goods to him for the delivery to, and collection of the purchase price from, a customer, who has the right to refuse the goods if not equal to the sample, such goods always being shipped in distinct packages corresponding to the several orders, except in the case of brooms, which, after being tagged and marked like other articles, according to the number ordered, are then tied together in bundles of about a dozen, and wrapped up conveniently for shipment.

But, where the agent is treated by the shipper as the real party to the transaction, the courts regard the sales by the "agent" to his customers as domestic, and not interstate, transactions.

Thus, in *People v. Smith*, 147 Mich. 391, 110 N. W. 1102, it was held that a municipal ordinance requiring hawkers and peddlers to be licensed was applicable, without unlawfully interfering with interstate commerce, to an agent soliciting orders which he transmitted to his principal's warehouse in another state, where the goods were put up in packages corresponding with the order cards, packed in boxes, and shipped to the agent, no particular package being put up for any particular customer, and no package marked with the name of the customer, and no account being made or kept with any person other than the agent; the method employed in sending the goods being an attempt to evade a local regulation, and not a good-faith engagement in interstate commerce.

And in *New Castle v. Cutler*, 15 Pa. Super. Ct. 612, it was held that an ordinance 19 L.R.A. (N.S.)

imposing, for the purpose of revenue, a license tax on all peddlers, hucksters, and persons traveling from house to house with goods, wares, merchandise, or products of any kind for sale, was not unconstitutional as applied to one who took orders for groceries on behalf of principals in another state, to whom such orders were transmitted, and who thereupon placed in a car a sufficient quantity of goods to fill them, mostly put up in packages ready for delivery and placed in open boxes, none of the packages being marked or labeled with the name of the purchaser, but the goods being consigned to the shippers themselves, the shippers retaining the custody and control of the goods until actual delivery, when the purchase price was paid to the agent making the delivery; as the sale of the goods was not in original packages, and the transaction was one of domestic, rather than interstate, commerce.

And in *Kimmell v. State*, 104 Tenn. 184, 56 S. W. 854, a statute imposing a privilege tax was held not to interfere with interstate commerce as applied to an agent who, after taking orders for goods, forwarded them to his principal outside the state, and to whom the goods to fill the orders were consigned and charged individually, and without reference to the persons to whom he sold them; the sales not being of the original package, which was broken before the sales were completed.

So, also *Croy v. Obion County* (*Croy v. Epperson*) 104 Tenn. 525, 51 L.R.A. 254, 78 Am. St. Rep. 931, 58 S. W. 235, it was held that one who takes orders in his own name, from house to house, for articles manufactured in another state; and who, in his own name, sends a single order to the manufacturer, without stating the names of his customers, and, on receiving the package containing the articles, delivers therefrom the separate articles to his customers,—is not engaged in interstate commerce so as to be exempt from a tax on the privilege of selling articles of that kind within the county.

—as affected by presence of goods within the state.

Where a sale is made of goods theretofore

when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 35 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213. The court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

We are well satisfied that the act has no such relation to the public health or morals as will sustain it as a police measure. Nor can it, because of its illegal discrimination as to property and persons, be upheld as a revenue measure. We think it repugnant

to the provisions of the Federal Constitution that no state shall abridge the privileges or immunities of citizens of the United States nor deny to persons within its jurisdiction the equal protection of the laws. Whether it is also in conflict with the provisions of the state Constitution requiring all laws of a general nature to be uniform in operation, we need not now determine. The judgment of the court below is therefore reversed, and the cause remanded, with directions to dismiss the action and to discharge the defendants.

McCarty, Ch. J., and Frick, J., concur.

shipped into the state, which, by reason of having been taken from their original package, or from some other cause, have ceased to be articles of interstate commerce, the transaction is not within the protection of the commerce clause.

In *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367, affirming 103 Mo. 241, 11 L.R.A. 219, 3 Inters. Com. Rep. 527, 23 Am. St. Rep. 874, 15 S. W. 81, a state statute requiring every peddler to procure a license and pay a tax therefor, under penalty, was held not to be repugnant to the commerce clause, as applied to a peddler, within the state, of sewing machines made in another state by a corporation of that state, and sent by it to him to sell, on its own account, and as its agent. The court said: "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the state of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods or of any order for their transfer, from one state to another, and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become a part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the state."

In *Re Wilson*, 8 Mackey, 341, 12 L.R.A. 624, it was held that there is no unconstitutional regulation of commerce in requiring the agent of a nonresident manufacturer who sells at wholesale merchandise in small packages which are packed in boxes for transportation, under an agreement that he will sell the contents of a certain percentage of the boxes at retail from house to house as an advertisement, and credit the wholesale purchaser with the proceeds, to procure a peddler's license; and that it is immaterial whether the boxes which the

agent is to dispose of are shipped directly to him, or reach him indirectly through the wholesale purchaser.

In *Hall v. State*, 39 Fla. 637, 23 So. 119, it was held that a statute imposing a license tax on hawkers and peddlers was not unconstitutional as applied to one bringing in goods from another state for the purpose of sale at retail, where it appeared that all negotiations prior to and attending the sales were had with reference to goods then present in the state, which were not sold in the original packages, but retailed in small quantities.

In *Re Abel*, 10 Idaho, 288, 77 Pac. 621, it was held that a statute providing for the licensing of peddlers, hawkers, and solicitors may be constitutionally applied to an agent or solicitor who has the goods which he is selling with him at the time of the sale; the business or commerce in which such agent is engaged being internal and domestic, and therefore subject to the taxing power and to the police power of the state.

In *South Bend v. Martin*, 142 Ind. 31, 29 L.R.A. 531, 41 N. E. 315, it was held that an ordinance requiring a license to be obtained by hawkers and peddlers did not interfere with interstate commerce in the case of a peddler of chairs imported into the state before his employment began, even though sales made by him were conditional, the title remaining in the foreign owner.

In *Re Pringle*, 67 Kan. 364, 72 Pac. 864, an ordinance imposing a license tax upon peddlers is held constitutional as applied to a person who takes orders from samples for goods which he engages to deliver, and which are to be shipped into the state from another state, when such orders are not transmitted to such other state, or filled there, but are filled from goods, not in the original package of importation, sent to him in bulk C. O. D. from such other state.

In *People v. Sawyer*, 106 Mich. 428, 64 N. W. 333, a municipal ordinance imposing a license fee upon peddlers was held constitutionally applicable to a resident of the state whose sales were made from a general stock of goods kept in the state, and not in original packages.

In *Muskegon v. Hanes*, 149 Mich. 460, 112 N. W. 1077, it was held that there was

no interference with interstate commerce in requiring a license of one to whom goods were shipped in bulk, and by whom they were distributed from house to house with the statement that within a certain time thereafter a collector would call for the merchandise or for the pay therefor.

In *State v. Smithson*, 106 Mo. 149, 17 S. W. 221, it was held that no constitutional question was raised in a prosecution for peddling medicine without a license, where it did not appear that the medicines sold were manufactured beyond the limits of a state, or whether, when sold, they were in the original package or otherwise.

In *State v. Parsons*, 124 Mo. 436, 5 Inters. Com. Rep. 250, 146 Am. St. Rep. 457, 27 S. W. 1102, affirmed in 166 U. S. 718, 41 L. ed. 1187, 17 Sup. Ct. Rep. 997, it was held that a statute requiring a peddler's license to be taken out by persons going from place to place selling medicine did not interfere with interstate commerce when applied to one vending single bottles of medicine manufactured in another state, and which were taken from a box in which several bottles separately wrapped were shipped into the state, such separate bottles not being considered as the original package.

In *State v. Gorham*, 115 N. C. 721, 25 L.R.A. 810, 44 Am. St. Rep. 494, 20 S. E. 179, it was held that a license tax on the business of putting up lightning rods is not a tax on interstate commerce, in the case of a person who puts up no rods except those which he sells and which are brought from another state, although he puts them up without extra charge.

In *Com. v. Harmel*, 166 Pa. 89, 27 L.R.A. 388, 5 Inters. Com. Rep. 89, 30 Atl. 1036, it was held that a statute requiring a license to be obtained by persons engaged in peddling clocks was not an unconstitutional interference with interstate commerce as applied to the peddling of separate articles after the package in which they were shipped from another state had been broken.

In *Ex parte Butin*, 28 Tex. App. 304, 13 S. W. 10, it was held that a statute imposing an occupation tax upon every person or firm who peddles out clocks, cooking stoves, or ranges, was not, as applied to the sale of ranges shipped into the state to distributing points, where they were loaded upon wagons in charge of canvassers, who made sales and delivery of goods from the wagons to the purchasers, obnoxious to the interstate commerce provision of the Federal Constitution.

In *French v. State*, 42 Tex. Crim. Rep. 222, 52 L.R.A. 160, 58 S. W. 1015, and *Kirkpatrick v. State*, 42 Tex. Crim. Rep. 459, 60 S. W. 672, an attempt was made to follow the case of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681 (the "original package" case), by holding, in each case respectively, that the peddling of organs, and of buggies, shipped into the state by a non-resident manufacturer, was within the protection of the commerce clause; the court saying: "If interstate commerce protects 19 L.R.A. (N.S.)

an article of traffic, between states in transit, and after its arrival at a warehouse, and until it is sold therefrom and delivered thence to the purchaser by the seller, who acts as the agent of the foreign company, it is difficult to see how the same article will not be protected while the agent of the foreign company carries it around with him, and, when he finds a purchaser, then sells and delivers it to such purchaser." But these decisions were overruled in *Saulsbury v. State*, *infra*, in which the court said that, at the time of deciding the *French* and *Kirkpatrick* Cases, its attention had not been called to the decision of the United States Supreme Court in *Emert v. Missouri*.

In *Saulsbury v. State*, 43 Tex. Crim. Rep. 90, 96 Am. St. Rep. 837, 63 S. W. 568, it was held that one to whom buggies were shipped, knocked down, and who took them from the original packages and put them together, proceeding over the country carrying one or two with him, which he offered for sale, was not engaged in interstate commerce, so as to exempt him from the payment of a tax upon the occupation of peddling buggies.

In *The Stella Block v. Richland Parish*, 26 La. Ann. 642, it was held that a parish might, without infringing upon the commerce clause, impose a license upon a steam-boat trader.

In *Cole v. Randolph*, 31 La. Ann. 535, it was held that a statute imposing a license tax upon all transient persons doing business or selling in the state was not unconstitutional in its application to a flat-boat trader engaged in selling goods brought by him from another state.

In *Hynes v. Briggs*, 41 Fed. 468, a statute imposing an occupation tax upon clock peddlers, agents for the sale of lightning rods, and stove-range agents doing business in the state, was held not to interfere with interstate commerce, as applied to the agent of a nonresident corporation engaged in selling stove ranges, shipped from the state where they were manufactured into the state enacting the statute, to be thereafter sold, sales being made and the orders filled from the ranges so stored within the state.

In *American Harrow Co. v. Shaffer*, 5 Inters. Com. Rep. 336, 68 Fed. 750, it was held that, where a manufacturer shipped harrows by car-load lots from Michigan into Virginia, and deposited the goods in a warehouse in the latter state, and then, through its agents, loaded them on a wagon and sent them through the country, selling and delivering them to purchasers from the wagon, such agents were not engaged in interstate commerce, and were therefore subject to the payment of local license taxes.

In *Duncan v. State*, 105 Ga. 457, 30 S. E. 755, it was held that the interstate commerce clause of the Federal Constitution has no application to sales of goods in the state, when it appears that the same had been manufactured in another state, shipped in quantities to an agent of the manufacturer residing in the state, by him deposited in a warehouse, and from thence delivered

on retail orders obtained by a traveling agent of the manufacturer.

In *L. B. Price Co. v. Atlanta*, 105 Ga. 358, 31 S. E. 619, it was held that sales of goods, which had been shipped in large quantities from another state to a warehouse, where they were divided and distributed among a number of customers who were procured after the goods had been deposited in the warehouse by a person who went from house to house exhibiting samples and taking orders, which were filled from the warehouse, did not constitute interstate commerce so as to exempt a person so selling them from a license tax imposed by a municipality upon canvassers.

In *Muskegon v. Zeeryp*, 134 Mich. 181, 96 N. W. 502, a municipal ordinance imposing a license fee upon peddlers was held not unconstitutionally to interfere with interstate commerce when applied to one taking orders on behalf of a nonresident principal, which he did not send to his principal, but, instead, ordered from the principal's warehouse in the state a sufficient quantity of merchandise to fill them, being himself charged with the price thereof.

In *State v. Snoddy*, 128 Mo. 523, 31 S. W. 36, it was held that one engaged in selling harrows as an agent and traveling salesman of a concern located in another state, which shipped its harrows to an agent by whom a single or sample harrow, as occasion might require, was loaded upon a wagon and sent through the county, in some cases being sold outright, and in other cases a written order being taken, which was filled by delivery of the one in the wagon, or of one from the warehouse, was not engaged in interstate commerce so as to preclude the enforcement of a statute requiring peddlers to obtain a license.

In *State v. Richards*, 32 W. Va. 348, 3 L.R.A. 705, 9 S. E. 245, a statute requiring a license to be obtained by agents traveling with one or more horses and selling any lightning rod, sewing machine, or organ or other musical instrument, was held not unconstitutional as applied to such agents selling sewing machines then in their possession inside the state, obtained from the storehouse of the manufacturer within the state, though such machines were manufactured outside the state.

See also *Cottam v. Oregon City*, 98 Fed. 570, and *Re Kinyon*, 9 Idaho, 642, 75 Pac. 268, 2 A. & E. Ann. Cas. 699, *supra*, under the heading, "Solicitation of orders, by sample or otherwise, as interstate commerce;" *Carrollton v. Bazzette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837, *supra*, under the heading, "Discrimination against manufactures or products of other states;" *Com. v. Newhall*, 164 Mass. 338, 41 N. E. 647, *supra*, under heading, "Validity as an exercise of the police power;" *McClellan v. Pettigrew*, 44 La. Ann. 356, 10 So. 853, *supra*, under heading, "As affected by delivery through agent."

In *Re Nichols*, 48 Fed. 164, and in *Re Tyerman*, 48 Fed. 167, an ordinance not purporting to be a police regulation, but

solely for the purpose of raising revenue, requiring the payment of a license fee by all persons canvassing or soliciting orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, was held void as a regulation of interstate commerce, so far as applied to an agent soliciting orders for books, to be filled on approval of his principal in another state, or as applied to an agent engaged in delivering the books and collecting the price therefor, notwithstanding that such principal has a branch office or storeroom in the state, which is kept replenished from the main office in another state, and from which the books are sent which are needed to fill the orders taken by the canvassers.

And in *Henderson v. Ortte*, 114 La. 523, 38 So. 440, it was held that the vender of sewing machines in their original packages could not constitutionally be subjected to a peddlers' license tax.

In this connection, see also note to *Sucker State Drill Co. v. Wertz*, 18 L.R.A. (N.S.) 134, on "Sale by foreign corporation of goods stored in state, as intrastate commerce."

—sale of picture frame as incidental to transaction protected by commerce clause.

A distinctive aspect of the question under discussion is presented where one who has, as a transaction of interstate commerce, ordered a picture, is given the option of purchasing a frame delivered with it. As to whether the sale of the frame under such circumstances is within the protection of the commerce clause, the decisions are in conflict.

In *Dozier v. State (Ala.)* 46 So. 9, where orders obtained by solicitors for enlarging photographs stated that it was also understood that the portrait was to be delivered in an appropriate frame, which the customer was entitled to accept at factory price, not being bound, however, to do so, the sale of the frames in such manner after they had come into the state was held not to constitute interstate commerce so as to preclude the application of a statute imposing a license tax upon any person selling picture frames.

In *State v. Montgomery*, 92 Me. 433, 43 Atl. 13, it was held that the agent of a concern having its place of business in another state, for which orders for the enlargement of pictures had been obtained, such orders stating that the picture would be delivered in an appropriate frame, which the customer was advised, but not compelled, to buy, who was engaged in delivering such pictures and frames, might constitutionally be required to obtain a peddler's license; the court saying: "The goods which this defendant is complained of for exposing for sale had been received by him within this state. He had broken the packages. He was traveling with them as a peddler. They had become a part of the general mass of property in the state. Hence, a statute regulation

break was in this weld; that the defect in the weld was latent, and could not be discovered by any external examination, and only appeared after the weld was broken; and that the hidden defect in the weld caused the cord to break, and the bridge, which was supported by the cord, to collapse.

We are of opinion that the evidence fails to sustain the contention of the defendant in error that the accident was caused by the stringers slipping off of the floor beams, and establishes the theory of the plaintiff in error that the accident resulted from the defective weld which caused the cord supporting the entire structure to break, thereby effecting the inevitable collapse which followed.

The witnesses introduced by the defendant in error for the purpose of showing that the bridge was not in a safe condition were without knowledge or experience in the construction of bridges or in bridge engineering. They do not profess to know that the stringers were in an unsafe condition, or whether they had been built into the bridge as situated when seen by them. They do not say that the slipping of the stringers, which they supposed had taken place, caused or contributed to the accident. They merely state, without having made any measurement, that the stringers only rested upon the floor beams $1\frac{1}{2}$ inches; the statement that they had slipped being mere assumption. Further, these witnesses made their observations of the stringers in most instances some time before the accident, and locate most, if not all, of the stringers observed by them at a point other than the section of the bridge where the collapse occurred. This theory of the defendant in error, that the stringers had slipped and thereby caused the accident, is, however, shown to be fallacious and without foundation by the testimony of competent experts, whose evidence is not in conflict with the plaintiff's witnesses, who admit their inability to say whether the conditions they describe did, or did not, cause or contribute to the collapse of the bridge.

Two experts were introduced by the plaintiff in error,—one a bridge builder and the other a bridge engineer,—both competent, with long experience in their line and familiar with the character and construction of the bridge in question. They show that the conditions described by the plaintiff's witnesses, if true, could not have caused the accident, and did not in any way contribute thereto. The undisputed testimony of these experts is that, if the stringers had slipped and fallen, it would not have caused the bridge to fall, for the reason that the stringers get their support, in part, from the

bridge, while the latter gets no part of its support from the stringers.

These experts explain the mechanism of the bridge, and show that, while it is built in six sections of $12\frac{1}{2}$ feet each, yet these sections are all connected into one entire span which makes the whole bridge. The iron cords which unite these several sections and bind them into one span are what holds up the bridge, the stringers performing no function of that sort. If one of these cords breaks, the bridge falls. It is further shown that, if one or more of the stringers had slipped from the beams and fallen into the creek, neither the bridge nor the car would have fallen from that cause.

These experts inspected the bridge after it had fallen, and found no unsound or broken timbers therein, and found no faulty condition of anything about the bridge, except the defect in the loop of the bottom cord, where there had been an imperfect weld. The broken cord was produced in court, and the unqualified testimony of these experienced bridge men is that the breaking of that cord was the sole cause of the accident, and that the defect in the cord was the imperfect weld, which could not have been detected by the utmost scrutiny.

"Where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." 2 Hutchinson, Carr. 3d ed. §§ 903, 904. The liability of a carrier of passengers as thus defined is now almost universally adopted.

As a matter of course, there can be no negligence where there is no breach of duty. It must appear, therefore, not only that the defendant owed a duty, but also that he did not perform it; and, if the accident complained of was inevitable, it is not a case of negligence. An accident is inevitable if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it or prevent its injuring another. In such a case the essential element of a legal duty is wanting, and it cannot, therefore, be a case of negligence. 1 Shearm. & Redf. Neg. § 15, 16.

Applying these well-settled principles to the established facts in the case before us, the conclusion cannot be escaped that the accident under consideration was one of those inevitable and unavoidable casualties which human care and foresight could not have provided against; and that no liability

attaches to the plaintiff in error on account thereof.

Notwithstanding the conclusion reached on the merits, the case must, under our practice, be remanded for another trial if the plaintiff be so advised. It is therefore necessary that objections taken to two of the instructions given by the circuit court should be considered.

The first of these is instruction No. 4, given on behalf of the plaintiff, which is as follows: "The slightest neglect against which human prudence and foresight might have guarded, and by reason of which the injury may have been occasioned, renders the Roanoke Railway Company liable in damages for such injury."

The objection made to this instruction is that the jury are told that negligence that may have occasioned the plaintiff's injury will justify a recovery; it being insisted that the negligence must have caused the injury in order to justify a recovery.

This instruction, in the same language that is here employed, has been more than once approved by this court in cases of a like nature. *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394. In both of these cases the accident resulted to a passenger from the falling of a railroad bridge. An examination of the records and the briefs filed in both cases shows that the same objection and the same argument in support thereof was there made to this instruction that is now made.

In the first case cited Judge Staples, speaking for a unanimous court, in referring to this instruction in common with four others, says: "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers and by the opinions of the most respectable courts in this country."

The Case of Noell, *supra*, is to the same effect.

In the light of these authorities, the objection to the instruction under consideration was properly overruled.

The second objection taken by the plaintiff in error is to the modification made by the circuit court of its instruction No. 2. The instruction as asked for was as follows: "The jury are instructed that the plaintiff, in order to recover in this case, must establish the negligence of the defendant by evidence sufficient to satisfy reasonable and well-balanced minds. They are further instructed that the evidence must show more than a probability of a negligent act, and 19 L.R.A. (N.S.)

the plaintiff cannot recover if it is just as probable that the accident in which the plaintiff was injured resulted from one of two causes, for one of which the defendant is not responsible."

This instruction was modified by the court, and made to read as follows: "The jury are instructed that the plaintiff, in order to recover in this case, must establish the negligence of the defendant by evidence sufficient to satisfy reasonable and well-balanced minds, and the evidence must show more than a probability of a negligent act; but, when the plaintiff has shown that she was injured by the breaking down of the bridge and overturning the car, then this is sufficient proof of negligence on the part of the defendant company to meet the requirements above stated, and then the burden of proof is on the company to establish, by a preponderance of evidence, that it has been guilty of no negligence whatsoever which caused the accident, and the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent."

There was no error in this action of the circuit court. Under the instruction, as asked for, the defendant company would merely have to raise a doubt as to the cause of the accident, and thereby shift to the plaintiff a greater burden than the law imposes in such cases. In the case of a passenger, when the plaintiff shows that his injury resulted from an accident which was caused by the breaking down of one of the carrier's bridges, it is sufficient proof of negligence on the part of the defendant company to put the burden upon it of establishing, by a preponderance of evidence, that the accident and the resulting damage was occasioned by inevitable casualty, or by some cause which human care and foresight could not have prevented. The presumption of negligence suggested does not arise from the abstract fact of an accident to a passenger, but arises from a consideration of the nature and quality of the accident; and it must appear that it was such an accident as does not, in the usual course of things, happen to passengers when due care is exercised on the part of the carrier. 3 *Thomp. Neg.* § 3484; *Richmond R. & Electric Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736.

Because of the error of the Circuit Court in not setting aside the verdict as contrary to the law and the evidence, its judgment must be reversed, the verdict set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

WASHINGTON SUPREME COURT.

E. L. FARNSWORTH, Resp't.,
v.

TOWN OF WILBUR et al., Appts.

(49 Wash. 416, 95 Pac. 642.)

Judgment— injunction — regularity.

1. A judgment enjoining the performance of a contract which has already been performed is irregular.

Equity — injunction — closed transaction.

2. Upon a petition to enjoin a town from carrying out an illegal contract consisting of the satisfaction without consideration of a judgment recovered by it, which has in fact been done, a court of equity may set aside the satisfaction and restrain the parties from carrying out the agreement.

Town — satisfaction of judgment — authority.

3. A town council has no authority to satisfy a judgment obtained by the town upon payment of the costs of the action, since such satisfaction is in fact a gift to the judgment debtor which the council has no power to make.

(May 11, 1908.)

Case Note. — Right of town, county, or municipality to surrender valid claim upon a partial payment thereof.

The right of a public corporation to compromise claims or judgments in its favor is usually sustained in the absence of fraud or collusion, unless the compromise is made for the purpose of making a gift or donation to the other party thereto, rather than for purposes which, as to private individuals, are recognized as lawful and valid objects for compromise or settlement.

Judgments.

Most of the cases passing upon the question wherein the foregoing doctrine has been enunciated or applied have been considering claims as to which there was a chance for further litigation, rather than, as in *FARNSWORTH v. WILBUR*, claims that had already been reduced to judgment, and as to which the right to an appeal had expired prior to the settlement, or as to which no right of appeal existed. Such a case, however, was considered by the court in *Collins v. Welch*, 58 Iowa, 72, 43 Am. Rep. 111, 12 N. W. 121, wherein the right of the board of supervisors to compromise a judgment for taxes was sustained, although no question was raised in regard to the validity of the judgment, and it had, at the time of the compromise, become a claim to be enforced by execution, and although the plaintiff taxpayers who sought a writ of certiorari for the purpose of testing the power of the board of supervisors to make the compromise, and to set it aside if it should be found that the power did not exist, al-

A PPEAL by defendants from a judgment of the Superior Court for Lincoln County enjoining the satisfaction of a judgment. Reversed.

The facts are stated in the opinion.

Messrs. E. F. Scarborough and Neal, Sessions, & Myers for appellants.

Messrs. Merritt, Hilschman, Oswald, & Merritt for respondent.

Fullerton, J., delivered the opinion of the court:

This is an action for injunctive relief. It was tried upon the following agreed statement of facts: "(1) That the town of Wilbur is a municipal corporation of the state of Washington, organized and existing as a city of the fourth class under, and by virtue of the laws of the said state relative to municipal corporations.

"(2) That the defendants L. Lewis, W. W. Howells, F. T. Bump, W. J. Browne, and James A. Muir are the duly elected, qualified, and acting members of the town council of the town of Wilbur.

"(3) That the defendant Peder Faldborg is the duly elected, qualified, and acting town treasurer of said town of Wilbur.

leged in their petition that the judgment debtors were solvent and able to pay the judgment in full. The decision of the court was based on its construction of § 303, subdiv. 11, of the Code, which, in substance, provides that the county supervisors are to represent their respective counties, and to have the care and management of the property and business of the county in all cases where no other provision is made. This section was said to authorize the board of supervisors to compromise the judgment if it acted in good faith. As to the claim that there was no basis for compromise in this case, because the judgment was a valid judgment, enforceable by execution, and the judgment debtors were solvent, the court said: "It is true that, where a claim has been reduced to judgment, all questions pertaining to the rightfulness of the claim have been adjudicated. But questions may arise subsequent to the rendition of the judgment, and, where they are of such a character as to render a compromise expedient, it is manifest that the board ought to have the power to make it. Suppose, for instance, that the financial condition of the judgment debtor is such that the board is unable to discover any way of collecting any part of the judgment. The board should have the power to accept a part in satisfaction of the whole, if, in its judgment, the best interests of the county would thereby be promoted. All rules of business conduct by which a prudent person is governed are applicable to a county in the management of its affairs under similar circumstances. It is true that in the case at bar the plaintiff avers that the judgment debtor

"(4) That, on or about the 13th day of March, 1906, judgment was entered by the superior court of the state of Washington in and for the county of Lincoln, in an action wherein the defendant the town of Wilbur was the plaintiff, and wherein one J. E. Nave, one E. H. Lewis, and one C. A. Person were defendants, for the sum of \$1,000 and costs, and that thereafter the said J. E. Nave, E. H. Lewis, and C. A. Person duly appealed to the supreme court of the state of Washington from the judgment aforesaid. That, on the 9th day of October, 1906, the said appeal was by the said supreme court dismissed, and that the said judgment was at the time of the dismissal of the appeal a valid, legal, and binding claim against the said J. E. Nave, E. H. Lewis, and C. A. Person, to which there was no further defense of any nature; and said judgment still remains a valid, legal, and binding claim against said defendants J. E. Nave, E. H. Lewis, and C. A. Person, unless it has been satisfied, settled, and discharged by reason of the facts hereinafter set forth; and that no part thereof has been paid, except the sum of \$290.95, as hereinafter set forth. That an execution has been issued by the

clerk of the superior court of the state of Washington for said county upon the judgment aforesaid, and that said execution is now in the hands of the sheriff of Lincoln county for the satisfaction of said judgment.

"(5) That, on the 21st day of November, 1906, at a regular meeting of the town council of the town of Wilbur, composed of the defendants L. Lewis, W. W. Howells, F. T. Bump, W. J. Browne, and James A. Muir, a resolution was introduced, seconded, and passed by the said defendants, to the effect that the said judgment should be satisfied and discharged upon the payment by the said defendants in the action wherein the judgment was entered, of the costs and expenses therein incurred by the said town of Wilbur, aggregating the sum of \$290.95; and that the said town council and the defendants above named as members of the said council then and there agreed with the said J. E. Nave, E. H. Lewis, and C. A. Person to accept from them in full satisfaction of the said judgment as a full discharge of all their liability to the said town of Wilbur under said judgment the sum above

was solvent. But that averment is not material. We cannot go into any such question of fact in this action. The question before us is one of jurisdiction. If the board can make a compromise with an insolvent judgment debtor, it must be allowed to judge for itself in any given case as to whether the debtor is insolvent or not, and an error made in this respect, however great, would not affect its jurisdiction."

The doctrine of the Collins Case also finds support in *Hagler v. Kelly*, 14 N. D. 218, 103 N. W. 629. While in that case the court was considering the right of a county to sell a judgment, yet it reached its conclusion that the county might sell a judgment for less than its face, on the ground that it had the clear right to compromise a judgment. On this subject it is said: "It must be conceded that the board had the power to abate or compromise the tax which became merged in this judgment, if, in the fair exercise of its discretion, such action was advisable. . . . It is clear that this same power continued after the judgment was obtained. The duty of the county commissioners with respect to the collection of the taxes merged in this judgment was the same after as before the entry of the judgment. If they had the power to abate or compromise the claim, we can conceive of no valid objection to their right to effect the same result by selling the claim."

Where a county owned a judgment against its treasurer and bondsmen, each and all of whom were insolvent, and, as collateral thereto, a claim against an insolvent bank, no part of which was immediately collectable, and the ultimate value

of which, and the time when such value would be realized by the county, were uncertain, it was held, in *Washburn County v. Thompson*, 99 Wis. 585, 75 N. W. 309, that it was competent for the county board to release one of the bondsmen, the president of the insolvent bank, and consent to a reassignment to the bank so that it could resume business with some prospect of ultimately paying its indebtedness, suspend further proceeding to collect such judgment, and extend the time for the bank to pay the claim, on condition of its giving a bond with sufficient sureties to make reasonably certain the payment of the indebtedness at the end of the extended period. The court, in reaching its conclusion, distinguished *Butternut v. O'Malley*, 50 Wis. 329, 7 N. W. 246, 248, in which a town board attempted to rebate a judgment which had been affirmed by the court of last resort, and the solvency of the judgment debtors was not questioned. The two cases may be said to establish the principle, so far as the Wisconsin courts are concerned, that a public corporation may compromise a valid claim if disputed before it is merged in a judgment, and thereafter, if the solvency of the debtors is questionable.

A similar doctrine was also enunciated in *Standart v. Burtis*, 46 Hun, 82, wherein taxpayers were allowed injunctions restraining a city from canceling and discharging a judgment in its favor on payment by the judgment debtors of a sum much less than its face, where it was alleged that the purpose of the settlement was to favor the debtor at the expense of the taxpayers of the city, and that the action of

referred to and amounting to \$290.95, as aforesaid.

"(6) That the said J. E. Nave, E. H. Lewis, and C. A. Person, in pursuance of the resolution of the said town council of the said town of Wilbur, hereinbefore mentioned, paid to the treasurer of said town, and the treasurer accepted from the said defendants, the sum of \$200, and the said defendants paid to the clerk of the above-named court the sum of \$90.75 in full satisfaction and discharge of the said judgment, and thereafter the treasurer of the said town council of the said town of Wilbur paid the said sum of \$200 into the treasury of the said town of Wilbur, which was thereafter used and expended by said town in its usual and ordinary course of business, and that the said town council of the said town of Wilbur has instructed the sheriff of Lincoln county, Washington, not to proceed under the execution placed in his hands referred to in paragraph 5 of the plaintiff's complaint herein.

"(7) That the plaintiff is a resident and taxpayer of the said town of Wilbur, and pays annually to the said town of Wilbur large sums of money as taxes, and that the said settlement of the said judgment by the defendant, as hereinbefore mentioned, will increase the taxes of this plaintiff and all

other taxpayers of the said town of Wilbur to the extent of the reduction made on this judgment by said town council.

"(8) That the said J. E. Nave, E. H. Lewis, and C. A. Person are the owners of property in Lincoln county, not exempt from execution, of the value of at least \$1,200."

On the facts so stipulated, the trial court held that the town council was without power to settle and satisfy the judgment on the terms recited in the resolution, and entered a decree as follows: "It is ordered, adjudged, and decreed that the defendants L. Lewis, W. W. Howells, F. T. Bump, W. J. Browne, James A. Muir, and Peder Faldborg, and their successors and each and all of them be, and they are hereby, perpetually enjoined from making any settlement with J. E. Nave, E. H. Lewis, and C. A. Person upon the judgment and claim involved in this action for any sum whatsoever less than the full amount due to said town of Wilbur under said judgment; that they and their successors and each of them be perpetually enjoined from carrying out the agreement made with said Nave, Lewis, and Person for the settlement of said judgment for less than is due thereon to the defendant the town of Wilbur; that they and each of them and their successors in office be, and they are hereby, perpetually en-

the board was in gross violation of law, and of their duties as officers of a municipality. and in violation of their duties to taxpayers of the city.

The doctrine that public corporations have the power to compromise judgments in favor of the corporation, where the time for an appeal from such judgments has not yet expired, is sustained by the great weight of authority. Thus, in *Farnham v. Lincoln*, 75 Neb. 502, 106 N. W. 666, the right of the officer of a municipality to compromise a litigation still pending in behalf of the city against a street railway company for taxes was sustained, although a judgment had been rendered in the lower court in behalf of the city for a much larger sum than that received in the compromise.

And in *Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230, while it was recognized that a city council was without power to sell or in any manner dispose of the property of a corporation without consideration, or to discharge, without payment, a debt due a public corporation from parties who were solvent and responsible, where no controversy existed in regard to the validity and binding effect of the indebtedness, yet it was held that, where the city had obtained a judgment, but steps had been taken by the judgment debtor to appeal the same, on which appeal he would be entitled to a trial *de novo*, the transaction was one which was in the nature of a pending controversy, and as such the city council had the power to settle it by compromise.
19 L.R.A. (N.S.)

To the same effect, under very similar facts, is *Petersburg v. Mappin*, 14 Ill. 193, 56 Am. Dec. 501.

In reaching the same conclusion as to the right of a board of supervisors to settle a judgment in favor of a county, but from which an appeal had been taken which was still pending, in *Orleans County v. Bowen*, 4 Lans. 24, the court said: "The power to commence and prosecute actions necessarily includes and comprehends the power to finish them, and to determine how far they shall be carried on, and in what manner they may be ended. It includes the power to discontinue the action commenced, upon terms or otherwise, and to agree upon the terms. . . . It is claimed in behalf of the plaintiffs that what they undertook to do was to give away the corporate property, and that this was wholly beyond their power. But here was no gift in any just or proper sense of the term. It was a gift in the same sense that every party to a controversy gives when he relinquishes a portion of a claim he makes against his adversary to effect a settlement and avoid further litigation, and no other."

A case going to the extreme in sustaining this doctrine is *Gering v. School Dist.* 76 Neb. 219, 107 N. W. 250, wherein the right of a school district to make a compromise with its judgment debtor, against whom it held two judgments unappealed from, but from which the time to appeal had not yet

joined and restrained from interfering in any manner whatsoever with the sheriff of Lincoln county in his efforts or attempts to proceed under the execution issued in said action; and that the said town of Wilbur, the town council of said town, the defendants above mentioned as councilmen, and their successors in office be, and they are hereby, required and commanded to have an execution issued on the said judgment and to take all other necessary steps and proceedings to collect in full all sums due to said town of Wilbur under and by virtue of said judgment against J. E. Nave, E. H. Lewis, and C. A. Person, and that they proceed immediately to collect for the said town of Wilbur and pay into the treasury of said town all sums due to said town in and by virtue of said judgment, to which defendants except and exception allowed."

From the judgment so entered, the town and its officers appeal.

In this court the appellants make two principal contentions: First, that the court was without power to enjoin a transaction that the proofs showed had been then committed; and, second, that a municipal corporation in this state has power and authority to compromise and satisfy a final judgment in its favor by taking a part for the whole, even though the judgment debtor

has property out of which the judgment can be made on execution.

The judgment is irregular. The acts which the appellants were enjoined from committing were performed at the time the judgment was entered as fully and completely as the parties were capable of performing them, and the proper judgment would have been one vacating and setting aside the attempted compromise and settlement, and restraining the parties from carrying out the agreement. Such a judgment is within the powers of the superior court to enter when sitting as a court of equity. The powers of the court to grant injunctive relief are mandatory as well as prohibitive. It may, by its mandate, compel the undoing of those acts that have been illegally done, as well as it may, by its prohibitive powers, restrain the doing of illegal acts. Nor was it material in this case that the complaint asked for preventive relief rather than for a mandatory injunction vacating and setting aside what had been done. The plaintiff based his complaint for relief on the facts then in his possession. He did not know that the acts contemplated had been consummated. After the facts developed he was entitled to amend his complaint so as to make the pleadings and proofs correspond had objection been then taken as to its sufficiency. No such

expired, by not only releasing and discharging the judgment debtor from all claims in reference thereto, but also paying him a sum of money, was sustained. One of the judgments compromised was rendered in an action by the judgment debtor against the school district, for costs of suit, and, of course, there was a chance of his reversing this judgment on appeal and securing a favorable judgment against the district.

In the following cases, also, the right of public corporations to compromise judgments in their favor, where the right to an appeal had not expired, was also sustained: *State v. Davis*, 11 S. D. 111, 74 Am. St. Rep. 780, 75 N. W. 897; *St. Louis, I. M. & S. R. Co. v. Anthony*, 73 Mo. 431; *Kinsley v. Norris*, 62 N. H. 652; *Mills County v. Burlington & M. River R. Co.* 47 Iowa, 66; *Multnomah County v. Dekum* (Or.) 93 Pac. 821.

Compromise of claims not reduced to judgment.

The question has arisen as to the right of a public corporation to accept from an officer having in charge its money a sum less than the full amount owing by him, where he has lost a portion of such money through some misfortune, as by theft; and it is very generally held by the courts that such circumstances do not present a proper ground for compromise, and that a settlement or compromise for less than the full amount of money owing by such officer is 19 L.R.A. (N.S.)

invalid. Such was the holding of the court in the following cases: *Jefferson County v. Lineberger*, 3 Mont. 231, 35 Am. Ren. 462; *Bland v. Orr*, 90 Tex. 492, 39 S. W. 558; *Com. v. Tilton*, 111 Ky. 341, 63 S. W. 602.

To the same effect, as to moneys illegally allowed a county officer by the board of commissioners in a settlement with him, is *Zuelly v. Casper*, 37 Ind. App. 186, 76 N. E. 646.

But in *Hancock County v. Bradley*, 53 Ind. 422, the fact that the treasurer of a county had settled with the county commissioners for a sum less than the amount of which he was the custodian for the county, and which had been stolen from him, was held to be a good defense to an action against him and his bondsmen by the board, brought after such settlement.

In *Behan v. Board of Assessors*, 46 La. Ann. 870, 15 So. 397, the right of the mayor of a city to make a compromise with a college as to the number of students from the municipality which the college was to accept free of tuition was denied.

And in *Delta County v. Blackburn*, 100 Tex. 51, 93 S. W. 419, the right of the commissioners' court of a county to reduce the rate of interest on a contract for the purchase of real estate was denied. In this case, however, such a contract would have been invalid had it been made by private persons, because not based on a valuable consideration.

objection having been taken, this court will treat it as sufficient.

The second contention is of more difficulty, but we think the court rightly held that the attempted settlement was beyond the powers of the town council. It is true the council has the exclusive management of the fiscal affairs of the town, and must be accorded a somewhat wide discretion as to the manner in which it will conduct such affairs, yet we think this power does not enable them to give up to third persons the actual property of the town. No doubt the town council may legally compromise doubtful or disputed claims where they act in good faith and with ordinary discretion, but they cannot, under the guise of a compromise, surrender up valuable rights or claims over which there is no longer room for a substantial controversy. Such an attempt is a gift rather than a settlement of a doubtful or disputed claim, and gifts to private individuals are beyond the powers of the town.

For the irregularity first mentioned, however, the judgment must be reversed, with instructions to modify it in the particulars mentioned. It will be so ordered.

Hadley, Ch. J., and Crow, Mount, and Rudkin, JJ., concur.

WASHINGTON SUPREME COURT.

NORTHWEST THRESHER COMPANY,
Appt.,
v.

LEWIS DAHLGREN et al., Resp'ts.

(50 Wash. 325, 97 Pac. 228.)

Agent — authority — collection of notes.

An agent of a corporation may be found to have had power to receive property in satisfaction of notes issued to the corporation where he sold the machinery for which the notes were issued, received the notes and the mortgage securing them, collected all payments upon them, and conducted the proceedings to foreclose the mortgage, although an officer of the corporation states that his authority was only to collect the notes.

(September 15, 1908.)

APPEAL by plaintiff from a judgment of the Superior Court for Snohomish County in defendants' favor in an action brought to recover a balance alleged to be due on certain promissory notes. Affirmed.

The facts are stated in the opinion.

Mr. E. C. Dailey for appellant.

Mr. F. E. Anderson, for respondents:

The respondents were warranted in believing that the agent had general authority. 19 L.R.A. (N.S.)

Palmer v. Roath, 86 Mich. 602, 49 N. W. 590; Aultman, M. & Co. v. Dodson, 104 Mich. 507, 62 N. W. 708; Dusenberry v. McDole, 42 Wash. 470, 85 Pac. 40; Kasson v. Noltner, 43 Wis. 647, 28 Am. Rep. 576; Harris v. Simmerman, 81 Ill. 413; Estey v. Snyder, 76 Wis. 624, 45 N. W. 415; Howe Mach. Co. v. Ballweg, 89 Ill. 318; Billings v. Mason, 80 Me. 496, 15 Atl. 59.

By receiving and retaining the proceeds of the mortgaged property upon foreclosure, the company ratified the acts of its agent..

Mechem, Agency, § 130; Curtis v. Janzen, 7 Wash. 58, 34 Pac. 131; Windsor v. St. Paul, M. & M. R. Co. 37 Wash. 156, 79 Pac. 613, 3 A. & E. Ann. Cas. 62; Peterson v. Hicks, 43 Wash. 412, 86 Pac. 634; Strasser v. Conklin, 54 Wis. 102, 11 N. W. 254; Miles v. Ogden, 54 Wis. 573, 12 N. W. 81; Scott v. Middletown, U. & W. G. R. Co. 86 N. Y. 200; Rich v. State Nat. Bank, 7 Neb. 201, 29 Am. Rep. 382; McClure Bros. v. Briggs, 58 Vt. 82, 56 Am. Rep. 557, 2 Atl. 583; Henderson v. Cummings, 44 Ill. 325; Everts v. Selover, 44 Mich. 519, 38 Am. Rep. 278, 7 N. W. 225.

Fullerton, J., delivered the opinion of the court:

This action was brought by the appellant against the respondents to recover a balance alleged to be due upon three promissory

Case Note. — Authority of agent to accept chattel in payment of indebtedness due his principal.

The general doctrine that an agent with authority merely to collect an indebtedness cannot collect on such indebtedness anything but money is well settled. This doctrine was applied in *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478, 71 N. W. 724, wherein it was held that an attorney holding a claim secured by a chattel mortgage was without power to settle with the debtor by taking the mortgaged property in full satisfaction of the debt which it was pledged to secure, unless he was specially authorized so to do.

And in *Robinson v. Nipp*, 20 Ind. App. 156, 50 N. E. 408, the doctrine was applied as to the right of an agent to deliver up the notes of his principal secured by a mortgage on chattels, and cancel the debt on condition that the mortgagor should turn over the property covered by the mortgage to him. The fact that the agent in question assisted in delivering the purchased property, received the notes given for the purchase price, demanded payment of the notes when due, took possession of the chattels turned over by the debtor, and sold the same as stipulated in the mortgage, was held not to be sufficient evidence of authority in the agent to make such an arrangement with the debtor.

To the same effect, as to an agent set-

notes. The notes in question were executed by the respondents, and delivered to the Minnesota Thresher Manufacturing Company on December 30, 1892, and were secured by mortgage upon certain personal property. Foreclosure proceedings were begun in 1898, and the property taken from the possession of the mortgagors. Thereafter the appellant purchased the notes at a receiver's sale of the thresher company's assets, it having become insolvent. This action was brought on October 5, 1906. To the complaint, which was in the usual form, the respondents filed an answer in which they admitted the execution of the notes, but averred that the same had been paid and satisfied by an accord and satisfaction between the respondents and the Minnesota Thresher Manufacturing Company, made at the time of the

ting with a mortgagor of real estate covered, is *Rodgers v. Peckham*, 120 Cal. 238, 32 Pac. 483.

This general doctrine was also applied in the following cases, wherein merchandise or other personal chattels were taken by an agent, whose authority was merely to collect for his principal, and who had no special authority to receive anything but money; and it was held that the receipt of chattels under such circumstances was not binding on the principal, and would not, apply on the indebtedness, if the principal had not received the benefit of it: *Mudgett v. Day*, 12 Cal. 139; *Sioux City Nursery & Seed Co. v. Magnus*, 1 Colo. App. 45, 27 Pac. 257; *McLaughlin v. Blount*, 61 Ga. 168; *Reynolds v. Ferree*, 86 Ill. 570; *Kirk v. Hiatt*, 2 Ind. 322; *Aultman v. Lee*, 43 Iowa, 404; *Woodruff v. American Road Mach. Co.* 23 Ky. L. Rep. 1551, 65 S. W. 600; *Parker v. Leech*, 76 Neb. 136, 107 N. W. 217; *Loy v. McClure*, 124 Mo. App. 689, 101 S. W. 1148; *Wright v. Daily*, 26 Tex. 730; *Rhine v. Blake* 59 Tex. 240; *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771; *Wees v. Page*, 47 Wash. 213, 91 Pac. 766.

In other jurisdictions it has been held that if the debtor, in turning over property to an agent to apply upon an indebtedness of the principal, knew, or had reason to believe, from the character of the property turned over, such as merchandise, that the agent would apply the same to his personal use and benefit, such property would not apply as payment, either in whole or in part, of the principal's indebtedness. *L'Artiste Pub. Co. v. Walker*, 11 Misc. 426, 32 N. Y. Supp. 151; *Erie Preserving Co. v. Pearsall*, 13 Jones & S. 636; *Sier v. Bache*, 7 Misc. 165, 27 N. Y. Supp. 255; *Williams v. Johnston*, 92 N. C. 532, 53 Am. Rep. 428; *National Loan & Invest. Co. v. Bleasdale* (Iowa) 119 N. W. 77.

The general doctrine that an agent merely to collect cannot accept anything but money in payment of his principal's indebtedness was applied in *Taylor v. Robinson*, 14 Cal. 19 L.R.A. (N.S.)

mortgage foreclosure, by which the company took the mortgaged property and certain other property then owned by the respondents in satisfaction of the mortgage debt.

Whether or not such a settlement was made was the only issue between the parties. On the question the evidence was conflicting; but, since the trial judge found in favor of the respondents, we shall not disturb his findings. The witnesses were before him, and he is in a much better position to judge of the weight of the evidence than we are, who must take the evidence from the printed record. The appellant contends, however, that, conceding the respondents' version of the transaction to be true, the defense was not made out, since it was shown that the transaction was had with an agent of the Minnesota Thresher Manu-

396, in a controversy between the principal and a levying creditor of the debtor, who had levied upon the property taken by the agent as the property of the debtor. The claim was made that the property was the property of the debtor at the time of the levy, because the agreement with the agent of the creditor to take it to apply upon his principal's indebtedness was not binding until ratified, and that, before the ratification by the principal, the levy had been made. Applying the foregoing doctrine, this contention was sustained.

But, under a similar state of facts, except that the agent was given full authority to act for the principal in regard to his claim, the court, in *Oliver v. Sterling*, 20 Ohio St. 391, and *Knowles v. Street*, 87 Ala. 357, 6 So. 273, held that the title to the property passed from the debtor to the principal upon the consummation of the agreement with the agent; and that a levying creditor on the property, after such arrangement had been entered into, who levied upon it as the property of the debtor, could not hold it as the property of the debtor.

To the same effect, also, is *Keating Implement & Mach. Co. v. Terre Haute Carriage & Buggy Co.* 11 Tex. Civ. App. 216, 32 S. W. 556. In this case the agent was authorized by telegraph to take chattels of the debtor upon the indebtedness.

In cases of general agency, where, as in *NORTHWEST THRESHER CO. v. DAHLGREN*, the agent is in possession of the property of the principal, selling the same, taking notes therefor and collecting the notes, and frequently taking property as part payment of the notes, or as part payment of the purchase price, the doctrine is applied that the principal, by allowing the agent so to conduct his business, renders himself obligated by the acts of his agent, outside the express or actual authority of the agent; and that therefore a payment to the agent in chattels is sufficient. *Eggleston v. Advance Thresher Co.* 96 Minn. 241, 104 N. W. 891; *John Hutchinson Mfg. Co. v. Henry*, 44 Mo. App. 263.

facturing Company, and it is not shown that he had authority to make such an agreement. But it was testified that the agent sold the machinery to the respondents for which the notes were given; that he received the notes and mortgage from the respondents; that he collected all payments made upon the notes, some of which payments were in the form of lumber and timber products; and that he conducted the foreclosure proceedings, and received on behalf of the company, not only the mortgaged property, but the other property not covered by the mortgage which the respondents turned over therewith. Here was such apparent general authority to deal with the notes as to warrant the conclusion that he had full power to make such a settlement, even as against the belated statement of an ex-officer of the corporation to the effect that the agent's authority was only to collect the notes.

The judgment is affirmed.

Hadley, Ch. J., and Mount, Crow, and Root, JJ., concur.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN, Resp't.,
v.
CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Appt.

(— Wis. —, 117 N. W. 686.)

Interstate commerce — railroad employees — congressional regulation — state action.

1. A regulation by Congress of the number of hours per day for which telegraph operators and train despatchers on interstate railroads may be employed inhibits state legislation upon the same subject,—especially such as limits such employment to fewer hours per day than allowed by Congress, and puts the regulation in force sooner than the time provided by the congressional act.

Same — Intrastate business.

2. A state statute applicable to every corporation operating a line of railroad wholly or partly within the state, which limits the hours during which its telegraph operators and train despatchers may be allowed to work, and which restricts the employment of all operators, without discrimination as to the character of their services, cannot be upheld as applying only to operators engaged exclusively on business wholly within the state.

Note. — As to state regulation of relations between railroad companies engaged in interstate commerce and their employees, see *State v. Northern P. R. Co.* 15 L.R.A. (N.S.) 134, and case note thereto. 19 L.R.A. (N.S.)

Act of Congress — constitutionality.

3. An act of Congress regulating the hours of labor of railroad employees engaged strictly in the business of interstate commerce cannot be annulled because not within its constitutional powers.

(September 29, 1908.)

APPPEAL by defendant from a judgment of the Circuit Court for Milwaukee County imposing upon it a penalty for violation of the statute regulating the hours of labor of railroad telegraph operators. Reversed.

Statement by Dodge, J.:

Action for penalty under chapter 575, p. 1188, of the Laws of 1907, for that, on the 11th day of January, 1908, one McGrath was a telegraph operator in defendant's station at Milwaukee, engaged in reporting and receiving orders affecting the movement of cars, engines, and trains of the defendant company, and operating signal devices; that on said day the defendant required, allowed, and permitted said McGrath to be and remain on duty for said defendant twelve consecutive hours, not by reason of any casualty upon said railroad. The answer set up numerous separate defenses, most of them attacking the validity of the state law as inimical either to the 14th Amendment of the United States Constitution, or to certain provisions of our own Constitution; and some of them asserting certain technical grounds of escape from the words of the act. By the second and fifth defenses it was set forth that the defendant's road ran through several states; that it was engaged in both interstate and intrastate business by the same employees, trains, cars, appliances, and track; that it was unavoidable that the same operator should work upon all trains passing over the same division of the road, both those whose termini were wholly within the state and those which crossed the state line; that it was wholly impossible that either class of trains should be directed or governed by a separate man; that, during the excess time of employment of McGrath, there was one train as to which he made reports, received orders, etc., which ran wholly within the state and carried nothing of interstate commerce, but that the great majority of trains in any way acted upon by him were interstate-commerce trains; that any attempt to separate interstate from domestic commerce in the operation of trains and the regulation thereof by said operatives would result in great danger, delay, interference, and expense to the interstate commerce; that the statute in question was therefore void as restricting and regulating interstate com-

merce, in defiance of the Constitution of the United States, conferring upon Congress the power to regulate such commerce, and also act Cong. March 4, 1907, chap. 2939, 34 Stat. at L. 1415 (U. S. Comp. Stat. Supp. 1907, p. 913), which prescribed a different and longer service for the same employees. The separate defenses of the answer were each met by a separate demurrer, except the first, which merely denied indebtedness for the penalty. The court below sustained the demurrer to all of said defenses, except the first. The defendant declining to amend, judgment was entered for the plaintiff for the sum of \$1,000, with costs, from which the defendant appeals.

Mr. Burton Hanson, with Messrs. C. H. Van Alstine and H. J. Killilea, for appellant:

Congress has the exclusive right to regulate a train moving in interstate commerce, even though the regulation affects intrastate commerce carried on by means of the same train and the same operator.

United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321.

In the absence of a law of Congress, the states may pass laws, under the police power, affecting, to some extent, subjects or things connected with interstate commerce.

Cushing v. The John Fraser (The James Gray v. The John Fraser) 21 How. 184, 16 L. ed. 106; United States v. St. Louis & M. Valley Transp. Co. 184 U. S. 247, 46 L. ed. 520, 22 Sup. Ct. Rep. 350.

A law of Congress governing the same subject or thing covered by a state law supersedes and displaces the state law.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 297, 43 L. ed. 706, 19 Sup. Ct. Rep. 465; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

As the act is not and cannot be limited to the regulation of intrastate commerce, it is in conflict with the Federal nine-hour law, and with the commerce clause of the Constitution of the United States, and is void.

Employers' Liability Cases, supra; State v. Missouri P. R. Co. 212 Mo. 658, 111 S. W. 500.

Messrs. F. L. Gilbert, Attorney General, A. C. Titus, F. E. McGovern, and N. L. Baker, for respondent:

The law is a legitimate exercise of the police power of the state.

State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 114 N. W. 137; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

The law is not invalid as a regulation of, or interference with, interstate commerce.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92; Crutcher v. Kentucky, 141 U. S. 61, 35 L. ed. 653, 11 Sup. Ct. Rep. 851; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Austin v. Tennessee, 179 U. S. 362, 45 L. ed. 233, 21 Sup. Ct. Rep. 132; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 307; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234.

Dodge, J., delivered the opinion of the court:

The primary and most earnestly argued question is whether the act (Laws 1907, chap. 575, p. 1188, § 1816m) prohibiting a corporation operating a line of railroad in whole or in part in this state to require or permit any (telegraph or telephone) operator (including train despatcher) to remain on duty for more than one period of eight consecutive hours, so regulates interstate commerce intentionally or by necessary effect that it invades the power conferred upon Congress by article 1, § 8, Const. U. S. "to regulate commerce with foreign nations and among the several states, and with the Indian tribes," that it cannot stand. That the regulation of the relation between master and servant as to acts done in interstate commerce is within the power thus conferred upon Congress is authoritatively de-

cided by the Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 494, 52 L. ed. 297, 307, 28 Sup. Ct. Rep. 141. It is categorically so declared in the opinion of the court, although three of the five justices who concurred in the decision withheld their assent from this proposition, which, however, received the approval of the three justices who dissented from the ultimate decision. We can discover no distinction in principle between the subject of regulation considered in that case, namely, the responsibility of the employer for injuries to an employee, though due to the negligence of a fellow servant, and the subject of the act under consideration, which is the prohibition of employers from imposing upon employees excessive hours of labor. Both must seek their justification for governmental action in the same principles and reasons, either in the protection of a class of employees from requirements hurtful to them, or in the protection of the welfare and safety of the public and of the commerce from dangers supposed to arise by reason of burdensome responsibilities or perils imposed upon the employees of railroads. While the thing primarily regulated is not commerce, the regulation of the conduct of the individual while engaged in carrying on that commerce so directly affects it that the latter is thereby regulated.

But the mere fact that in some degree interstate commerce is affected by the act of a state legislature is not universally sufficient to condemn that act. The power of the state to control the conduct of individuals therein for the safety of the community is not taken away by the provision of the Federal Constitution above mentioned, merely because some fanciful or remote influence upon interstate commerce may result. Property may be taxed upon its value, although that value in part depends upon a franchise, or ability to use it, in interstate commerce, even though it may appear that the increased burden of taxation upon it must be paid out of the earnings of interstate commerce, and that, therefore, the charges upon such commerce will probably be increased. Dishonest practices by peddlers may be forbidden and punished by a state, notwithstanding they are practices by which some peddlers effect sales in the course of interstate commerce. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532. On the other hand, state legislation is prohibited which directly and intentionally controls and regulates interstate commerce, as, for example, an act which in terms regulates freight or passenger charges for interstate carriage, or which imposes a direct prohibition or charge upon the importation of property from one state

into another. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087. Between these two extremes, however, lies a broad field for legislation claimed to be justified by necessary protection of the safety of the local community, which more or less directly obstructs, restrains, and regulates the transaction of interstate commerce,—legislation not enacted for that purpose, but incidentally having the result. The Supreme Court of the United States, in *Covington & C. Bridge Co. v. Kentucky*, supra, has classified that field into three classes of legislative acts: The first, where the states have plenary power and Congress has no right to interfere, which concern the strictly internal commerce of the state, and, while the regulation may affect interstate commerce indirectly, its bearing is so remote that it cannot be termed in any just sense interference. The second includes cases of what may be termed "concurrent jurisdiction," where the states may act in the absence of congressional action. Obviously this field must be one where Congress has right and power to act if it sees fit, but where some restraint and regulation is necessary, and the authority therefor is deemed to be conceded to the states pending nonaction of Congress. The third is the class where, from the very intimacy with and directness of effect upon interstate commerce of any legislative action, and national scope of the subject of legislation, it is presumed that the refraining of Congress from promulgating any regulations must be considered to declare a policy that the subject shall be free from regulation.

Pretty obviously, under the decisions of the Supreme Court of the United States, the act we are considering must fall in the second class. The safety of the public may be so imperiled by the employment of incompetent or disabled persons in and about railroads, navigation, and the like that the necessity for some legislation in regard thereto is manifest, and the forbearance of Congress to legislate might well be deemed significant of its policy to leave the subject of regulation to the legislatures of the several states. In this line, it has been held that examination of pilots or railroad engineers with reference to physical capacity, especially color blindness, as a condition of their employment, is competent for a state. *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep.

564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28. As pointed out in the latter case (page 101 of 128 U. S.): "Such legislation is not directed against commerce. It only affects it incidentally." In the former case it is suggested that acts much more intimately connected with the commerce itself would be competent, such as those requiring safeguards and signals in running trains, provision for the safety of passengers, regulating the manner of heating cars (New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418), regulating the speed of trains (Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819), requiring the stopping of trains at certain stations (Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627), and others of like import. From these we cannot doubt that prohibition of an overfatigued telegraph operator from directing the operation of trains falls within the state's power to control, even though thereby the conduct of interstate commerce might be impeded or burdened. But this power in the states is subject to that provision in the Constitution that Congress shall have power to regulate interstate commerce,—that is, to prescribe the restrictions and limitations under which it shall be conducted,—and, when it prescribes those regulations, it does so to the exclusion of state legislation accomplishing a like regulation directly or indirectly, and whether intended for that purpose or not. That is declared in all of the cases above cited, conceding to the states authority over such subjects in the absence of congressional legislation.

Within the field of authorized congressional action, the Federal power must, in the nature of things, be supreme in all parts of the United States. "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U. S. Const. art. 6, § 2. In *Cooley v. Port Wardens*, 12 How. 299, 318, 13 L. ed. 996, 1004, it was said of this class of legislation: "It is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations." In *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435, where a state law authorized the building of a bridge over a navigable water, it was declared that, even in the matter of

a bridge, "if Congress chooses to act, its action necessarily precludes the action of the state." In *United States v. Colorado & N. W. R. Co.* (C. C. A.) 157 Fed. 321, 330, Sanborn, J., remarks: "The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce; and, if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary, in order to regulate interstate commerce fully and effectually. . . . That power is not subordinate, but it is paramount, to all the powers of the states. If its independent and lawful exercise of this congressional power and the attempted exercise by a state of any of its powers impinge or conflict, the former must prevail and the latter must give way." See also *Gibbons v. Ogden*, 9 Wheat. 1, 209, 210, 6 L. ed. 23, 73. It will be observed from these utterances that it is not a mere question of conflicting laws in the two jurisdictions, so that the law of a state will be valid so far as not antagonistic to a Federal law. The question is more properly one of jurisdiction over the subject; the holding being that, within the second class of subjects above outlined, silence of Congress is deemed a relegation to the states of such jurisdiction and authority, but action by Congress upon the particular subject is deemed an assertion of the Federal power, a declaration of the policy that the subject shall be under Federal, and not state, regulation, and that, therefore, the power shall no longer rest in the state to exercise that authority which, by the Constitution of the United States, was surrendered to the Federal government when and if Congress deemed its exercise advisable.

On March 4, 1907, before the act now under consideration was passed, and even before it was introduced in the Wisconsin legislature, Congress had legislated fully upon the subject of hours of labor for the very class of employees affected by § 1816m. It then provided (act March 4, 1907, chap. 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1907, p. 913), that it should be unlawful for any common carrier subject to the act to require or permit any employee subject to the act to be or remain on duty for a period longer than sixteen consecutive hours; and that no operator or train dispatcher should be required or permitted to remain on duty for a longer period than nine hours in any twenty-four period in places continuously operated night and day, nor for a period longer than thirteen hours in places operated only during the daytime, with exceptions in case of emergencies. This

was a clear declaration by Congress of a will and policy that, so far as the regulation and safeguarding of interstate commerce might properly be affected by prescribing hours of labor for such employees, the subject should be under control of Congress, and not of the state legislatures. Doubtless the state legislatures persisted in their power to protect the safety of their respective communities by reasonably regulating the hours of service of railroad employees, with the limitation, however, that they must not thereby restrict or effectively regulate interstate commerce. Under many of the decisions above cited, the state was thereby precluded from enacting any law of that sort which would have that effect, for the field of policy and legislation was thus assumed by Congress and withdrawn from state competency. *State v. Missouri* P. R. Co. 212 Mo. 658, 111 S. W. 500.

Apart from this view, however, it is too obvious to need more than statement that the legislation fixing nine and thirteen hours, respectively, as the permitted term of employment, was declaration of a Federal policy on that subject, and that a state law excluding interstate railways from the use of their employees on interstate commerce for one of the nine hours, or for five of the thirteen hours, would be in direct conflict with that policy. The absence of such an employee at a small station upon an interstate road might well be a most serious inconvenience and burden upon both the celerity and safety of interstate commerce past that station, and requirement of such absence would be in direct antagonism to the policy of the Federal law permitting presence and employment. Not less obviously, the act of Congress declared a policy that interstate railroads should have a reasonable time in which to adjust their business to the new restrictions, by postponing the date when the law should become operative for one year after its passage, thus indicating that such period of time was so necessary to reasonable convenience of interstate commerce. Indeed, this latter implication is not only clear from the act, but made the more certain by reference to the debates and reports of committees attending the consideration and passage of the law of Congress. Hence a state provision to the effect that the time for such preparation and adjustment should be restricted to the 1st of January, 1908, as contained in chapter 575, p. 1188, Laws of 1907, is in direct conflict with the policy of Congress. *State v. Missouri* P. R. Co. *supra*. We are therefore constrained to the conclusion that restriction of hours of labor of telegraph operators engaged in moving interstate trains or traffic is a field of leg-

islation forbidden to the states by the Federal Constitution, but also that the limitation contained in our statute is in conflict with and in negation of the act of Congress, and cannot be enforced as to such employees.

It may not be out of place to reiterate, what has already been said, that the right of the state, in the sincere exercise of its police power, to protect its citizens generally from any perils resulting from excessive hours of labor by railroad employees, is in no way impaired by the Federal Constitution, except as such legislation shall interfere with or restrain interstate commerce in a respect in which Congress has deemed wise to regulate it. The conduct of persons within the state inimical to public safety is within the police control of the state, whether those persons be engaged in interstate commerce or not, so long as restrictions upon their conduct will not affect the interstate commerce. *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Reid v. Colorado*, 187 U. S. 147, 148, 47 L. ed. 114, 23 Sup. Ct. Rep. 92; *Gibbons v. Ogden*, 9 Wheat. 1, 104, 6 L. ed. 23, 48; *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485.

The further contention is made by the respondent that, even if it be beyond the power of the state to restrict the services of an operator engaged in moving interstate trains, it is competent to so restrict as to one engaged exclusively upon trains or business wholly within the state, and that the law may be construed as so limited, and its validity as so limited be sustained. The principle invoked is doubtless sound, if it is reasonably possible to separate the permissible from the forbidden, and to believe that the legislature intended by the act to effect the one and omit the other. On this subject the *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 494, 52 L. ed. 297, 307, 28 Sup. Ct. Rep. 141, are entirely germane and controlling. It is there pointed out that, by its terms, the act is aimed simply at the employer, and makes no distinction in denunciation of his acts, whether they be done in interstate or intrastate business, so that it in terms regulates purely domestic acts and transactions. Chapter 575, p. 1188, Laws of 1907, is even more objectionable in this regard than the employers' liability act; for it in terms is directed to every corporation operating a line of railroad, in whole or in part, in the state of Wisconsin, thus expressly including those who are engaged in interstate commerce. But it is also open to the other objection, held to be fatal, that it restricts the employment of all operators, without discrimination as to

the character of their services. This alone, under the reasoning of the employers' liability act, *supra*, must condemn the state act; for it is matter of common knowledge, and is set up as a fact by the answer, that any operator who works upon trains or transportation wholly within the state also necessarily and at the same time works upon interstate trains and transportation. *State v. Missouri P. R. Co. supra*. The state legislature has in terms undertaken to restrict hours of work of employees engaged in safeguarding and conducting interstate commerce, as well as domestic; and, controlled as we must be by the decision of the Federal Supreme Court, we cannot import a meaning contradictory to the express words. Neither can we feel any certainty that the generality of the restriction was not an essential element in the entire legislative scheme, so that we might believe the legislature would have imposed upon domestic commerce, or on employees exclusively engaged therein, burdens not also resting on entirely similar acts of employees involving interstate trains or commerce.

Apart, however, from the controlling effect of the reasons urged in the Employers' Liability Cases, and in addition thereto, we think the impracticability, if not impossibility, of limiting hours of work devoted to domestic commerce alone is so obvious as to preclude belief in any such legislative purpose. That impracticability is largely shown by facts alleged in the answer, but also by facts which are matter of common knowledge. The direction and despatching of every train on an interstate railway necessarily involves knowledge in the train despatcher of all other trains which are in the same vicinity at the same time, and also ability to control such other trains. An interstate train from Milwaukee to Chicago cannot be safely forwarded if, under the direction of a separate employee, a local train may be moving between Milwaukee and Racine over the same track at the same time, or nearly so. The very switching at local stations must be within the knowledge and under the control of him who is to decide upon and direct the most important of interstate transportation. Obviously diversion of authority over these subjects would be fraught with great perils and delays to both kinds of transportation. Hardly any act of a train despatcher on a busy railroad can be conceived which does not affect both interstate and domestic commerce. He cannot move or stop the most distinctively local train without affecting the interstate train, or *vice versa*. No extra or special can be put on the division without adjustment of other trains. Of course, also, every interstate train carries

some purely intrastate freight or passengers. Many purely domestic trains carry some freight or passengers in transit to extrastate destination. It would seem that any severance of control over state from interstate trains involved so much of confusion and probability of danger, and its possibility even is so doubtful and experimental, that no legislature would absolutely precipitate it without careful consideration, nor without providing in the act for the event of the failure of such experiments. For this reason as well, we are convinced that the legislative purpose involved what the legislative words include,—the regulation of services of all operators,—and would in no wise be satisfied, even in part, by a restriction to those whose acts affect only domestic commerce, if, indeed, there are any such.

But it is claimed that the Federal act of March 4, 1907, itself is unconstitutional upon the same ground that the employers' liability act was so held in the case already mentioned, reported at 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141. That case, from amongst great contrariety of opinion of individual justices, finally decided the very narrow proposition that the mere fact that a person or corporation is engaged in interstate commerce does not confer upon Congress authority to regulate its acts not connected with such commerce. The court took judicial notice of the fact that nearly all railroad companies engaged in interstate commerce are also engaged in business which is purely domestic to some individual state, as, for instance, in transportation wholly within the state, but also in the maintenance of factories and repair shops and other operations in no wise affecting interstate commerce. That law was addressed to every common carrier engaged in interstate commerce, and regulated every such common carrier in its relations with each and every of its employees, wholly without regard to the kind of service rendered by such employees. It was held that, by its terms, it sought to regulate that relation with employees not engaged in interstate commerce,—a boilermaker in its engine shops, a carpenter repairing its warehouses, or a sweeper in the barns of an express company,—and that, therefore, it was not within any power conferred upon Congress, notably not within that to regulate interstate commerce. The act of Congress of March 4, 1907, was passed after that case had been decided in the same way in the lower court, and after a writ of error had been for some time pending in the Supreme Court, and the Department of Justice had asked, and been granted, right to be heard on behalf of the United States on the ques-

tion of constitutionality. The contention of those who attacked the employers' liability law was doubtless well known to the Interstate Commerce Commission and to the Congress. It is therefore entirely natural and probable that an attempt would have been made to differentiate the latter enactment from the former one, and to escape the somewhat technical ground of invalidity in the former. It is without surprise, therefore, that we find such differentiating provision in the first section [34 Stat. at L. 1415, 1416, chap. 2939, U. S. Comp. Stat. Supp. 1907, p 913], to the effect "that the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers," etc., between the several states; and also: "The term 'employees,' as used in this act, shall be held to mean persons actually engaged in or connected with the movement of any [interstate] train." It will also be noted that the hours of employment are prescribed for "any employee subject to this act." We cannot doubt that by these phrases the operation of the present act was limited, not only to employers engaged in interstate commerce, but to the conduct of employees so engaged, to the exclusion of any who might be engaged purely in the domestic affairs of the employer; and that by this very distinction and limitation of the application of the act the legislation is brought within that portion of the decision which holds that the employers' liability act would have been valid had it been confined in application to the relation of employees while engaged in interstate commerce. 207 U. S. at page 496.

Since our conclusion is fatal to chapter 575, p. 1188, Laws of 1907, no possible necessity for or benefit from a new trial can result. Hence:

Judgment reversed, and cause remanded, with directions to enter judgment for the defendant.

WISCONSIN SUPREME COURT.

MICHAEL HIROUX, Resp't.,

v.

JOHN BAUM et al., Appts.

(— Wis. —, 118 N. W. 533.)

Master — automobile — child.

1. A boy may be found to be the agent of his father in operating the latter's automobile, where it was purchased mainly at his solicitation, with the understanding that he was to learn to run it for the benefit of the family, if at the time in question he was

operating the car under the instructions of the vendor.

Same — possession of machine — responsibility.

2. An automobile which has been purchased with the understanding that the son of the purchaser shall be taught to operate it may be found to be in possession of the son as agent of the purchaser, while the instructions are being given, and not in that of the vendor as an independent contractor.

Appeal — instructions — defect.

3. An inadvertent insertion of a word in an instruction to the jury is not reversible error where it operates in favor of the complaining party.

Damages — reviewing court — interference.

4. The reviewing court will not interfere with a verdict for \$1,200 in favor of a man sixty-three years of age who was knocked down by an automobile, rendered unconscious, and suffered a contusion of the head and hip, and who at the time of the injury was earning \$1.50 per day, and at the time of the trial, six months later, was unable to work, and for three weeks after the accident did not rest well, where at the later date the tenderness in the wounds had not disappeared, and in the opinion of a doctor was permanent.

(December 1, 1908.)

A PPEAL by defendants from a judgment of the Circuit Court for Brown County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

Statement by Kerwin, J.:

The plaintiff was at work sweeping one of the streets in the city of Green Bay, Wisconsin, and was run into and injured by an automobile owned by appellant John Baum. The appellant purchased the automobile a few days before the time of the accident, and had an understanding with Mr. Lucia, one of the members of the firm from whom the machine was purchased, that he would instruct the appellant's son, Cecil Baum, to run it. At the time of the injury Mr. Lucia and Cecil Baum were out with the machine, and Cecil was running it. Defendant Cecil was seventeen years of age, living with his father, who was a merchant doing business in Green Bay, and occasionally worked in his father's store. The complaint charges de-

Note. — As to parent's liability for torts of minor child, see subject note to *Broadstreet v. Hall*, 10 L.R.A. (N.S.) 933.

As to liability of owner of automobile for injuries caused thereby while being used by a servant or a third person for his business or pleasure, see case note to *Jones v. Hoge*, 14 L.R.A. (N.S.) 216.

defendants with negligence, and that the defendant Cecil was acting as the agent and servant of the defendant John Baum, and that said Cecil, while in the employ and acting as the agent and servant of John Baum, and with his sanction and authority, drove an automobile belonging to the defendant John Baum carelessly and negligently, and ran into plaintiff, causing the injury. The defendant John Baum answered by general denial, and the defendant Cecil answered by his guardian *ad litem*, admitting that plaintiff was employed as a street sweeper by the city of Green Bay, and was, at the time of the accident, sweeping Main street, and was thrown upon the ground in the street, and that defendant Cecil is the son of defendant John Baum; and denied the other allegations of the complaint.

The jury returned the following verdict:

(1) Was Cecil Baum the servant and agent of the defendant John Baum in running the automobile at the time the plaintiff was injured?

Answer. Yes.

(2) If you answer the first question yes, then answer this: Was Cecil Baum acting within the scope of his employment while driving the automobile at the time of the injury?

Answer. Yes.

(3) Was Cecil Baum wanting in ordinary care in driving and managing the automobile prior to and at the time it struck the plaintiff?

Answer. Yes.

(4) If you answer the third question yes, then answer this: Was such want of ordinary care the proximate cause of the plaintiff's injury?

Answer. Yes.

(5) If your answer to the third question should be "Yes," then answer this: Did any want of ordinary care on the part of the plaintiff contribute to his injury?

Answer. No.

(6) What amount of money would compensate the plaintiff for his injury?

Answer. Twelve hundred (\$1,200) dollars.

The usual motions were made to amend the verdict, for judgment in favor of the defendant John Baum upon the verdict as amended, for judgment notwithstanding the verdict, and for a new trial, which motions were denied, and due exceptions taken. Exceptions were also duly filed to the charge of the court to the jury. Judgment was entered in favor of the plaintiff upon the verdict. from which this appeal was taken.

Messrs. Aarons & Niven, for appellant John Baum:

The liability of the father for the torts 19 L.R.A. (N.S.)

of his minor child results from the rule of *respondere superior* only when the fact of the child's agency for the father is proven, and no presumption of agency results from the domestic relationship.

Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325; 1 Thomp. Neg. ¶ 537; Winkler v. Fisher, 95 Wis. 355, 70 N. W. 477; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58.

The decisive question is: Has the defendant the right to control in the particular instance the conduct of the person doing the wrong?

1 Thomp. Neg. ¶¶ 621, 622; 26 Cyc. Law & Proc. pp. 1546, 1547; Bailey, Mast. & S. ¶ 2608; Richmond v. Sitterding, 101 Va. 354, 65 L.R.A. 453, 99 Am. St. Rep. 879, 43 S. E. 562; Salliotte v. King Bridge Co. 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; Bauer v. Richter, 103 Wis. 412, 79 N. W. 404; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Smith v. Milwaukee Builders' & T. Exchange, 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041.

Messrs. Kittell & Burke for respondent:

The fact that the father was the owner of the automobile, and that the son was there by his direction, is sufficient to make a *prima facie* case as to master and servant.

Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Supp. 161; Collard v. Beach, 81 App. Div. 582, 81 N. Y. Supp. 619; Gilmartin v. New York, 55 Barb. 239; Schaefer v. Osterbrink, 67 Wis. 502, 58 Am. Rep. 875, 30 N. W. 922; Davis v. Dregne, 120 Wis. 63, 97 N. W. 512.

The vendor was not an independent contractor.

16 Am. & Eng. Enc. Law, p. 188; Jensen v. Barbour, 15 Mont. 582, 39 Pac. 909; Shearm. & Redf. Neg. § 76; Walker v. Simmons Mfg. Co. 131 Wis. 542, 111 N. W. 697; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Atlantic Transport Co. v. Coneys, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; Gerhardt v. Swaty, 57 Wis. 41, 14 N. W. 851.

The verdict was not excessive.

Duffy v. Chicago & N. W. R. Co. 34 Wis. 188; Donovan v. Chicago & N. W. R. Co. 93 Wis. 378, 67 N. W. 721.

Kerwin, J., delivered the opinion of the court:

The plaintiff's theory of the case upon the trial below was that Cecil Baum was the agent or servant of appellant, and therefore the appellant was liable for Cecil's torts. The jury found for plaintiff upon that issue, and the question arises whether such finding has support in the evidence. It is insisted by appellant that it had not. There is evidence tending to prove that Cecil was seventeen years of age, lived with his father,

occasionally worked in his father's store, but received no compensation for his services; that appellant bought the automobile from Lucia Brothers mainly upon the solicitation of his son, Cecil, about a week before the injury; that it was understood between appellant and Cecil that the latter should learn to run the automobile or car so purchased and teach the other members of the family to run it, or run it for their benefit; that, by agreement between appellant and Lucia, the latter was to teach Cecil to run the car, and it was understood, by arrangement between appellant and Cecil, that Cecil was to have the right to take the car whenever he had time, and, with the aid of Lucia, learn to run it. On the day in question Cecil took the car, and, at his request, Lucia went with him to teach him to run it, and, after going a considerable distance, Lucia turned the car over to Cecil to run, and Cecil was running it at the time of the injury; that, from the time of the purchase, the car was owned and controlled by appellant, and at the time of the injury was in the possession of Cecil, with the consent of appellant, for the purpose of learning to operate it under instructions from Lucia. The jury would be entitled to find the foregoing facts from the evidence. If Cecil was running the car by authority from appellant, that would be sufficient to make a prima facie case of master and servant. *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851; *Schaefer v. Osterbrink*, 67 Wis. 502, 58 Am. Rep. 875, 30 N. W. 922; *Davis v. Dregne*, 120 Wis. 63, 97 N. W. 512; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161. The foregoing cases are quite analogous in principle to the one before us, and we think support the ruling of the lower court that the evidence was sufficient to warrant the findings of the jury. On the question of the agency of Cecil we are cited by counsel for appellant to *Kumba v. Gilham*, 103 Wis. 312, 79 N. W. 325; *Winkler v. Fisher*, 95 Wis. 355, 70 N. W. 477; and *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 330. In *Kumba v. Gilham*, supra, the son was clearly acting beyond the authority or direction of the father, and contrary to his desire. In *Winkler v. Fisher*, supra, the son disobeyed the express instructions of the father, and was not at the time of the injury in his father's employ in any sense whatever, but was acting contrary to his instructions. In *Maddox v. Brown*, supra, the son took his father's horse on business exclusively of his own, and without the knowledge of the father. The boy was in no way executing the orders of his father.

It is further insisted that Cecil was not the servant of appellant, but the servant of Lucia, an independent contractor, and *Carl-*
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son v. Stocking, 91 Wis. 432, 65 N. W. 58; *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Bauer v. Richter*, 103 Wis. 412, 79 N. W. 404; *Smith v. Milwaukee Builders' & T. Exchange*, 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; *Sal-lotte v. King Bridge Co.* 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; *Bailey v. Troy & B. R. Co.* 57 Vt. 252, 52 Am. Rep. 129; and *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37, are cited. We have carefully examined these cases, and cannot discover that they are controlling upon the question in appellant's favor. In *Carlson v. Stocking*, supra, there was evidence that one Frazer had full control of the dam and drive of logs in question, that he employed all the men, and furnished the supplies, and that the defendants were merely to pay him a compensation for driving their logs, the defendants participating in raising the dam and operating the same in making the drive at the time in question; and it was held that whether Fraser was an independent contractor was a question for the jury. In *Smith v. Milwaukee Builders' & T. Exchange*, contractors had agreed to erect a building according to fixed plans and specifications, and it was held they were independent contractors, although the owner reserved the right of inspection. In *Kuehn v. Milwaukee*, supra, one who had a contract with the city to remove garbage, with no right on the part of the city to control the mode or manner of performance of the contract, was held to be an independent contractor, although the city had the right to relet the contract in case of "improper or imperfect" performance. Other authorities cited by appellant under this head are similar in principle to the foregoing. The case before us turns upon whether or not Cecil was, at the time of the injury, in possession of and operating the car as servant of appellant, or whether Lucia had possession of it as an independent contractor. While we regard the question close, we have arrived at the conclusion that the jury was warranted upon the evidence, and the legitimate inference to be drawn therefrom, in finding that Cecil was the agent and servant of appellant in the operation of the car, and therefore cannot disturb the verdict upon that point.

2. Error is assigned upon the following portion of the charge: "Now, if you are satisfied from all the circumstances of this case,—you must take into consideration just what the young man was doing, what experience he had had, and what he knew about operating the machine, and what was on the street, everything that he saw or knew, and everything that he should, in the exercise of ordinary care, have seen or known, and

determine just what he did, and just what happened, and determine whether he was exercising at the time such care as men of ordinary care and prudence would exercise under the same and similar circumstances, and, if you find he was not, then you will find that he was in the exercise of ordinary care in answer to this question." It is very obvious that the use of the word "not," which made the portion excepted to read "and, if you find he was not in the exercise of ordinary care," was clearly a slip in the use of the word "not" which the learned trial judge did not intend, and must have been so understood by the jury. This we think would be apparent to any juror of average intelligence from the connection in which the word "not" was used, as well as viewing the portion of the charge excepted to together with the balance of the charge. Besides it will be seen that, taking this portion of the charge in its literal sense, it was more favorable to the appellant than if the word "not" had been omitted. A case in point is *Binns v. State*, 66 Ind. 428. Without further pursuing the subject, we are of opinion that there was no prejudicial error in the charge. *Hoffman v. Rib Lake Lumber Co.* (Wis.) 117 N. W. 789; *Lipsky v. C. Reiss Coal Co.* (Wis.) 117 N. W. 805; *Kiekhoefer v. Hidershide*, 113 Wis. 288, 89 N. W. 189; *Pelton v. Spider Lake Sawmill & Lumber Co.* 132 Wis. 219, 112 N. W. 29; *Twentieth Century Co. v. Quilling* (Wis.) 117 N. W. 1007.

3. It is also contended that the damages, \$1,200, awarded, are excessive. We would be better satisfied, upon the facts of the case as disclosed by the evidence, with a smaller verdict. The court below refused to disturb the verdict, and the question arises whether we can reverse it, because a new trial was not granted on account of excessive damages. It is true the actual expenses incurred by the plaintiff in consequence of the injury were small, the appellant paying the doctor's bill. The plaintiff is about sixty-three years of age, and the injuries did not at first appear to be of a serious character. The principal injuries complained of were to the head and hip. The evidence of the doctors who examined him is quite strong to the effect that they were unable to find any physical injury to the hip, and were obliged to rely upon plaintiff's statements, conduct, and behavior, nothing being observable of any consequence except a scalp wound, which healed in a short time. There is evidence, however, tending to show that the machine was going 8 or 9 miles an hour; that plaintiff, when struck, was knocked down and rendered unconscious; that he had not at the time of trial recovered from the injuries, was unable to work, and suffered considerable pain; did not rest 19 L.R.A. (N.S.)

well for three weeks after the injury; was earning \$1.50 per day when injured in July, and the case was tried in December, 1907. One doctor who made an examination two months before the trial found tenderness in the scalp wound, also soreness in hip, which he thought would be permanent, and that the injuries complained of could have been received without leaving any external evidence of them; that the conditions he found came from the injuries received when struck by the car; that the result of an operation for relief of the scalp injury would be uncertain, and that plaintiff's head was permanently injured, and soreness continued in the hip and back. From a careful examination of the evidence we do not feel that this court would be justified in holding that the damages awarded by the jury are excessive. *Duffy v. Chicago & N. W. R. Co.* 34 Wis. 188; *Donovan v. Chicago & N. W. R. Co.* 93 Wis. 373, 67 N. W. 721, and cases cited. It follows that the judgment must be affirmed.

The judgment of the court below is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PATRICK F. DORAN

v.

HUGO A. THOMSEN, Plff. in Err.

(— N. J. —, 71 Atl. 296.)

Master — daughter as servant — automobile.

1. Where a father was possessed of an automobile which he kept upon his premises, and his daughter, about nineteen years of age, was accustomed to drive it, and did so whenever she felt like it, asking permission to use it when the father was at home, but when not at home took it sometimes without permission, there being no proof that the daughter was actually employed by the father to operate the machine,—Held, in an action against the father, where the daughter, in using the machine for her own pleasure in driving her personal friends, negligently injured a person in the highway, that such proof was not sufficient to constitute the daughter the servant or agent of the master; and that a motion for a direction of a verdict for the defendant should have prevailed.

Same — scope of employment.

2. An act by a servant, not malicious, is within the principle that, to render a master liable for the negligent act of the

Headnotes by VOORHEES, J.

Note. — See footnote to preceding case.

and daughter, yet it does not appear in this case that on the occasion in question she was acting as such servant within the scope of her employment. That the master is responsible for the negligence of his servant when acting within the scope of his employment is elementary law, but that he is not responsible if the negligence was committed by the servant when engaged in some private matter of his own is equally elementary. These two propositions are well stated in two New York cases. *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37, where the court spoke as follows: "Where one person has sustained an injury from the negligence of another, he must, in general, proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief, and hold the master responsible for the damages sustained." In *Wyllie v. Palmer*, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381, the court said: "The doctrine of *respondere superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time and in respect to the very transaction out of which the injury arose." In *Holler v. Ross*, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472, Mr. Justice Fort, speaking for this court, says: "The servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did which caused the injury was an act which was expressly or by necessary implication within the line of his duty under his employment." We have seen that there was no express authority for the daughter to take the vehicle on the occasion of the accident, nor can we perceive that, by necessary implication, her use of it for her own purposes was within the line of her duty under her assumed implied employment. In *Evers v. Krouse*, 70 N. J. L. 653, 66 L.R.A. 592, 58 Atl. 181, the case last cited received again the approval of this court; and it was further stated that "an act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent . . . purpose of the servant. Such an act is not, as a matter of fact, the act of the master in any sense, and should not be deemed to be so as a 19 L.R.A. (N.S.)

matter of law. As to it, the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsible." In that case the defendant's son had been intrusted with a garden hose with which to sprinkle his father's lawn, and, while so engaged, deliberately turned the water upon a horse, frightening him, causing the injury complained of and for which the father had been sued. The court then said: "The fact that he [the son] used the tool supplied to him for the doing of his father's work for the accomplishment of his own mischievous purpose did not make it an act within the scope of his employment, and did not render the defendant liable for the injury resulting therefrom." While in that case the act was malicious, yet an act not malicious is within the enunciated principle, if such act is not expressly or by necessary implication within the scope of duty, and with regard to which it cannot be said that the servant was engaged in the performance of the act for the other. The act must be done for the purpose of executing the master's orders and doing his work and while actually engaged in serving the master; and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master. *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405; *Howe v. Newmarch*, 12 Allen, 49. For a clear exposition of this principle, see *Morier v. St. Paul, M. & M. R. Co.* 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952. The following are some recent authorities on this subject with special relation to automobiles; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Clark v. Buckmobile Co.* 107 App. Div. 120, 94 N. Y. Supp. 771; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946; *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506; *Patterson v. Kates* (C. C.) 152 Fed. 481; *Slatter v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A. (N.S.) 598, 107 N. W. 133; *Evans v. Dyke Automobile Supply Co.* 121 Mo. App. 266, 101 S. W. 1132; *Lotz v. Hanlon*, 217 Pa. 339, 10 L.R.A. (N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 A. & E. Ann. Cas. 731; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Jones v. Hoge*, 47 Wash. 663, 14 L.R.A. (N.S.) 216, 92 Pac. 433.

Undoubtedly liability might be visited upon the father, but upon quite different grounds. If the machine had been bought for his children's use, and it was in its nature or use a menace to the safety of others, then, under the theory illustrated in *Van Winkle v. American Steam Boiler Co.*

52 N. J. L. 240, 19 Atl. 472, it might well be that liability would arise by reason of the father's intrusting a dangerous machine or agency to the hands of an inexperienced or incompetent person. Such a liability does not rest upon the negligence of the servant, but upon the father's negligence in permitting his child to use a dangerous machine. In the one the gist of the action is the negligence of the servant imputed to the master; in the other, the negligence of the father. This distinction is thus stated in 29 Cyc. Law & Proc. p. 1665: "The mere relation of parent and child imposes upon the parent no liability for the torts of the child committed without his knowledge or authority, express or implied; and although, when a parent authorizes the child to act as his agent or servant in any matter, he is liable for the torts of the child committed in the course of the employment, this liability does not grow out of the relation of parent and child, but is based upon the relation of principal and agent or master and servant, and is governed by the rules applicable to such relations. So, also, while a parent may be liable for an injury which is directly caused, by the child, where his negligence has made it possible for the child to cause the injury complained of, and probable that the child would do so, this liability is based upon the rules of negligence rather than the relation of parent and child." We are not at liberty to consider this possible liability, for there could not be any finding of fact against the defendant to this effect; it appearing from the bills of exception that the trial judge excluded from the consideration of the jury that question of fact by his instruction that, unless there was agency, there was no liability. *Fielders v. North Jersey Street R. Co.* 68 N. J. L. 343, 59 L.R.A. 455, 96 Am. St. Rep. 552, 53 Atl. 404, 54 Atl. 822. It was therefore error to refuse to direct a verdict for the defendant.

Error has also been assigned upon exception taken to the charge. The defendant requested the court to charge: "If, at the time of the accident, Miss Thomsen was using the machine for her own pleasure, and without reference to the defendant's business, then there must be a verdict for the defendant." This the court refused, and instead charged: "When you come to consider the defendant's business, . . . it is the business for which he bought this machine; that is, the business of the defendant. . . . It was the particular business for which he bought this machine. Was this servant engaged in operating that machine for the purpose for which her father bought it? Was she operating it for her own pleasure in the way 19 L.R.A. (N.S.)

that she has testified to? If she took that machine out at that time in pursuance of a general authority of her father to take it whenever she pleased for the pleasure of the family and for her own pleasure, for the purpose for which the master bought it, for the purpose for which her father owned it, for the purpose for which he expected her to operate it, then she was the servant of the father. Under those circumstances, that was the business for which the father bought the machine. If she did not have this general authority from her father, if she took this machine out for her own recreation, amusement, and pleasure, contrary to the authority of her father, and this accident occurred, while she may be liable, the father is not. I charge the sixth request to charge with the qualification which I have stated to the jury." This makes the defendant's liability to depend upon the object for which he purchased the machine, which was for the pleasure of the family, in connection with the fact that his daughter operated it for that purpose, the jury being instructed that thereby she became his servant. This is contrary to the doctrine of *Evers v. Krouse*, 70 N. J. L. 653, 66 L.R.A. 592, 53 Atl. 181. It would subject a parent to liability if he bought for his son a baseball or for his daughter a golf club, and, by permitting them to be used by his children for their appropriate purposes, injury occurred. It bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons, that such use must be in furtherance of, and not apart from, the master's service and control, and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. The reason for liability is founded upon the idea of control which a master has over his servant. The court, although attempting to rest the liability upon the relation of master and servant, yet actually tested the liability by the fact that she was intrusted with the operation of the machine for her own pleasure, if purchased for that object, whereby she *ipso facto* became a servant. So that the charge thus in fact left the legal relationship of master and servant out of account, and raised it in name only because the daughter was allowed to drive the machine. In this there was also error.

The judgment must be reversed and a *venire de novo* awarded.

NEW YORK COURT OF APPEALS.

DONATO CITRONE, Resp't.,
v.
O'ROURKE ENGINEERING CONSTRUCTION COMPANY, Appt.

(188 N. Y. 339, 80 N. E. 1092.)

Master and servant—safe place to work—prosecution of work.

The common-law doctrine of the duty of the master to furnish his servant with a reasonably safe place to work, which cannot be devolved upon a fellow servant so as to relieve the master, does not apply in favor of a member of a gang of workmen whose duty it was to enter a portion of a trench in course of construction after a blast had been fired by a preceding gang, and assist in removing broken stone, who was injured by the fall of some loose earth from the sides of the trench.

(April 30, 1907.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming, by a divided court, a judgment for plaintiff after a jury trial at a trial term for Richmond County in an action by an employee against an employer to recover damages for personal injuries. Reversed.

The facts are stated in the opinion.

Subject Note. — Servant's assumption of risk from changing condition of the working place during progress of work.

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- II. Work of construction or demolition.
 - a. In general, 342.
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- III. Excavations.
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- V. Completed working place.
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I. Introductory.

In examining the question of the servant's assumption of risk so far as the fact that the conditions of the working place are changing as the work goes on bears upon it, cases which might be in point as to the facts, but which turn upon grounds that would apply as well to fixed conditions of the working place are excluded, as they can throw no light upon the subject.

The rule relating to changing conditions of the working place forms an exception 19 L.R.A. (N.S.)

Mr. Theodore H. Lord, with Messrs. Rollins & Rollins, for appellant:

The trench was not a place to work, furnished by the defendant.

Hogan v. Smith, 125 N. Y. 774, 26 N. E. 742; Cullen v. Norton, 126 N. Y. 1, 26 N. E. 905; Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021; Kimmer v. Weber, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860; O'Connell v. Clark, 22 App. Div. 466, 48 N. Y. Supp. 74; Brown v. Terry, 67 App. Div. 223, 73 N. Y. Supp. 733; Trapasso v. Coleman, 74 App. Div. 33, 76 N. Y. Supp. 798.

Mr. Thomas J. O'Neill, for respondent:

The respondent was not guilty of contributory negligence, nor were his injuries caused by any risk which he assumed.

Rice v. Eureka Paper Co. 174 N. Y. 398, 62 L.R.A. 611, 95 Am. St. Rep. 585, 66 N. E. 979; Alcott v. Kirkham, 101 App. Div. 77, 91 N. Y. Supp. 775; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978.

Willard Bartlett, J., delivered the opinion of the court:

The judgment which comes before us for review on this appeal is based upon the alleged negligence of the defendant corporation in failing to provide the plaintiff, who was a laborer in its service, with a reasonably safe place wherein to do the work

to the safe-place rule, and is stated by Labatt on Master & Servant, § 269, to be: "The rule that it is the duty of a master to exercise ordinary care to provide a reasonably safe place . . . for his servants is held not to be applicable to cases in which the very work which the servants are employed to do is of such a nature that its progress is constantly changing the conditions as regards an increase or diminution of safety. The hazards thus arising as the work proceeds are regarded as being the ordinary dangers of the employment, and, by his acceptance of the employment, the servant necessarily assumes them." This doctrine, said the court in Schneider v. Philadelphia Quartz Co. 220 Pa. 548, 69 Atl. 1035, resulted from the fact that the prosecution of the work made the place dangerous, but it was not the master's duty in such case to follow up the servants every moment to see that they made the place safe.

The decisions upon this subject are harmonious, and of late this exception has been interposed quite frequently against the servant's demand for damages. The reason for relaxing the rule in such cases is that it is more than the master can do to keep a changing working place safe from transient, shifting hazards which spring up only as the work advances. The servant is supposed to know this. He therefore assumes the risk when he goes to work. It is sometimes said in these cases that the servant has a better chance to become aware of the fleet-

which he was employed to perform. That work, considered as a whole, was the construction of a trench through earth and rock in the city of New York. It was prosecuted, first, by blasting, and, secondly, by the removal of the blasted material. The plaintiff does not appear to have had anything to do with the blasting, but he and the gang of workmen to which he belonged would enter the portion of the trench already open after a blast had been fired and assist in removing the broken stone, sometimes breaking it up into smaller pieces to facilitate the process of removal. While engaged in this employment on September 13, 1904, he was injured by the fall upon him of some loose stones and earth from the sides of the trench. A small blast had previously been fired immediately before he began to work, about two hours earlier on the same morning.

The theory of the plaintiff's case, as presented to the jury, was that the defendant was negligent in not protecting him and his fellow laborers against such an accident as that which befell him, which could have been done by shoring or bracing up the sides of the trench so far as it had already been opened. At the place where the accident occurred the trench was about 14 feet deep and 6 or 7 feet wide, and was being cut mostly through rock. There was shoring

on the sides to the height of 5 or 6 feet from the bottom, but no further up. The question which the learned trial judge left to the jury on this branch of the case was thus stated in his charge: "Was this trench made reasonably safe for such work, considering the character of the work, which was necessarily dangerous? In other words, was this trench where the plaintiff was employed made as safe as a trench where the work of excavating and blasting is carried on ordinarily is made by ordinarily prudent men?" The jury must have answered these questions in the negative in order to find the verdict which they rendered in favor of the plaintiff; for they were expressly instructed by the court that they could not hold the defendant liable either for a failure to provide competent workmen to perform the work, or for a failure to provide proper tools or appliances with which the work was to be done.

It was the contention of counsel for the defendant on the trial, and he contends here, that, under the circumstances disclosed by the uncontradicted evidence, the doctrine of the duty of a master to furnish his servant with a reasonably safe place to work in has no application to the case at bar. This point is distinctly raised by proper exceptions, and, if well taken, is fatal to the judgment. In my opinion it is well taken.

ing dangers that threaten him than the master, and that the servant therefore assumes the risk of injury therefrom.

In *Cleveland, C. C. & St. L. R. Co. v. Brown*, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970, the court said that it was the master's duty to provide for his servants a safe place in which to work, but that manifestly that principle was not applicable to a case in which the place became dangerous during the progress of the work, either necessarily or from the manner in which the work was done.

But the fact that an injured employee was working in a place in which the conditions were constantly changing was held to be a matter of defense, and not of demurrer, in *Black v. Virginia Portland Cement Co.* 104 Va. 450, 51 S. E. 831.

In *American Bridge Co. v. Seeds*, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605, the court said that the positive duty of the master did not extend to keeping a place safe where the servant's work necessarily changed its character as to safety as the work progressed; but that the duty to care for the safety of the place in such cases devolved upon the servants to whom the work was entrusted.

While, as a general rule, it is the duty of a master to exercise ordinary care to provide a reasonably safe working place, this rule cannot be applied to cases in which the very work in which the servant is engaged changes the character of the place 19 L.R.A. (N.S.)

for safety as the work progresses. When the servant's work makes the working place hazardous from time to time, the hazard of such temporary danger becomes a risk of the business. *Fortin v. Manville Co.* 128 Fed. 642.

In *Montgomery v. Robertson*, 229 Ill. 466, 82 N. E. 396, the court said that an exception to the safe-place rule universally recognized was that the general rule did not apply where the conditions were changing from time to time during the prosecution of the work. If the nature of the work was such as to produce changes and temporary conditions in the place where the work was performed, the rule itself did not require the master to keep the place reasonably safe under such changed conditions which the work rendered necessary.

The master is not bound to protect his servant against mere transitory perils that the execution of the work occasions. *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A. (N.S.) 418, 80 N. E. 529.

In *Bloomfield v. Worster Constr. Co.* 118 Mo. App. 254, 94 S. W. 304, the court said that, generally speaking, it was the duty of the master to exercise ordinary care to furnish his servant a reasonably safe working place, where, by exercising ordinary care, the latter could perform the labors assigned with a reasonable degree of safety to himself, subject only to the risks ordinarily incident to the employment. But this well-settled rule had an equally well-settled

The evidence clearly shows that the work to be done was the construction of the trench. The learned trial judge so instructed the jury. As I have already pointed out, this work of construction was twofold in character, and consisted of the blasting followed by the removal of the material. The gang of workmen to which the plaintiff belonged were fellow servants with those engaged in the blasting. Precisely what that gang did appears from the testimony of another witness who belonged to it. "After a blast," he said, "we would be sent to clean out the stone that had been loosened by the blast. Wherever the stone fell after the blast was the place to which we went to clean it out. That is the way we were working. That is the kind of work that all the men in that gang were doing, and some of them were breaking stone and some of them putting them up. He [the plaintiff] was working removing the stone that had been thrown out by some blast. He was there where they had blasted and we were cleaning it out. Immediately after the blast some of them would lift the stone from one bank to another and others would load cars. They would get these stones from down in the ditch wherever there was blasting." It is

apparent from this and all the other evidence in the case relating to the character of the work and the manner in which it was being conducted that, whatever was the danger to which the men were exposed, it was due to the manner in which the work was prosecuted. The degree of safety near the head of the trench was constantly subject to change as the trench was extended. Under such circumstances, the rule of law which makes it incumbent upon an employer to provide or maintain a safe place in which his employees are to do their work has no application. As was said by Mr. Justice Cullen in *O'Connell v. Clark*, 22 App. Div. 466, 48 N. Y. Supp. 74, "the principle of a safe place does not apply where the prosecution of the work itself makes the place and creates its danger;" and by the same judge in *Stourbridge v. Brooklyn City R. Co.* 9 App. Div. 129, 41 N. Y. Supp. 128: "The rule that the master must provide a safe place for work only applies where the work and the place are not connected, where the work is not in the construction of the place as in the case of a mill, a factory, mine, ship, well, etc." All those engaged in the master's service in effecting a common purpose are to be deemed fellow servants,

exception, and that was that the master was not required to furnish the servant a safe place in which to work when the danger was temporary and transitory only and arose from the hazard and nature of the work itself and was known to the servant. What was termed an exception to the rule of safe place, however, amounted to nothing more than the doctrine that the servant assumed the risks ordinarily incident to the employment, inasmuch as the rule of safe place was abrogated thereby only as to such risks as arose from the nature and hazard of the work, and were therefore ordinarily incident, etc.

In *Kath v. Wisconsin C. R. Co.* 121 Wis. 503, 99 N. W. 217, the court, in holding that it was not necessary for the master to give warning of the dangerous condition of a burning bridge to an engineer and fireman who were sent to assist in putting out the fire, since they assumed all the risks that might ordinarily be expected to be present because of the weakening of the bridge by the fire, said that the place to work was being changed constantly, and was necessarily incomplete and dangerous; that the employees knew it, and accepted such risks as were ordinarily present in such operations.

It is not enough, however, that the place was safe when the work was commenced, and that it became unsafe as the work progressed owing to the method of doing it, where the work was commenced several weeks before the injured servant was employed. The place must be made safe at the time he is himself set to work. When a new servant is hired, new duties are cast upon the mas-

ter with reference to him, for the master is bound to furnish him a safe place when he puts him to work. *Simone v. Kirk*, 173 N. Y. 7, 65 N. E. 739, reversing 57 App. Div. 461, 67 N. Y. Supp. 1019.

For duty of master to furnish safe appliances as affected by the fact that the defective appliances were prepared by fellow servants, see note to *Haskell v. Cape Ann Anchor Works*, 4 L.R.A.(N.S.) 220.

II. *Work of construction or demolition.*

a. In general.

The doctrine that the safe-place rule does not apply where the conditions of the working place are constantly changing is now being frequently invoked in construction cases, which have heretofore been excepted from the operation of that rule on other grounds.

So it was held that, where men were engaged in blasting, a ledge of rock for the construction of a right of way, the duty of the master to furnish a reasonably safe place for his workmen was not so continuous, that in every change in the surface of the ledge of rock, whether by blasting or by shoveling off the crushed stones, the master's duty of furnishing a safe place at once attached. *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021. The court said that it had not been understood to be the rule in New York that, in the performance of work of such character, the master, after making the place in the first instance reasonably safe for the prosecution of the

notwithstanding the fact that the work is done in successive stages, different parts thereof being devolved upon different persons, and the labor performed by one set of employees being prior in time to that performed by another set. *Murphy v. Boston & A. R. Co.* 88 N. Y. 146, 42 Am. Rep. 240. See, also, *McGuire v. Bell Teleph. Co.* 167 N. Y. 208, 215, 52 L.R.A. 437, 60 N. E. 433; *Neagle v. Syracuse, B. & N. Y. R. Co.* 185 N. Y. 270, 77 N. E. 1064. If, therefore, the accident to the plaintiff was due to the carelessness of those who did the blasting, this was the negligence of his fellow servants for which the master could not be held responsible at common law; and the trial court ruled that the plaintiff was not entitled to go to the jury under the employers' liability act, though for what reason does not appear.

The learned counsel for the respondent relies largely upon *Kranz v. Long Island R. Co.* 123 N. Y. 1, 20 Am. St. Rep. 716, 25 N. E. 206, as an authority for the application of the doctrine of a safe place to the case at bar; but in the *Kranz* Case and the other trench cases in which that doctrine has been held applicable the person injured had noth-

ing to do with the preparation of the trench in which the accident occurred. It was prepared, not by him, but for him long before he began work therein, and that work constituted no part of the construction of the trench itself. See *Schmit v. Gillen*, 41 App. Div. 302, 58 N. Y. Supp. 458. In the present case, however, the plaintiff was engaged in the removal of material the removal of which was just as essential to the construction of the trench as was the preliminary blasting.

The opinions in the appellate division were devoted chiefly to the consideration of another and very interesting question relating to the plaintiff's assumption of risk, growing out of the decision of this court in the case of *Rice v. Eureka Paper Co.* 174 N. Y. 385, 62 L.R.A. 611, 95 Am. St. Rep. 585, 66 N. E. 979; but it is not necessary to consider that question now if the foregoing views are correct, as they suffice to require a reversal of the judgment and a new trial, with costs to abide the event.

Cullen, Ch. J., and Gray, Edward T. Bartlett, Haight, Werner, and Hiscock, JJ., concur.

work, had any duty to perform other than to furnish safe appliances and to hire competent and skillful employees.

A workman, in tearing down a scaffold, assumes the risk of its falling, where the dangerous condition of the structure is occasioned by the work of its own destruction, which is performed by the servant and his fellow laborers in a manner that necessarily increases the danger to themselves as the work progresses. *Richards v. Riverside Iron Works*, 56 W. Va. 510, 49 S. E. 437.

A carpenter engaged in the work of building a battle ship assumes the risk of an iron plate falling upon him while the plate is being hoisted to its place on the vessel, and therefore cannot recover for a resulting injury on the theory that the master has failed to furnish a safe working place, since the servant, in such a case, is in a better position to know of the danger of the situation than the master. *Miller v. Moran Bros. Co.* 39 Wash. 631, 1 L.R.A. (N.S.) 283, 109 Am. St. Rep. 917, 81 Pac. 1089. The court said that the servant's work was constantly being changed from place to place in removing or adjusting the shores about the ship. The particular place where the accident happened was rendered unsafe only at the moment when they began to elevate the heavy plate. The entire situation might have been thoroughly inspected and found safe a minute before, so far as the evidence showed. The master was under no obligation to have an officer constantly follow the servant around to protect him from situations made dangerous by occurrences un-

usual and unexpected by either master or servant. The very nature of the work of building a ship necessitated constant changes. A place perfectly safe one minute might become extremely dangerous the next by the ordinary and necessary operation of the work and without fault on the part of anyone. A servant working in the capacity of the plaintiff knew all this, and must be held to be to a certain extent his own inspector. He could not complain because the master, with less opportunity than he, had failed in a given instance to detect or anticipate an unexpected occurrence.

The safe-place rule does not apply to the construction of a breakwater so as to render the master liable for injury to a laborer due to the breaking of a cap on a bent of a temporary trestle. *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017. The court said that "manifestly the place in which the work was to be done was not provided by the defendant, nor could it be said that different portions of the work in which the laborers might be engaged as it progressed was the 'place' furnished by their employer," within the meaning of the safe-place rule. On the contrary, the making of the bent was a part of the work to be done by the laborers themselves in the construction of the jetty.

But the fact that the servants day by day, as they carried off coal from beneath an unsafe trestle, progressed from one timber to another of the trestle, does not in any respect change the condition of the place of work so as to relieve the master from liability for an injury caused by the falling of an insecurely fastened timber. *Nix v. C.*

NEW YORK COURT OF APPEALS.

JAMES R. RUSSELL, Respt.,

v.

LEHIGH VALLEY RAILROAD COMPANY, Appt.

(188 N. Y. 344, 81 N. E. 122.)

Master and servant — safe place to work — changing conditions.

1. The common-law doctrine of the duty of the master to furnish his servant with a reasonably safe place to work, which cannot be devolved upon a fellow servant so as to relieve the master, does not apply in favor of an employee injured while engaged with fellow servants under a competent foreman in a detail of the work of removing a bank of earth and gravel, by the fall of an overhanging ledge, which was the condition on the day of the accident, and not a condition that had previously existed.

Same — failure to furnish explosives.

2. A master cannot be charged with liability for injuries to a servant from the fall of an overhanging ledge, a changing condition in the work of removing a bank of earth and gravel, upon the ground that he did not supply the foreman with explosives for the removal of ledges, where it is not shown that there was any demand for explosives, or that they were deemed by the

foreman to be necessary, or that the means at hand were ineffectual for the purpose.

(April 30, 1907.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment in favor of plaintiff upon verdict of a jury at a trial term for Oneida County in an action by an employee against his employer to recover damages for personal injuries. Reversed.

The facts are stated in the opinion.

Messrs. Diven & Diven, for appellant: The alleged negligence of the defendant in failing to supply explosives was not the proximate cause of the accident.

Hofnagle v. New York C. & H. R. R. Co. 55 N. Y. 608.

The foreman was a fellow servant of the plaintiff.

Loughlin v. State, 105 N. Y. 159. 11 N. E. 371.

Mr. Albert T. Wilkinson, with Messrs. Davies, Johnson, & Wilkinson, for respondent:

Defendant's negligence was the proximate cause of the injury.

Cone v. Delaware, L. & W. R. Co. 81 N.

Reiss Coal Co. 114 Wis. 493, 90 N. W. 437. The court said that, had the business of the men been the tearing down of such a structure, it might have been claimed that the weakening of the portions of the structure still standing, resulting from previous work, was a condition which they themselves had created and changed, and which therefore must be held to have been within their knowledge as fully as within that of their employer. It would be as reasonable to contend that a painter progressing upward on a ladder and injured by reason of a defective rung changed and therefore created the conditions of his work because he had gradually progressed upward toward the defect.

b. Railroads.

Some of the railroad-construction cases are ruled against the servant on the ground that he is employed in making the place safe, and that he cannot therefore expect it to be safe, and some upon the general ground that construction cases form an exception to the safe-place rule. In a few of the decisions, however, the changing conditions of the working place are recognized, and are relied on as the reason for holding the master not responsible.

In *Walling v. Congaree Constr. Co.* 41 S. C. 388, 19 S. E. 723, it was pointed out that there is a distinction between a defective track and roadbed on a completed railroad, and one in process of construction, so far as liability of the master for injury to a servant caused thereby is concerned. In 19 L.R.A. (N.S.)

that case an employee of a construction company was killed by the derailment of a construction train, and the court said: "We have not been able to find a case precisely in point as to the liability of a construction company for accidents occurring while constructing a railroad; but it would seem that, on principle, there must be a difference, especially as to maintaining a safe roadbed, between a railroad company already in operation and a construction company having no finished road of their own, and running no cars but a material train, engaged in the very work of constructing the road; which, in the process of construction, necessarily changes its condition every day, and, therefore, at no particular time can that condition possibly be known either to the company or their employees."

A servant engaged in the work of removing a railroad trestle assumes the risk of its falling. *Grayson-McLeod Lumber Co. v. Carter*, 76 Ark. 69, 88 S. W. 597. The court said that there was no duty in such a case to furnish the servant a safe place in which to work, since his employment made it his duty to tear down and to change and destroy his places of work, and to make them safe or unsafe as his work rendered them; and was such as to place it out of the power of his employer to perform such duty.

A member of a construction gang engaged in bolting angle irons on the ends of rails assumes the risk of injury caused by a rail flying up and striking his hand as the construction train passes over a tie that is a

Y. 207, 37 Am. Rep. 491; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546.

Defendant was also negligent, apart from the question of tools and appliances, in not furnishing the plaintiff a safe place to work, and in failing to warn him of the danger.

Simone v. Kirk, 173 N. Y. 13, 65 N. E. 739.

Gray, J., delivered the opinion of the court:

The injuries, because of which the plaintiff has brought this action, were sustained while in the defendant's employment, and under the following circumstances: The defendant was operating a steam shovel for the removal of gravel and earth from a bank on one side of its main track. The car containing the shovel and its machinery was upon a temporary track, laid between the bank and the railway, and the work was in charge of a foreman, who, so far as it appears, was competent. The plaintiff came upon the work while it was in progress and four days before meeting with his accident. His duty was to attend to one of the four jackscrews, which were placed under each corner of the shovel car, and which served to keep it steady while the shovel was in

motion. At the place where the accident occurred, the bank was about 21 feet in height, sloped gradually from the top, and was composed of a thick layer of hard clay above, with loose earth, or gravel, below. When the bank was shoveled away, as far as the reach of the shovel ahead permitted, the temporary track was shifted on, and the shovel car moved forward. In that way, the situation changed from day to day at the rate of some 20 feet. Just prior to the accident, the plaintiff was directed by the foreman to attend to his jackscrew, which was upon the side of the shovel car next to the bank. He had tightened up his screw, and was gathering up his "blocking," when suddenly the bank caved in and a part of the overhanging top fell upon him. The plaintiff recovered a judgment against the defendant, which was affirmed by the appellate division by a divided vote.

Negligence is, generally, charged against the defendant for the failure to furnish a safe place for the plaintiff to work in, and suitable tools and appliances for doing the work of excavation. Particularly, it is insisted that the defendant was neglectful of the duty to furnish explosives, with which to break off, or to prevent, overhanging

little higher than the others. *Meehan v. St. Louis, M. & S. E. R. Co.* 114 Mo. App. 396, 90 S. W. 102. The court said that the duty of a master to furnish a servant a reasonably safe place in which to work applied with all its rigor only where the place and its conditions had some permanency, and were unshifting. It did not apply where the place was constantly undergoing a change by the very work the servant was engaged in performing, nor where the work required a repeated and continuous change of the servant's place of work, as in the work of attaching angle bars to steel rails on a railroad track under construction. When the rule did not apply, the duty of a master to a servant was fully discharged if he did not place the servant in a discovered position of peril, or in one that might have been discovered by the exercise of ordinary care, which peril was not incident to the business or its duties.

Permitting ties or other obstructions to remain in the way of men who are engaged in dismantling an old railroad track, so that one of the members of the gang who is carrying a steel rail stumbles and falls, causing the rail to strike and injure plaintiff, is not negligence for which the master can be charged. *Gulf, C. & S. F. R. Co. v. Jackson*, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48. The court, in referring to the plaintiff, who was one of the men engaged in the work, said that he certainly had no reason to suppose that the right of way where he would have occasion to work would be kept free at every moment from all such impediments as might cause a man to lose

his footing; nor could it be said, in view of the character of the work in which the plaintiff was engaged, that it was the duty of the defendant to keep its right of way at all times free from obstructions. In so far as the injury complained of was occasioned by defects in the place where plaintiff was required to work, it must be attributed to one of the ordinary risks of the service in which he was engaged, and which he impliedly assumed when he became engaged in such service.

A servant employed in dismantling a railroad trestle assumes the risk of stepping on an unsecured timber causing him to be thrown to the ground, since it is an ordinary and apparent risk necessarily incident to the work. *Moore v. Pennsylvania R. Co.* 167 Pa. 495, 31 Atl. 734.

A railroad company is not required to block a frog during the progress of the construction of the road; and the only duty which the company owes to a brakeman on a freight train is to give him such notice and warning as will put him on his guard against the dangers incident to the use of the track while the work is in progress. *Hauss v. Lake Erie & W. R. Co.* 40 C. C. A. 94, 105 Fed. 733.

It must not be taken for granted, however, that the mere fact that the working place is unfinished absolves the master from all responsibility as to its safety, or from all liability for negligence in relation thereto. The reason for making an exception to the safe-place rule under such circumstances being that the changing conditions render it impracticable, if not impossible,

ledges; and the case was submitted to the jury upon that theory. The jurors were told, in effect, that the plaintiff's case depended upon the evidence establishing that the accident was the result of the lack of explosives. This was not a case for the application of the rule that the master must furnish a reasonably safe place. The place where the men were to work changed from day to day, as the steam shovel moved on in its operations. It was, necessarily, such as the conformation of the embankment and the process of excavation made it. The kind of work which the men were employed to do was such as to make the possibility of a fall of earth an ever present one, and called for the exercise of active vigilance to guard against their being involved in it. The situation was one which made it the duty of the foreman to watch each supervening condition during the progress of the work, and to warn the men. They were not excused themselves, of course, from being vigilant to observe conditions. The master's liability in this case is determined by common-law rules, and is not predicated

upon statute. If the defendant set the men at work under a competent foreman and with suitable appliances, it had performed its duty towards them, and the execution of the details of the work could properly be intrusted to the judgment of the foreman. For his negligence, or for his mistakes in judgment, as to such, it could not be made liable for injurious results.

Now, with respect to the claim that the defendant is liable because of its failure to furnish explosives with the other tools and appliances in the car, it is clear that can only be a tenable one, provided the evidence disclosed that an emergency arose when it was judged that they were necessary and they could not be had. Experts were examined to show that explosives were used in certain cases to break away overhanging ledges, and there was evidence that, at some time previously, the foreman had spoken of sending for dynamite. It may be assumed that, in this case, the use of explosives might have been efficient; but it was not shown that the foreman would have used them upon the occasion in question, and it

for the master to keep the place reasonably safe, it would seem that the duty to keep the place safe would remain in so far as it would be practicable for the master to fulfil it. A few illustrative cases will indicate this limitation.

A servant, in passing to and from his work over newly constructed pieces of road, assumes greater risks than would another servant whose duty takes him back and forth over the same line of track after its full completion and equipment for passengers; but such a servant has an undoubted right to expect a degree of care and skill equal to that ordinarily exercised during the progress of railroad construction. *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 31 Am. St. Rep. 335, 30 Pac. 249.

In *Van Amburg v. Vicksburg, S. & P. R. Co.* 37 La. Ann. 650, 55 Am. Rep. 517, the court said that, although a bridge, for construction purposes, was not required to be as solid and complete as for traffic, when heavy trains must pass over it, it was necessary that it should be solid and complete enough to make it safe. No company had any right to trifle with the lives of its employees, nor to put them in greater peril than was incident to the nature of their employment.

A constructing engineer, in riding over a new and partially completed roadbed and unballasted track, does not assume risks which are the result of running trains at an unreasonably high rate of speed over a track in a bad and dangerous condition. *Meloy v. Chicago & N. W. R. Co.* 77 Iowa, 743, 4 L.R.A. 287, 14 Am. St. Rep. 325, 42 N. W. 563.

Whether or not the failure of the master to provide a target for a switch on a rail-

road in process of construction is a neglect of duty owed to his employees is a question for the jury. *Bennett v. Long Island R. Co.* 21 App. Div. 25, 47 N. Y. Supp. 258.

c. Buildings.

The safe-place rule does not apply to servants at work on buildings in course of erection which are undergoing constant changes in passing through successive temporary conditions, many of which must, from the very necessity of construction, be dangerous, the hazards involved being incident to the employment and hence assumed by the servant. *Richardson v. Anglo-American Provision Co.* 72 Ill. App. 77. To the same effect is *McNeill v. Bottsford-Dickinson Co.* 128 App. Div. 544, 112 N. Y. Supp. 867.

Nor does the rule apply where a servant is employed in the demolition of a building, since the work of removal is one in which each part of the structure in turn is rendered insecure, which every workman understands. *Clark v. Liston*, 54 Ill. App. 578.

In *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A. (N.S.) 684, 81 C. C. A. 338, 162 Fed. 120, in holding that a foreman in charge of the brickwork of a building in process of construction, who, while superintending the construction of a scaffold, was knocked off a plank by a cement bucket which was being lowered by roofers by means of a derrick, could not maintain an action against the master for a resulting injury, on the theory of the master's failure to establish a system of signals to be used by the roofers to warn employees when the bucket was to cross the wall, and of his failure to provide the derrick with a lever, or the boom with a guy rope to steady and control its movements,—the court said that the

was not shown that there was any demand for them, or that they were deemed by him to be necessary. There were picks, bars, and other tools; but there was no attempt to use them to pry off the top of the bank, then, or at any other time, as was shown to be a usual method. If they had been used, and had proved ineffectual for the purpose, it might then be claimed, with some force, that the men were inadequately provided with appliances. It was necessary, before the defendant could be charged with a neglect of duty, to show that efforts to change, or to improve, the situation had been rendered abortive through the insufficient supply of the means to meet it. There was nothing to show this to have been the case, and, if the occurrence is attributable to the omission of the foreman to make use of the tools at hand, or to procure further appliances, the fault was that of a fellow servant, and not of the defendant. A jury's speculation upon the situation cannot be allowed to affect the question of the master's liability. The performance of the work was committed to the foreman's

supervision and judgment, and there is no complaint of his lack of skill. If he chose to operate his shovel solely upon the bank, when a better judgment would advise the resort to additional methods for breaking it down, the fault was his, and not that of the defendant. If he failed to be watchful, and omitted to warn the plaintiff seasonably of the peril, again, the latter suffered from the fault of his fellow servant. The thing to be done at the time was a detail of the common work upon which all were engaged. The caving in of the bank was the result of the operation of the shovel. The ledge that fell was the condition of that day, and not a condition that had existed, and the cause of its fall was the removal of the earth beneath.

The case is not within the authority of *Simone v. Kirk*, 173 N. Y. 7, 65 N. E. 739, which was altogether exceptional in its character. There the laborer was killed by the fall of a projecting mass of material under which he had been directed to work. The condition had existed for several days before he came upon the work. He

safe-place rule was inapplicable. The duty of caring for the safety of a place in cases in which the work which the servants were employed to do necessarily changed its character as the work progressed was not the duty of the master, but of the servants to whom the work was intrusted.

A master is not liable for injury to a servant caused by the falling of a truss upon him while at work upon the construction of a building, on the theory that the master has failed to furnish him a safe place in which to work. *McElwaine-Richards Co. v. Wall*, 166 Ind. 267, 76 N. E. 408. The court said that the work of construction was clearly of such a character as to make it inevitable that, as it progressed, the environment of the servants engaged therein must undergo frequent changes; and that it was not the duty of the master to be continuously present to warn and protect such servants against dangers resulting from these changes.

The obligation of the master to provide reasonably safe places and structures for his servants to work on does not impose upon him the duty of keeping a building which they are engaged in erecting in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows, so as to render the master liable for injury to a carpenter so employed who steps upon a loose timber and falls. *Armour v. Hahn*, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433. The court said that, if the timber was, at the time, insecure, it was so either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building, or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were

employed or paid by the same master, and who were working in the course of their employment at the same place and time with an immediate common object, the erection of a building; and therefore, within the strictest limits of the rule of law upon the subject of fellow servants, one of whom could not maintain an action for injuries caused by the negligence of another, against their common master.

In *Holloran v. Union Iron & Foundry Co.* 133 Mo. 470, 35 S. W. 260, a case in which a servant was working on the construction of a building and fell from a girder while assisting in moving a derrick, the court said that in the course of the erection of a building it was almost impossible to keep it in an absolutely safe condition at every moment of the work. Certain risks were ordinarily incident to the state of things found in the unfinished condition of every building in course of construction. The mechanics and laborers employed and paid to build it were presumed to understand their duties and the risks usually attendant upon them, and, knowing beforehand the methods in use, they assumed the risks usually incident to the discharge of their duties.

A master is not liable for injury to an iron worker employed in the construction of a building, who steps upon a plank which breaks and allows him to fall to the ground, since, for aught that appears, the plank may have been laid by some of the workmen engaged in the building for their own convenience and of their own motion, or may have been a surplus board left over from the construction of scaffolding. *Schneider v. American Bridge Co.* 31 App. D. C. 420. The court said that the obligation of the master to provide a reasonably safe place did not impose upon him the duty of keeping a building

was unacquainted with its condition, and he was sent by the foreman to work under it in the nighttime and with but a dim light. The rule applicable to this case is to be found in the decisions of the cases of *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371, *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021, and *Capasso v. Woolfolk*, 163 N. Y. 472, 57 N. E. 760. In the last two of these cases the plaintiffs were injured by the falling of stones from the sides of a bank or rock which was being cut down by blasting operations. The judgments recovered by them were reversed by us upon the ground that the removal of these stones was a detail of the work, and the negligence of the foreman in that respect was that of a fellow servant. What were details of the work the master had the right to intrust to a competent foreman, and where the situation was, in the nature of things, a changing one, there was no continuing duty to provide a safe place for the workmen.

If there was negligence in this case, which was the cause of the plaintiff's injuries, it was that of his fellow servant, the foreman, and that was a risk which he assumed when entering upon the employment.

I think that the judgment should be reversed, and that a new trial should be ordered, with costs to abide the event.

Cullen, Ch. J., and Edward T. Bartlett, Haight, Werner, and Willard Bartlett, JJ., concur. Hiscock, J., takes no part.

which they were employed in erecting in a safe condition at every moment of their work.

The master is not liable for injury to one who walks off of an unprotected platform while engaged in the work of dismantling the master's plant, since the master cannot be required to provide a place safe at all times for workmen who are expressly employed to make it unsafe by tearing down the structure upon which they are at work. *Chicago Edison Co. v. Davis*, 93 Ill. App. 284.

A master is not liable for injury to a servant caused by the turning or rolling of an iron column temporarily lying upon an unsteady surface near the place where it is to be put in a structure in course of erection, since the obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep the building they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellow servants. *F. J. McCain Co. v. Kingsley*, 126 Ill. App. 165.

The safe-place rule does not apply where the servant is injured by being knocked from a beam on which he is walking, by a temporary elevator in the building in process of

COLORADO SUPREME COURT.

EDITH P. MALONEY, Appt.,

v.

FLORENCE & CRIPPLE CREEK RAILROAD COMPANY.

MARY S. ALLEN, Appt.,

v.

SAME.

(39 Colo. 384, 89 Pac. 649.)

Master—safe working place.

1. The rule requiring a master to furnish a safe working place for his servant does not apply to a place at which railroad employees are engaged in clearing the tracks of *débris* from a landslide.

Same—representations of fellow servant.

2. Representations of the foreman in charge of a section of railroad on which a landslide occurs, to the foremen of other sections who have brought their crews to help clear the tracks, that he examined the place before dark and it was safe, are those of a fellow servant of the men engaged in the common enterprise; and the master is not responsible for their inaccuracy.

(April 1, 1907.)

APPLEALS by plaintiffs from judgments of the District Court for Fremont County in defendant's favor in actions brought to recover damages for the deaths of plaintiffs' husbands which were alleged to have been caused by defendant's negligence. Affirmed.

construction. *Clancy v. Guaranty Constr. Co.* 25 App. Div. 355, 50 N. Y. Supp. 800.

Where an I-beam was properly placed on a railroad tie for use in a building in course of construction, and was in a safe condition two days before a steel worker was injured by the slipping of the beam from the tie, it was held that the master was not liable for the injury, since he could not be expected to have every piece of material used in the erection lie in absolute regularity. *Olcott v. Passaic Steel Co.* 122 App. Div. 90, 106 N. Y. Supp. 566.

A carpenter employed on the work of erecting a building cannot recover for injuries received by the fall of a floor, where the master has used ordinary care in the selection of competent persons to do the work. *Walton v. Bryn Mawr Hotel Co.* 160 Pa. 3, 28 Atl. 438.

The safe-place rule does not apply where a servant engaged in the construction of a building is injured by stepping upon the point of upturned nails protruding through a piece of board lying upon the floor of the building, since this is a mere temporary danger not due to any fault or plan of construction, but arising only during the course of the work, which is of such character that, as it progresses, the environment of the serv-

Statement by Goddard, J.:

These cases were originally brought by the appellants, respectively. The facts being the same in each, they were, by consent, consolidated for trial. The facts are substantially as follows: The Florence & Cripple Creek Railroad Company owns and operates a railway between the towns of Florence and Cripple Creek. A considerable portion of the road is built through a rough, mountainous country, necessitating frequent cuts along the mountain side. In the early afternoon of the 11th of April, 1901, a landslide came down from the mountain side of a cut about 30 feet in height and nearly perpendicular, at a point on the road about 2 miles north of the station of Adelaide, covering the track in what is known as a "thorough cut" for 50 feet in length, and to the depth of 6 or 8 feet, with rock and earth, completely obstructing the passage of trains. John McGrath, who was foreman of the section upon which this slide occurred, with one man, commenced preparation for removing the fallen rock and earth. About 4 P. M. a conductor of a south-bound freight train which was stopped by the obstruction went to Adelaide and telegraphed information of the occurrence to some managing officer. About 5 P. M. Miles McGrath, roadmaster and superintendent of bridges upon defendant's road, then at Florence, in pursuance of an order of the train master of the road, prepared a work train, consisting of flat cars, and started to the place of the slide, gathering up on the way all the

employees of the road, among them Timothy J. Maloney and Jackson P. Allen, who were foremen on other sections. This train arrived at the place of the obstruction about 8 P. M. The cars were pushed up to the rock and earth lying in the cut. It was then quite dark, and the only light available was furnished by lanterns and such light as reached the north end of the cut from the headlight of the freight engine, which, by reason of a curve in the track, did not reach the south side of the cut, and by a small bonfire, which lasted but a few minutes. After the arrival of Miles McGrath, no inspection of the mountain side of the cut from which the slide came was made. The conductor of the freight train, when he met Miles McGrath at Adelaide, stated to him that, from what he observed while at the place, he was of the opinion that there was danger of rock falling at the cut. The attention of John McGrath, foreman of the section, and who was in charge of the work, while it was still daylight, was called by Harris, a brakeman on the freight train, to a crevice at the side of the rock on the mountain side, who expressed the opinion that it was dangerous. During the afternoon, John McGrath warned two men not to go through the cut because it was dangerous. Upon arriving at the obstruction, several of the foremen went to Miles McGrath, and one of them, in the presence of the others, asked him if the place had been examined and was all right, whereupon John McGrath, who was also present, said

ant must necessarily undergo frequent changes. *Armour & Co. v. Dumas*, 43 Tex. Civ. App. 36, 95 S. W. 710.

One who is employed to wheel away bricks from a building that is being torn down assumes the risk of being struck by a board which is knocked off by other employees in the course of the work. *Walaszewski v. Schoknecht*, 127 Wis. 376, 106 N. W. 1070. The court said that in the removal of buildings, as in their erection, the rule that the master must furnish a safe place in which a servant is to work can have but a very limited application. In doing such work new adjustments and changes are continually going on from which danger may arise, against which no forecast can provide or warning be given.

A master is not liable, under the safe-place doctrine, for injuries to a servant engaged in carrying stone across the floor of a building in course of erection, who breaks through a temporary flooring across an elevator shaft and falls down the well, since the contingencies of construction and repair are constantly changing, and it is impossible for employers to foresee all the purposes to which temporary supports may be applied, and to hold them in readiness therefor. *Fournier v. Pike*, 128 Fed. 921.
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An experienced carpenter who is working in a building in process of construction, and who falls through a hole in the floor in the course of the work, cannot recover damages from the master on the theory that he was put to work in an unsafe place, although the master knew of the existence of the hole. *Beique v. Hosmer*, 169 Mass. 541, 48 N. E. 338. The court said that obviously the condition of such a building was not a permanent one, but was liable to change as the necessities of construction required. An experienced workman must be assumed to know this, and to have regard to it. It was one of the risks of the business in which he was engaged. To require his employer to warn him, or to guard him against such a risk, would be, therefore, to compel the employer to protect him from a risk concerning which, from the very nature of the case, the employer would have no reason to suppose that the workman needed any warning or protection.

But a master engaged in the construction of a building is liable to a common laborer for injuries caused by falling through an unguarded hole in a temporary floor upon which he had been ordered to go, where the plaintiff took no part in the laying of the floor. *Merrill v. Pike*, 94 Minn. 186, 102 N. W. 393.

in their hearing to Miles McGrath, "Yes, I examined it before dark, and it is all right." Upon hearing that statement, the foremen, with their men, including Maloney and Allen, went to work loading the fallen rock upon the cars, and the work continued until about 9 o'clock P. M., when a large rock fell from the mountain at the south side of the cut, killing Maloney and Allen and some others. The appellants, who are the widows of the deceased, seek to recover damages which they allege they have sustained by the death of their respective husbands, which they aver was caused by the negligence of the company by not ascertaining by proper inspection the dangerous condition of the premises, and in failing to prop and support the cliff of rock, or rock wall, so as to prevent the same from falling, and in not advising said Maloney and Allen of the dangerous condition of the work, and in not furnishing sufficient light to enable them to observe the safe, or unsafe, condition of the place, and in failing to provide a safe place in which to work. Upon the conclusion of the plaintiffs' testimony, the court, on mo-

And where, in dismantling a building, the master, through his representative, is present and assumes control and direction of the work of furnishing props and supports for the building, it becomes his duty to exercise ordinary care to provide such reasonable precautions as are compatible with the nature and character of the work, to insure a reasonable degree of safety under the attending circumstances. *Bloomfield v. Worsster Constr. Co.* 118 Mo. App. 254, 94 S. W. 304.

And it cannot be asserted as a matter of law, said the court in *Wolf v. Great Northern R. Co.* 72 Minn. 435, 75 N. W. 702, that a common laborer engaged in loosening layers of stone in the bottom portion of a wall that is being torn down assumes the risk of the upper part of the wall falling upon him. This case was distinguished from the gravel-pit cases decided against the servant on the ground that the latter was supposed to be acquainted with the effect of the law of gravitation, the court saying that a wall of stone and mortar had lateral strength not found in a bank of earth, so that an ordinarily intelligent man might not readily understand how far he could go with comparative safety when removing foundation stones of the wall. See *infra*, VI.

And the master is not within the exception to the safe-place rule when it appears that, in building a shed over a sidewalk in the nighttime, guy lines were attached across a street, one of which was struck by a wagon which caused it to sway and throw a workman from a post on which he was standing and to which he was spiking a girder, since the place could not have been reasonably safe when the workmen began their work. *Grace & H. Co. v. Kennedy*, 40 C. C. A. 69, 99 Fed. 19 L.R.A. (N.S.)

tion, directed verdicts in favor of defendant, and, upon the return of said verdicts, the court entered judgment dismissing said causes, and for costs against plaintiffs. From this judgment, plaintiffs prosecute an appeal.

Messrs. Charles D. Bradley and Joseph H. Maupin, for appellants:

The premises where the employee is put to work must be reasonably safe for the purposes of the employment.

Grant v. Varney, 21 Colo. 333, 40 Pac. 771; *Denver Tramway Co. v. O'Brien*, 8 Colo. App. 74, 44 Pac. 766; *McKean v. Colorado Fuel & Iron Co.* 18 Colo. App. 285, 71 Pac. 426; 2 *Bailey*, Personal Injuries relating to Master & Servant, 980.

The duty of preparing the place for the men to work was a personal duty of the defendant.

Grant v. Varney, *supra*; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *Denver, S. P. & P. R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243, 21 Pac. 708;

679, affirming 92 Fed. 116. The court said that the negligence, if it existed, arose from the insufficiency of the means of protection of the workmen, which were originally adopted.

III. Excavations.

a. In general.

The exception to the safe-place rule is also applied to excavation work. In *Gibson v. Midland Bridge Co.* 112 Mo. App. 594, 87 S. W. 3, the court said that the rule requiring the master to exercise reasonable care to put the servant to work in a reasonably safe place, though an elemental principle applicable to the relation of master and servant, is subject to exceptions and qualifications, and should not be given to the jury as an unqualified rule in a case where inherent danger lurks in the place which, itself the subject of operation, is undergoing change from the work performed upon it, as where a servant is shoveling dirt at the side of an embankment, a portion of which falls upon him because of the excavation.

In *Baird v. Reilly*, 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884, the court said that the employer's obligation towards an employee does not oblige him to keep the work place in a safe condition at every moment of the work, so far as its safety depends upon the due performance of their work by the fellow servants of the employee. But in this case a trench caved in, and the master was held liable for not properly shoring it up. The injured servant was not engaged in the work of excavating, but was sent into the trench after it had been dug.

A servant engaged in excavating for a cellar, and working at the base of a perpendicular

Denver, T. & G. R. Co. v. Simpson, 16 Colo. 55, 25 Am. St. Rep. 242, 26 Pac. 339; Colorado Mill. & Elevator Co. v. Mitchell, 26 Colo. 284, 58 Pac. 28; McKean v. Colorado Fuel & Iron Co. *supra*.

If there were hidden and lurking dangers connected with the performance of the work, known to the company and unknown to the employee, it was the clear duty of the company to inform him of the existence of such dangers.

Denver Tramway Co. v. O'Brien, 8 Colo. App. 76, 44 Pac. 766; Dresser, Employers' Liability, § 99; Lynch v. Allyn, 160 Mass. 248, 35 N. E. 550; Hughes v. Malden & M. Gaslight Co. 168 Mass. 395, 47 N. E. 125; McCoy v. Westborough, 172 Mass. 504, 52 N. E. 1064; Gorman v. Woodbury, 173 Mass. 180, 53 N. E. 373; Colorado City v. Liafe, 28 Colo. 468, 65 Pac. 631; Walker v. Scott, 10 Kan. App. 413, 61 Pac. 1091; Faulkner v. Mammoth Min. Co. 23 Utah, 437, 66 Pac. 800; Elledge v. National City & O. R. Co. 100 Colo. 282, 38 Am. St. Rep. 290, 34 Pac. 720; Thompson v. Chicago, M. & St. P. R. Co. 4 McCrary, 629, 14 Fed. 564; Thomas v.

Ross, 21 C. C. A. 444, 41 U. S. App. 574, 75 Fed. 552; Anderson v. Winston, 31 Fed. 528; Burgess v. Davis Sulphur Ore Co. 165 Mass. 71, 42 N. E. 501; Collins v. Greenfield, 172 Mass. 78, 51 N. E. 454; Ryan v. Tarbox, 135 Mass. 207; Foster v. Greeley, 15 Colo. App. 176, 61 Pac. 483.

Messrs. Henry M. Blackmer, Karl C. Schuyler, and Walter F. Schuyler, for appellee:

The defendant, under the circumstances, was under no obligation to furnish to the deceased a safe place, or reasonably safe place, in which to work.

Colorado Coal & I. Co. v. Carpita, 6 Colo. App. 248, 40 Pac. 248; Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251; Kennedy v. Spring, 160 Mass. 203, 35 N. E. 779; Armour v. Hahn, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433; Porter v. Silver Creek & M. Coal Co. 84 Wis. 418, 54 N. W. 1019; Carlson v. Oregon Short Line & U. N. R. Co. 21 Or. 450, 28 Pac. 497; Fraser v. Red River Lumber Co. 45 Minn. 235, 47 N. W. 785; Gulf, C. & S. F.

lar bank of earth 14 feet high for the purpose of undermining the bank so that it can be pried off from the top assumes the risk of injury from the falling of the overhanging bank, since the danger to the plaintiff and his fellow workmen is created by themselves during the progress of the work. Logerto v. Central Bldg. Co. 123 App. Div. 840, 108 N. Y. Supp. 604.

Where a pile of clinkers upon which a shoveler is at work is constantly changing by the very work he is doing, he cannot recover for an injury received by the falling of a portion of the pile upon him, on the theory that the master has failed to furnish him a safe place in which to work. The rule that the master is not liable for dangers existing at the place where the servant is sent to work, unless the master knows of the dangers, or might know of them in the exercise of ordinary care, was held to apply with greater force in cases where the conditions surrounding the work are constantly changing owing to the progress of the work. Pre v. Standard Portland Cement Co. (Cal. App.) 100 Pac. 122.

A master is not liable for injury to a coal shoveler caused by a frozen crust of the coal falling on him as it is undermined by the work, on the theory that he has failed in his duty to furnish a safe working place. Miller v. Thomas, 15 App. Div. 105, 44 N. Y. Supp. 277. The court said that, when the plaintiff and those engaged with him commenced to work upon the pile of coal, there was nothing apparently or inherently dangerous in the place or nature of the service, charging the defendant with negligence for setting men at work there. Later, however, in the work as it progressed and in the course of it, the condition was produced which was dangerous to one exposed, as was the plain- 19 L.R.A. (N.S.)

tiff when he received his injury. When the plaintiff and his coemployees went to work on this pile of coal there was no occasion to apprehend any danger of injury from the service, and whatever hazard followed arose from the manner in which the work was done, and, so far as the place became unsafe, it resulted in the detail of the work, from the method of doing it by the plaintiff and his coemployees. In such case the consequences came within the hazard assumed by them.

A master is not liable for the killing of a servant engaged in excavating a pit in a building in course of alteration, the accident being due to the negligent piling of a number of heavy iron plates close to the edge of the pit, the earth giving way causing some of the plates to fall into the pit, since the place was safe enough until it was made dangerous by the reconstruction operations being carried on. Morgan Constr. Co. v. Frank, 86 C. C. A. 168, 158 Fed. 964. The court said that it could no longer be contended that the duty of providing a safe place or structures extended to places or structures made dangerous by the very work in which the workmen were engaged, so far as safety depended upon the due performance of that work by them or those who stood in law in the relation of fellow servants.

One who is employed in a common work of excavating for and constructing a cement wall assumes the risk of injury by the falling upon him of a stone which has been loosened by a previous blast, since, the place furnished being originally safe, the master is not bound personally to inspect it at every moment of the time during all the changes incident to the performance of the work, having the right to intrust the details

ger there was in the situation; and under such circumstances the doctrine of 'safe place' had no application." The same rule is announced in *Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351, and in *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251. The company, therefore, was not remiss in the performance of any duty in failing to furnish a safe place for the deceased to work in, and it is equally clear that, under the existing conditions, it would have been impracticable to prop or support the embankment so as to prevent the rock from falling.

It only remains, therefore, to consider whether, in the circumstances of this case, the appellee was delinquent in the performance of any other duty it owed to the deceased. Counsel for appellants insist that it was incumbent upon appellee to have made a careful and diligent examination of the premises before the men were permitted to work therein. There is no evidence as to what inspection, if any, was made by John McGrath, the foreman of the section, during the afternoon, or what disclosure, if any, as to the result ascertained by such examination, or as to the condition of the premises, was made to the deceased. It does,

him. The court said, among other things, that the condition and dangers of such places were liable to change from hour to hour as the work progressed, and the employee himself had much better means of knowing of such condition and dangers than his employer possibly could have.

A master is not liable for an injury to a servant caused by the falling of a rock upon him while he is engaged in taking out coal in a mine. *Rolla v. McAlester Coal Co.* 6 Ind. Terr. 404, 98 S. W. 141. The decision rests upon the ground that it is not the duty of the master to follow up the servant and see that his place is safe at every moment of the work, and approves the exception to the safe-place rule, that the master is not bound to keep a place in which to work safe which is constantly changing as the work progresses.

A master is not liable for the killing of a miner by reason of the falling upon him of a portion of the roof of the room in which he is working, due to failure properly to prop and support the roof, on the theory that the duty of the master to provide a safe working place cannot be delegated so as to absolve him from liability in case of failure of the vice principal to perform that duty, because in this case the place is not furnished as in any sense a permanent place of work, but is a place in which surrounding conditions are constantly changing, and, instead of being a place furnished by the master for the employees, is a place the furnishing and preparation of which are in themselves part of the work which they are hired to perform. *Coal & Min. Co. v. Clay* (Consolidated Coal 10 L. R. A. (N.S.)

however, appear that, in response to an inquiry by some one of the foremen, John McGrath stated to Miles McGrath, in the presence and hearing of some of the men, that he had examined it before dark, and it was all right. It was apparent to all, including the deceased, that no inspection other than that made by John McGrath, or someone employed with them in the common work, had been made, and, with this knowledge, they entered upon the work. If he was negligent in his examination, it was the negligence of a fellow servant, of which they cannot complain, and the deceased had no right to assume that any inspection, other than that by a fellow servant, had been made. Judge Lochren, in the opinion above referred to, in discussing this phase of the case, said: "Here all these servants, including the foremen and the roadmaster, were, when the disaster happened, engaged in the common work and enterprise of keeping the railway in proper condition for the passage of trains. The disaster caused an instant, sudden emergency in the very work in which they were engaged,—an emergency admitting of no delay, not even for daylight, certainly not for the summoning of the managing officers of

& Min. Co. v. Floyd) 51 Ohio St. 542, 25 L. R. A. 848, 38 N. E. 610.

The rule that the master is bound to furnish his servants a safe place in which to work is not applicable to a case where an experienced miner who is engaged in driving a neck of a room in a mine is killed by the falling of a rock which has been undermined by his work. *Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80. The court said that the principle invoked was usually applied to a permanent place, and not to such places as were constantly shifting and being transformed as the direct result of the employee's labor.

In *Smith v. Hecla Min. Co.* 38 Wash. 454, 80 Pac. 779, in holding that it was erroneous to charge that the law does not, under any circumstances, exact from the servant the use of diligence in ascertaining the defective condition of structures or appliances, but charges him with knowledge of such only as are open to his observation, and that beyond this he has a right to assume without inquiry or investigation that his employer has discharged his duty of furnishing him with a reasonably safe place in which to perform his duties, where a miner known as a "mucker" was injured by the falling of a rock when he knew that "air slacking" was constantly going on, which loosened the rock overhead and made it more dangerous from time to time,—the court said that the very nature of mining was such that the working place of the miners or muckers was constantly undergoing changes. These changes were necessarily accompanied with dangers to the workmen notwithstanding careful inspection and protection by the master. The

the railway or of its engineers. The work to be done was simply the rough work of clearing the tracks of the fallen rocks, which the servants, under their foremen and road-master, were entirely competent to perform. The circumstances and conditions must have made it plain to all that no inspection or precaution respecting the cliff was or could have been had, except by such of the servants as were there while it was daylight. Under these circumstances, the servants who came later, as well as those who were there in daylight, assumed the risk of the employment they engaged in; and, if John McGrath or Miles McGrath were negligent in representing the place to be safe, that was negligence of fellow servants. *Northern P. R. Co. v. Dixon*, 194 U. S. 338, 343, 48 L. ed. 1006, 1009, 24 Sup. Ct. Rep. 683, 684; *Pennsylvania Co. v. Fishack*, 59 C. C. A. 269, 123 Fed. 465."

Upon a careful consideration of all the facts disclosed by the record, we think the court below properly directed a verdict in favor of appellee. The judgment is therefore affirmed.

Steele, Ch. J., and Bailey, J., concur.

safe-place rule could be applied only in a qualified sense. It was the duty of the master to keep this place in as safe a condition as he could consistently with the reasonable and practicable carrying on of the business. The working place being necessarily dangerous, it was incumbent upon the master to provide for inspection, such inspection as would afford as full security as could reasonably be made practical in view of the nature of the work. But the very conditions of danger which imposed the duty of careful inspection upon the master also imposed a corresponding duty of care upon the servant.

Where a servant was employed in operating a car for the purpose of carrying away loose rock and debris that might result from the work of excavating rock which had fallen from the roof of a mine, and was killed by the falling rock, it was held that the master was not liable, on the ground that the rule as to furnishing a safe place did not apply to cases in which the work the servants were employed to do consisted in making dangerous places safe, or in constantly changing the character of the place for safety as the work progressed. *Moon-Anchor Consol. Gold Mines v. Hopkins*, 49 C. C. A. 347, 111 Fed. 298.

But the rule which requires the master to furnish a safe place in which to work does not apply where the servant has no part in producing the condition which leads to his injury, as where the servant, who is engaged in loading coal in a mine, is injured by the falling of coal from the face of an entry, due to the carelessness of the master in allowing a cross cut to be developed in ad-

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

OMAHA PACKING COMPANY, Plff. in Err.,

v.

LOUIS SANDUSKI.

(84 C. C. A. 89, 155 Fed. 897.)

Master — unsafe platform — injury to servant — liability.

An employee injured by slipping upon a platform used as a passageway in going to and from his work cannot hold the master liable for the injury if the slippery condition was caused by ice formed as a necessary result of trucking done over the platform as part of the regular work of the establishment, or through the negligence of fellow servants, he having long been cognizant of the probability of ice being there in freezing weather.

(July 22, 1907.)

ERROR to the Circuit Court of the United States for the District of Nebraska to review a judgment in plaintiff's favor in an action brought to recover damages for

vance of and close to the rib and face of the entry so as to loosen, crack, and weaken the rib and face of the entry at the point at which he is at work. *Superior Coal & Min. Co. v. Kaiser*, 229 Ill. 29, 120 Am. St. Rep. 233, 82 N. E. 839.

A servant helping to push out loads of ore through the base of an ore pile does not assume the risk of a portion of the frozen crust of the same falling upon him, since it is the duty of the master to keep the overhanging crust broken down so as to render the place reasonably safe to those working below. *Illinois Steel Co. v. Olste*, 116 Ill. App. 303, affirmed in 214 Ill. 181, 73 N. E. 422. The court said that the fact that the place might still be dangerous after the master had discharged his duty of making the place as safe as could be reasonably expected, in view of the character of the work to be performed, by the exercise of reasonable care on his part, afforded no reason why he should be absolved from his duty to the servant; but reason and humanity required that the master should be held to the performance of his duty under such circumstances to the end that the hazards of a dangerous situation were not unnecessarily increased by his negligence.

That it is the nature of gneiss rock to disintegrate and fall from time to time at unexpected intervals from the action of the elements operating upon it does not excuse the master from using proper precautions to protect his workmen from a danger known to him, arising from such a cause, as where he has notice of the dangerous character of an overhanging cliff and fails to prop it up. *Pantzar v. Tilly Foster Iron*

personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Argued before Van Devanter and Adams, Circuit Judges, and Riner, District Judge.

Messrs. Charles J. Greene and Ralph W. Breckenridge, for plaintiff in error:

Defendant did not owe the plaintiff a master's duty regarding the platform.

American Bridge Co. v. Bainum, 76 C. C. A. 633, 146 Fed. 367.

The doctrine *res ipsa loquitur* is inapplicable to cases between master and servant, brought to recover damages for negligence.

Northern P. R. Co. v. Dixon, 71 C. C. A. 555, 139 Fed. 737; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Wormell v. Maine C. R. Co. 79 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49; Quincy Min. Co. v. Kitts, 42 Mich. 41, 3 N. W. 240; Grant v. Pennsylvania & N. Y. Canal & R. Co. 133 N. Y. 659, 31 N. E. 220.

Where negligence is the ground of an action, it devolves upon the plaintiff to trace the cause of his injury to the defendant.

Cooley, Torts, 2d ed. p. 809; Overby v. Chesapeake & O. R. Co. 37 W. Va. 524, 16 S. E. 813; Nitro-glycerine Case (Parrott v. Wells) 15 Wall. 524, 539, 21 L. ed. 206, 212; Morrison v. Phillips & C. Constr. Co. 44

Wis. 405, 28 Am. Rep. 599; Leonard v. Miami Min. Co. 78 C. C. A. 517, 148 Fed. 827.

For an injury resulting through a defective condition created by the company's employees during their regular and ordinary work, the defendant is not liable.

Weeks v. Scharer, 49 C. C. A. 372, 111 Fed. 330; What Cheer Coal Co. v. Johnson, 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810; American Bridge Co. v. Seeds, 11 L.R.A.(N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Minneapolis v. Lundin, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525; Oregan v. Marston, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 952; Cleveland, C. C. & St. L. R. Co. v. Brown, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; Moon-Anchor Consol. Gold Mines v. Hopkins, 49 C. C. A. 347, 111 Fed. 298; Finalyson v. Utica Min. & Mill. Co. 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507; Gulf, C. & S. F. R. Co. v. Jackson, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48; Deye v. Lodge & S. Mach. Tool Co. 70 C. C. A. 64, 137 Fed. 480.

Messrs. Constantine J. Smyth and Edward P. Smith, for defendant in error:

The defendant owed the plaintiff a master's duty with respect to the place where the injury happened.

Fitzgerald v. Connecticut River Paper Co.

Min. Co. 99 N. Y. 368, 2 N. E. 24. The court said it was those risks alone which could not be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumed.

A miner digging out places in which other miners are to set supporting timbers is not engaged in work which changes the danger of the place, so as to make applicable the exception of the safe-place rule made in such cases. Faulkner v. Mammoth Min. Co. 23 Utah, 437, 66 Pac. 799.

The exception to the safe-place rule as to changing conditions of the working place does not apply where the servant is injured by rock falling from the roof of a stope in a mine, where the stope has been open for several years, and has never been timbered, and where water percolates through the roof of the place of the accident, since the danger is not the result of changing conditions produced by the operations of the workmen, but rather the result of permanent and extraneous causes. Bird v. Utica Gold Min. Co. 2 Cal. App. 674, 84 Pac. 256.

One who is employed as a common laborer to shovel ore into a chute in a stope of a mine is not engaged in work which in itself necessarily changes the character of the place with respect to safety, so as to relieve the master from liability for the former's death caused by the falling of a rock upon him which becomes detached from the hanging wall of a stope. Western Invest. Co. v. McFarland, 166 Fed. 76, 19 L.R.A.(N.S.)

c. Quarries.

When the servant is at work in a quarry at the foot of a slope from which rock has been blasted, where the conditions of danger must be constantly changing as the work progresses, he is under as much obligation as the master to be on the lookout for falling rocks; and, where he has equal facilities for ascertaining the danger, and continues work, the master is not liable for any injury caused by the sliding of the rock on the slope beneath which the servant is working, unless in some manner he urges or coerces the servant to continue the work after he himself is aware, or should be aware, of the danger. Thompson v. California Constr. Co. 148 Cal. 35, 82 Pac. 367.

A servant employed in the work of "stripping" cement rock from an overlying layer of earth and stone assumes the risk of injury from the falling of a frozen crust of earth and rock from the top of the pit, caused by the excavation. Utica Hydraulic Cement Co. v. Whalen, 117 Ill. App. 23. The court said that this case belonged to that class where the very work the servant was employed to do was constantly producing changes and temporary conditions for the time being more or less hazardous to those engaged in the work, and where it would be practically impossible to keep the conditions safe and prosecute the work.

The master is not liable for injury to a workman in a stone quarry, caused by the undermining of a stone which falls upon him, where, when the servant goes to work,

155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464; Haber v. Jenkins Rubber Co. 72 N. J. L. 171, 61 Atl. 382.

The failure to prevent or remove the icy condition of the platform was the proximate cause of the injury.

Texas & P. R. Co. v. Carlin, 189 U. S. 354, 47 L. ed. 849, 23 Sup. Ct. Rep. 585; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; Fitzgerald v. Connecticut River Paper Co. supra; Sweat v. Boston & A. R. Co. 156 Mass. 284, 31 N. E. 296; Atchison, T. & S. F. R. Co. v. Stanley, 71 Kan. 520, 81 Pac. 176; Heckman v. Mackey, 35 Fed. 353; Southerland v. Northern P. R. Co. 43 Fed. 646; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Bredeson v. C. A. Smith Lumber Co. 91 Minn. 317, 97 N. W. 977; Mason & O. R. Co. v. Yockey, 43 C. C. A. 228, 103 Fed. 265.

No matter who produces the defective condition, whether he is a fellow servant or a stranger,—unless it is the plaintiff himself,—if it is one which, in the exercise of reasonable care, the master should remove, it is his duty to do so.

Texas & P. R. Co. v. Carlin, supra; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368-386, 37 L. ed. 772-780, 13 Sup. Ct.

the place is safe, and it is the work done by the servants which dislodges the stone. Welch v. Carlucci Stone Co. 215 Pa. 34, 64 Atl. 392, 7 A. & E. Ann. Cas. 290. The court said the injury occurred while the servant was prosecuting the work in which he was engaged, and as a result of his own labor in digging the earth from under the stone, and was one of the risks incident to his employment.

A quarry man injured by the falling of a piece of rock from above upon a ledge upon which he is working cannot recover for resulting injuries, on the theory that the master has failed to furnish him a safe place in which to work, since the plaintiff and his fellow workmen are practically making the place in which they are to work, and at each succeeding blast the conditions and surroundings are changed. Mielke v. Chicago & N. W. R. Co. 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22. The court said the plaintiff was familiar with the situation and appreciated the danger.

A servant hurt by the fall of a stone thrown up by a blast while at work in a quarry cannot recover from the master on the theory that the latter has failed to furnish a safe place, since the master is not required to furnish his servant a safe place in which to work where the danger is temporary only, and when it arises from the hazard and progress of the work itself and is known to the servant. Zeigenmeyer v. Goetz Lime & Cement Co. 113 Mo. App. 330, 88 S. W. 139.
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Rep. 914; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 708; National Steel Co. v. Lowe, 62 C. C. A. 229, 127 Fed. 311; Baird v. Reilly, 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884; Southerland v. Northern P. R. Co. supra; Toledo Brewing & Malting Co. v. Bosch, 41 C. C. A. 482, 101 Fed. 530; Hall v. Missouri P. R. Co. 74 Mo. 298; Western Coal & Min. Co. v. Ingraham, 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219; Little Rock & M. R. Co. v. Moseley, 6 C. C. A. 225, 12 U. S. App. 514, 56 Fed. 1009; Union P. R. Co. v. Jarvi. 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; Union P. R. Co. v. Daniels (Union P. R. Co. v. Snyder) 152 U. S. 684-691, 38 L. ed. 597-601, 14 Sup. Ct. Rep. 756-758; Grace & H. Co. v. Kennedy, 40 C. C. A. 69, 99 Fed. 682; Sadowski v. Michigan Car Co. 84 Mich. 100, 47 N. W. 598.

Riner, District Judge, delivered the opinion of the court:

This is an action to recover damages for personal injuries alleged to have been suffered by the defendant in error by reason of the negligence of the plaintiff in error.

Louis Sanduski, plaintiff in the court be-

A servant engaged in the work of cutting down and blasting away the face of a rocky cliff assumes the risk of injury caused by the falling of a piece of rock from the top of the cliff, which was not there when his work began, since this is a danger occasioned by the general management and prosecution of the work. Di Vito v. Crage, 165 N. Y. 378, 59 N. E. 141, reversing 35 App. Div. 155, 55 N. Y. Supp. 64.

d. Gravel pits.

One who is engaged in wheeling sand assumes the risk of the fall of an overhanging frozen crust caused by the excavation of the sand below, the rule as to the master's duty to furnish a safe place having no application to such a case. Livingstone v. Saginaw Plate Glass Co. 146 Mich. 236, 109 N. W. 431. The court said that there was no danger whatever in doing this work, except such as arose during its progress as a necessary incident of the work itself, which was being performed by the plaintiff and his fellow servants. If any danger arose, it came through the prosecution of the work, and not through the condition of the place furnished by the master in which to work.

A servant employed to release gravel from the slope of a gravel pit so as to cause the gravel to break off and slide down assumes the risk of injury by falling gravel. Swanson v. Great Northern R. Co. 68 Minn. 184, 70 N. W. 978. The court said the place was made dangerous, and its character was

low (referred to hereinafter as the plaintiff), at the time of his alleged injuries, January 20, 1906, was in the employ of the Omaha Packing Company, defendant in the court below (referred to hereinafter as the defendant), in its packing house, located at South Omaha, in the hog-casing room, or department, and had been so employed for about three years. The room where the plaintiff worked was located in the third story of the building, connected with the defendant's packing plant and accessible from the street by means of a platform and stairway. The platform was 600 feet long, and between 10 and 14 feet wide. There is some conflict in the evidence as to its exact width. The platform, where it connected with the stairway leading up on the outside of the building to the door of the room where Sanduski worked, was between 10 and 15 feet above the ground. John Tnczar, a witness for the plaintiff, testified that it was "maybe 10 and maybe 12" feet from the foot of the stairs to the edge of the platform. There was a railing along the outside of the stairway, but no railing on the platform. It had, however, two pieces of 2x4 timber spiked to the edge of it. The platform sloped slightly toward the building; the outer edge being about 3 inches higher than the inner edge. The

platform was used, not only as a passageway for employees going to and from their work, but also for trucking the product of the plant, as one of the witnesses puts it, "from the beef house to the tank room," located at different points along the platform, and had been so used during the entire time of plaintiff's employment. The testimony shows that in this trucking process, if there was anything wet in the product conveyed by the trucks, the water would drip off on the platform, and that there usually was water dripping from the product carried on the trucks. All of this was known to the plaintiff. He testified that he knew the platform was used by truckers every day, in cold as well warm weather, and that water dripped off the meat carried on the trucks onto the platform, and that during his entire term of service he had used this platform and stairway as a passageway in going to and from his work, sometimes during the daytime and at other times after dark.

As to the condition of the platform on the morning when plaintiff went to work, the testimony is not altogether clear. Tnczar, who went to work about the same time plaintiff did, testified that he did not see any ice on the platform. Zalinski, another witness, could not say whether

continually changing, by reason of the work in which the plaintiff was engaged. The progress of the work necessarily changed the character of the place and enhanced the danger, and, under such conditions, it had never been held that it is the absolute duty of the master to furnish the servant a safe place in which to work.

The safe-place rule has no application in the case of a servant at work at the foot of a gravel pit, for, said the court in *Christenson v. Rio Grande Western R. Co.* 27 Utah, 132, 101 Am. St. Rep. 945, 74 Pac. 876, where one engages in employment obviously dangerous, and knows the manner in which it is to be carried on, is familiar with the conditions and surroundings, and is aware that his own work and that of his fellow workmen will constantly change its character, rendering it alternately safe and dangerous, he assumes the risks incident to the employment.

A common laborer working in a gravel pit assumes the risk of injury caused by the gravel caving in upon him, the safe-place rule not applying to such a case. inasmuch as the plaintiff and his fellow servants create the place and its attendant perils from hour to hour in the prosecution of their labors, and the conditions are constantly shifting by reason of their own acts, of which, as well as the probable consequences thereof, they must be held to have notice. *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662.

A master is not required to make a gravel

pit safe for employees from moment to moment, when the natural support of the bank is being constantly removed, and where the changing conditions must be watched and provided against by the laborers themselves. *Montgomery v. Robertson*, 229 Ill. 466, 82 N. E. 396.

e. Sewers, trenches, tunnels, etc.

The safe-place rule has no application where the work and the place are coincident, as where the servant is engaged in the construction of a sewer which is rendered unsafe by the failure properly to shore up the sides of the trench. *Curley v. Hoff*, 62 N. J. L. 758, 42 Atl. 731.

A master is not bound to furnish a laborer who is engaged in digging a trench a safe place in which to work, since the latter is making his own place. *Collins v. Crimmins*, 11 Misc. 24, 31 N. Y. Supp. 880.

A servant engaged in digging a trench assumes the risk of the falling of the sides upon him, the safe-place rule having no application to a case in which the injury is caused by the work in which the workman is engaged. *McKinzie v. Philadelphia*, 8 Pa. Co. Ct. 293.

The only place that can be furnished to men engaged in excavating a tunnel is the place where the excavation is going on, so that there can be no liability on the part of the master on the theory that he has failed to furnish them a safe place. *Ber-*

there was ice on the platform in the morning. Plaintiff at first said there was ice on the platform, but subsequently said he did not notice whether the platform was frozen or not in the morning. Plaintiff testified that on the day of his injury he went to work in the morning about 6:45, and quit work at about 6:30 in the evening; that it was dark both when he went to work in the morning and when he quit in the evening; that he descended the stairs on the outside of the building leading from the third story down to the platform; that he took a few steps after reaching the platform, when he slipped, and that was all he knew. He testified, also, that the night was foggy. He could not say whether there was ice on the platform, but stated that he felt "under his feet it was kind of slippery, but not long, and slipped, and that is all he knew." The record does not disclose who found him when he was picked up, or the condition in which he was found. Both Tnczar and Zalinski testified that there was ice in ridges on that part of the platform where they trucked beef, and, when asked how high these ridges were, said they were small. Tnczar further testified that the ice came there from the water dripping from the product carried on the trucks and that the ridges were made by the trucks.

The theory upon which the plaintiff sought to recover in this case was that the defendant was negligent, in that it had failed to use reasonable care to provide him with a reasonably safe place in which to work; and it is contended by counsel in their brief that this duty of the master extends to a reasonably safe mode of entrance to and exit from the place where the servant was employed. Conceding, for the purposes of this case, that the rule in regard to the master's duty to his servant is as broad as contended for by counsel, yet we think there can be no recovery upon the facts as they are presented by this record. Both the platform and stairway were open and exposed. No one knew better than the plaintiff the manner in which the business was carried on there. He knew that this platform was used daily by men trucking the product of the plant from the beef house to the tank room, and that the drippings fell from the trucks upon the platform. He had been coming and going back and forth to his work almost daily over this platform for about three years, as had the other workmen, and that it was, as one of the witnesses described it, "one of the most traveled ways in the establishment."

It is not contended that there was any defect in the platform itself, but it is sought

tolami v. United Engineering & Contracting Co. 120 App. Div. 192, 105 N. Y. Supp. 90.

A master is not liable for the death of a servant caused by the caving in of a trench in which he is digging, on the theory that the master has not furnished the servant a safe place in which to work. *Durst v. Carnegie Steel Co.* 173 Pa. 165, 33 Atl. 1102. The court said that the place as it stood when the work commenced was perfectly safe. The danger could arise only as the work progressed and because of the work done. In such a case the court did not think it was the duty of the employer to stand by during the progress of the work to see when a danger arose. It was sufficient if he provided against such dangers as they might possibly or probably arise, and gave the workmen the means of protecting themselves. They should look out for such dangers, and use the means provided.

A master who has provided necessary sheathing is not liable for the death of a workman who is killed by the caving in of a trench during the progress of the work. *Rocco v. F. A. Gillespie Co.* 73 N. J. L. 591, 64 Atl. 117. The court said that the work itself involved the place of working. The duty of the work of excavation made the place of working. The workman was creating his own place to work in, and was constantly changing it and making it more and more dangerous as the work progressed. He could know as well as the master, and 19 L.R.A. (N.S.)

even better than he, the danger of the place. It was under his constant observation. The dangers were of his own creation, clearly incident to the work. That such dangers would arise was known to both the master and the servant, and the master, with this knowledge that such danger would thus arise during the progress of the work, provided for use of his servant, when he found its use necessary, the sheathing with which the servant could protect himself, and, with proper care for his own safety, would protect himself. This was the whole duty of the master in such a case.

One employed as a miner in drilling a tunnel does not assume the risk of the failure of the master to take such reasonable precautions as are requisite to prevent the caving and falling of the roof of that part of the tunnel already completed. He assumes the risks incident to the work in front of him, and not the risks of defendant's failure properly to care for that part of the tunnel or place behind him, which he has completed, and turned over to the care and control of the master. *Kelley v. Fourth of July Min. Co.* 16 Mont. 484, 41 Pac. 273.

The decision in *CITRONE v. O'ROURKE ENGINEERING CONSTR. Co.* was approved in *Bertolami v. United Engineering & Contracting Co.* supra, in which it was held that the safe-place rule did not apply where the injured servant was engaged in shoring up the roof of a tunnel and removing iron

to charge the defendant with liability upon the sole ground that drippings from the product carried on the trucks on that particular day were permitted to freeze upon the platform, thus making it slippery. The plaintiff must have known the weather conditions before reaching the platform, because he had descended the stairway, which was open and exposed, from the third story of the building, down to the platform, and, if the weather was cold enough to form ice, he must have known that he would necessarily find that portion of the platform over which the trucking was done to some degree in a slippery condition, and that it devolved upon him to use more care than at other times when the weather conditions were more favorable.

The mere fact that an accident happened does not of itself create a presumption of negligence on the part of the defendant. Where negligence is charged as a basis of recovery, the burden is upon the plaintiff to show that, by some act or omission, the defendant has violated some duty which he owed to the plaintiff and which caused the injury complained of. The rule is stated by this court in *Northern P. R. Co. v. Dixon*, 71 C. C. A. 555, 139 Fed. 737, as follows: "The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes the risk

of which is the servant's, or from one of those the risk of which is the master's; and, for this reason, it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that the negligence of the master caused the accident to establish that fact, and a naked finding, as in this case, that the accident occurred and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of the master and that of the servant, such as the negligence of fellow servants and latent and undiscoverable defects in place or machinery, which may have produced it." *Chicago & N. W. R. Co. v. O'Brien*, 67 C. C. A. 421, 132 Fed. 593, and cases there cited.

Neither is the rule which makes it the positive duty of the master to provide the servant a reasonably safe place in which to work, even if it extends to providing a safe mode of entrance to and exit from the place where the workmen are employed, applicable to a case where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done. In this case, if this platform became dangerous during the day, it was by reason of this trucking

columns, which were moved afterward as the work progressed, and were replaced by timbers, and a portion of the roof fell while he was at work and killed him.

In *Litchfield v. Buffalo, R. & P. R. Co.* 73 App. Div. 1, 76 N. Y. Supp. 80, it was held that a trench, so far as the excavating gang is concerned, is not a place furnished by the master, but is made by them, and is a detail of their general work; and that therefore the rule as to safe place does not apply; and the fact that a member of an excavating gang finished his work and remained over to assist masons who were sent into the trench, and, while so at work, was injured by a cave-in, was also held to be immaterial.

But a servant who is ignorant of the increased hazard of making an excavation deeper than usual, and is ordered to dig in the trench, the master not having taken sufficient precaution to prevent the sides from falling, does not, by obeying, assume the risk of a cave in, since an employee assumes such risks as are incident to his employment, and do not arise or ensue from negligence of his employer. *Norfolk & W. R. Co. v. Ward*, 90 Va. 687, 24 L.R.A. 717, 44 Am. St. Rep. 945, 19 S. E. 849.

Although a workman assumes the risk of such transitory changes as are incident to and ordinarily may be expected to occur in the prosecution of the work in which he is engaged, whether arising from the operation of natural causes or otherwise, a servant 19 L.R.A. (N.S.)

engaged in the work of digging a trench cannot be said, as a matter of law, to have assumed the risk of injury caused by the falling of an overhanging top crust due to a crack in the earth, when there is nothing to show whether such cracks are liable to occur in digging, and, if so, how frequently, and whether the servant should have anticipated the crack which occurred. *McCoy v. Westborough*, 172 Mass. 504, 52 N. E. 1064.

f. Unexpected explosions.

The risk of injury from the unexpected explosions in the course of excavation work is assumed by the servant.

A helper on an air-drilling machine assumes the risk of striking a "missed hole" containing an unexploded charge of powder. *Browne v. King*, 40 C. C. A. 545, 100 Fed. 561. The court said that the measure of the master's duty to his servant while engaged in a work which necessarily involves a constant change of the place itself in which the servant is set to work is: "(1) To exercise reasonable care to have the place in which the servant is to work safe when he is set to work, having regard for the nature and character of the work which is to be done; (2) to furnish reasonably safe machinery, tools, and appliances with which to do the work, having regard to the nature and character of the work, and to exercise reasonable care to keep them so by making

carried on in the progress of the work, either necessarily or from the manner in which the work was done by other employees, fellow servants of the plaintiff, engaged in the same general business; and, if the platform became dangerous through their negligence, that was one of the risks which the plaintiff assumed when he entered the defendant's employment. In *Deye v. Lodge & S. Mach. Tool Co.* 70 C. C. A. 64, 137 Fed. 480, the court said: "Unless the business be of such a complex and dangerous character as to require that it shall be conducted upon a system or scheme, in order to secure the orderly conduct of the business and the safety of those engaged in it, the master's obligation to supply a safe place for his work to be done, and to keep it safe, does not impose the duty of always keeping it in a safe condition so far as its safety depends upon the proper performance of the very work which his servants have there undertaken to do. If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation." *American Bridge Co. v. Seeds*, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; *Minneapolis v. Lundin*, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525.

In any aspect, therefore, in which the case

may be viewed, on the facts disclosed by this record, we think the plaintiff was not entitled to recover.

The judgment of the Circuit Court is reversed, with directions to grant a new trial.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

WESTINGHOUSE, CHURCH, KERR, & COMPANY, Plff. in Err.,

v.

DANIEL CALLAGHAN.

(83 C. C. A. 669, 155 Fed. 397.)

Master — fellow servant — negligence — assumption of risk.

1. One who enters the employment of another thereby assumes the risk of the negligence of his fellow servants in the performance of all acts which they do while they are not discharging a positive duty of the master.

Same — change of circumstances.

2. The duty of caring for the safety of a place or of appliances in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the appliances as to safety

Headnotes by SANBORN, Circuit Judge.

necessary inspections, repairs, and the like; and (3) to exercise reasonable care to employ competent and fit persons to discharge the several duties they are required to perform, both with reference to the machinery and appliances, as well as other work to be done."

A servant working in a tunnel assumes the risk of injury caused by the explosion of a "missed hole" or unexploded charge left by another shift of men working in the same place. *Shaw v. New Year Gold Mines Co.* 31 Mont. 138, 77 Pac. 515. The court said that the safe-place rule could have no application to a case in which the plaintiff and his fellow servants were creating the place of work, when it was constantly being changed in character by the labor of the men working upon it, when it became dangerous only by the carelessness or negligence of the workmen or by the negligent manner in which they used the tools or materials furnished for their work, when the dangers which arose were very short-lived, or when by the negligence of the workmen, the place was rendered unsafe without the master's fault or knowledge.

One engaged in sinking a shaft in a mine assumes the risk of injury by the explosion of an unexploded charge in a "missed hole." *Anderson v. Daly Min. Co.* 16 Utah, 28, 50 Pac. 815. The court said that, where the nature of the business was extremely dangerous, and conditions were necessarily continually changing by reason of placing and

setting of blasts whereby dangerous conditions arose continually through the acts of the servant without the knowledge of the master, the employer could not be held responsible therefor without his fault; but such temporary dangerous conditions arose from the nature of the employment, and were among the natural and ordinary risks and hazards attending the employment, for which the master was not liable.

A master is not required to furnish a servant a safe place in which to work where the danger is temporary, and when it arises from the hazard and the progress of the work itself and is known to the servant, such as the danger of unexploded shots left by workmen during the progress of driving a tunnel in a mine. *Davis v. Trade Dollar Consol. Min. Co.* 54 C. C. A. 636, 117 Fed. 122.

It is not a breach of duty on the part of the master's foreman during the construction of a sewer to send a servant to reload holes that have been drilled for dynamite without cautioning him that there is unexploded dynamite in one of them. *Minneapolis v. Lundin*, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525. The court said that the duty of the master to furnish a safe place for the performance of work does not require him to keep that place safe under the constantly changing conditions which the performance of such work as the construction of a sewer necessitates. In this case the city furnished a street in which

as the work progresses is the duty of the fellow servants to whom the work is intrusted; and it is not the duty of the master.

Same — grades of service.

3. All who enter the employment of a common master to accomplish a common undertaking are *prima facie* servants, although their grades of service are different; and some direct and supervise the men subject to their command and their work, while others perform the labor.

Same — risk in direction of men.

4. The servant assumes the risk of the negligence of his superior fellow servant in the direction of the men and the work to the same extent that he assumes the risk of the negligence of the fellow laborer by his side who is engaged in performing the work.

Same — departments.

5. The homogeneous business of a master cannot be divided into distinct and separate departments under the rule in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 383, 37 L. ed. 772, 779, 13 Sup. Ct. Rep. 914, by the testimony to that effect of his servants; and such testimony is incompetent for this purpose. The nature of the business alone can separate it into departments.

Same — negligence of foreman.

6. The plaintiff and D. were employed by the defendant in dismantling heavy machinery in the World's Fair buildings. D. was foreman under a superintendent who was under a manager there. The day before

the accident a heavy wooden frame 25 feet high had been erected and temporarily fastened in place with guy ropes under the direction of D., to be used to lift and move the heavy parts of an engine. On the day of the accident the plaintiff and four other men were working under D. to permanently secure this frame in place. D. directed the plaintiff to go upon the frame, and, after he had climbed there for the purpose of moving one of the ropes which held this frame in place so that they could use it at another place as a permanent guy rope, D. untied it below, and the frame fell and injured the plaintiff. Held, D. was not a vice principal, but he was a fellow servant of the plaintiff; and the defendant was not liable for his negligence.

(July 10, 1907.)

ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries for which the defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Hook, Circuit Judges, and Phillips, District Judge.

Mr. Percy Werner, for plaintiff in error:

The act of Douglas in untying the rope was the act of a fellow servant of plaintiff.

it was safe to construct a sewer. The comparative safety of the place where each man worked was necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at each moment of the progress of the work. It was the duty of each workman to use reasonable care so to render his service that the place in which he and his fellow servants were required to labor should continue to be reasonably safe. If the place originally furnished by the city became unsafe in the progress of the work it was rendered so, not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts and this negligence the city was not responsible.

One who is working in a mine, and who is injured while drilling in a hole in which a charge has failed to explode, cannot recover on the theory that the master has failed to provide a safe place, since the rule does not apply where the place is necessarily dangerous and necessarily changes from time to time as the work progresses. *Poorman Silver Mines v. Devling*, 34 Colo. 37, 81 Pac. 252.

The master is not liable for the act of a foreman in a cement quarry in putting a servant to work too near an unexploded charge of powder in a hole drilled for blast-

ing, since this is a manner of conducting the work for which servants are responsible. *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905. The court said: "It can't be that, every time a blast was exploded and the men came back, the manner of their distribution for work was a duty of the master, and that the order of a foreman, mistakenly or negligently given, must be regarded as the order of the master in filling a duty to furnish a safe place to work in. It is, as it seems to me, a detail of the working or management of the business, the risks attending which have been assumed by the party taking employment."

An employee engaged in drilling in a pit that is being excavated assumes the risk of injury or death arising from the explosion of dynamite caused in some manner by the drilling, where the existence of the danger could not be the exercise of any ordinary care be ascertained or apprehended. *Man-cuso v. Cataract Constr. Co.* 87 Hun, 519, 34 N. Y. Supp. 273.

IV. Repair work.

In *MALONEY v. FLORENCE & C. C. R. Co.* the exception to the safe-place rule as applied to changing conditions of the working place is discussed, as it is, also, in *Florence & C. C. R. Co. v. Whipps*, 70 C. C. A. 443, 138 Fed. 13, referred to in the opinion, and which grew out of the same accident. These cases, however, more prop-

The Miami, 87 Fed. 757, 35 C. C. A. 281, 93 Fed. 218; Reed v. Stockmeyer, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; Northern P. R. Co. v. Charless, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848; Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; Yager v. Atlantic, M. & O. R. Co. 88 Fed. 773; Weeks v. Scharer, 49 C. C. A. 372, 111 Fed. 330; Baltimore & O. R. Co. v. Brown, 76 C. C. A. 482, 146 Fed. 24; Maxfield v. Graveson, 65 C. C. A. 595, 131 Fed. 843; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603.

Mr. James J. O'Donohoe for defendant in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

Westinghouse, Church, Kerr, & Company, a corporation, was engaged in dismantling heavy machinery in the World's Fair buildings in St. Louis. Caldwell was its manager and Oldham its superintendent there. According to the most favorable evidence in the record for the plaintiff below, Callaghan, he had worked for this corporation during the Fair, had left his employment for some time, and about the 1st of December, 1904, he returned and applied to Caldwell for his old

job. Caldwell referred him to Oldham, the superintendent who employed him. He then labored there three weeks with a gang of men in the power house taking down props, and Douglas worked in the machinery hall with another gang. Douglas was the foreman, and ordered the work to start promptly and gave the plaintiff his orders. On December 24, 1904, Oldham asked the plaintiff if he would work upon Christmas Day, and offered him time and a half. He accepted the offer, and reported to Oldham that he was ready to work. Douglas, on the night before Christmas, ordered him to work and to be out early. On Christmas Day Callaghan, Douglas, Stanley, Dorig, and two other men who had agreed to work on that day appeared and Douglas ordered them to put permanent guy ropes on a heavy wooden frame which had been erected the day before under his direction for the purpose of lifting and removing the heavy materials of which the engines were composed. This frame consisted of four upright pieces of timber 8x8, 25 feet long. Upon the east and west sides heavy timbers 14 feet long had been mortised into the uprights, and there were timbers lying across these from north to south. This frame was temporarily held in position by guy ropes. In order to substitute permanent guy lines for the temporary ones, Douglas, who was a rigger and

erly fall within the exception to the safe-place rule which applies to cases in which the servant is employed to make a dangerous place safe. The same may be said of *Kletschka v. Minneapolis & St. L. R. Co.* 80 Minn. 238, 83 N. W. 133, in which it was held that a trackman assisting in repairing a washout on a railroad assumed the risk of injury from falling earth from the bank at the side of the culvert at which he was working, since he must have known that as the work of restoration progressed the condition of the banks and the place where he was working would constantly change, and that the fact that he was temporarily absent from the work and was told to hurry on his return could not relieve him from the duty of using his senses to note changes in the work which were perfectly patent.

V. Completed working place.

a. In general.

The exception to the safe-place rule made in cases in which the conditions of the working place are changing does not necessarily apply only to an uncompleted working place. In *Fortin v. Manville Co.* 128 Fed. 642, it was held that a servant engaged in carrying piles of cotton on trucks from one place in a cotton house to another assumed the risk of a platform, safe in itself, being rendered dangerous during the progress of the work by the throwing of piles of cotton upon it. 19 L.R.A. (N.S.)

It is not a violation of the master's duty to furnish a safe place to allow coal dust to settle on the floor of a building in which the plaintiff works, and in a trench and pit therein, which explodes and injures the plaintiff, if the place furnished by the master to the servant in which to work is safe as it stands when the work begins, and the danger can arise only as the work progresses and is caused by the work done; since it is not the duty of the employer to stand by during the progress of the work to see when the danger arises, it being sufficient if he provides against such dangers as may possibly arise, and gives the workmen the means of protecting themselves. *United States Cement Co. v. Koch* (Ind. App.) 85 N. E. 490.

In *Moy v. Ocean S. S. Co.* 12 Misc. 375, 33 N. Y. Supp. 563, in holding that the master was not liable for the killing of a servant who, while at work in one of the lower holes of a steamship, was struck in passing under a hatchway by a barrel which fell from a sling while being lowered into the hold, the court said that there could be no claim that the servant did not have a reasonably safe place in which to work, for that meant a place in which the permanent constructions had been made with reasonable safety.

A longshoreman who is injured by the falling of a box leaned against the side of a gangway cannot recover damages therefor in a common-law action, since the place is

sound and inspect them so that they would be reasonably safe, to drill holes in their faces, charge them with powder, and fire it at the proper times to bring down the coal. This court held that the foreman was not a vice principal, but a fellow servant of the workmen. In *Minneapolis v. Lundin*, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525, the city engineer was the general superintendent of all the work of the city. He appointed a superintendent of sewer construction. The latter employed a foreman who superintended and directed the work of a crew of about 50 men. This foreman was empowered to hire and discharge men, and to direct them when, where, and how to work. He ordered one of his gang to reload a hole which had been drilled in a rock, and had been filled with dynamite which had failed to explode, but he did not inform the workman that dynamite remained in the hole. The workman, in ignorance of the presence of the dynamite, proceeded to drill out the hole, the dynamite exploded, and he was injured; but the foreman was held to be his fellow servant. To the same effect are *Kansas & A. Valley R. Co. v. Waters*, 16 C. C. A. 609, 36 U. S. App. 31, 70 Fed. 28, and *The Miami (D. C.)* 87 Fed. 757.

The principles and authorities to which reference has been made leave no alternative in the case in hand. The plaintiff and Douglas were engaged in the same work, the work of dismantling heavy machinery, and at the

moment of the accident in securing in place for this purpose a frame which had just been erected and which was held in place by temporary guy ropes, a work which necessarily continually changed the character of the place where, and the appliances with which, they were working, as to safety. It was the duty of these servants, of Douglas and Callaghan, and not the duty of the master, to care for the safety of this place in so far as that safety was conditioned by the frame which they were securing in place and their manipulation of it. Douglas was not a vice principal of the master, because he was neither a general manager nor a superintendent of the entire undertaking or of any distinct department of a vast and diversified business. He was not a vice principal because the performance of the specific act which caused the injury was not a part of the positive duty of the master, but one of the duties of the servant. In the performance of these acts, a fellow servant of relation to this frame, the evidence is conclusive that he was discharging no positive duty of his master, but the ordinary duty of a servant. He was, therefore, in the performance of these acts, a fellow servant of the plaintiff, and the defendant was not liable.

The judgment below must accordingly be reversed, and the case must be remanded to the Circuit Court, with directions to grant a new trial; and it is so ordered.

close to the track by a snowplow, since the dangers from the snow bank are such as are inseparable from the operation of the road when snow prevails and is removed from the track. *Dowell v. Burlington, C. R. & N. R. Co. supra*.

Failure of a railroad company to remove ice from the top of a freight car is not a ground of complaint against the master when the servant slips upon the ice and loses his life, since the increased dangers of operating railroads, arising from rain, snow, and ice, or the weather, are a part of the ordinary risks incident to the business. *O'Bannon v. Louisville & N. R. Co.* 9 Ky. L. Rep. 706, 6 S. W. 434.

A master is not liable for injury to a brakeman who slips on snow and ice upon the ground at the side of a track in the neighborhood of a station platform, and falls under the wheels of an engine. *Piquego v. Chicago & G. T. R. Co.* 52 Mich. 40, 50 Am. Rep. 243, 17 N. W. 232.

Failure of a railroad company to put ashes or cinders upon snow in its yards where the surface of the snow is very slippery, so as to prevent a switchman from slipping and being hurt, is not sufficient evidence of neglect of duty to take the question of its negligence to the jury, since it is practically impossible, in view of the number and size of railroad yards and the frequent falls of snow and changes of weather

in northern winters, to adopt such a method. *Fay v. Chicago, St. P. M. & O. R. Co.* 72 Minn. 192, 75 N. W. 15.

In *American Bridge Co. v. Bainum*, 76 C. C. A. 633, 146 Fed. 367, in holding that negligence could not be imputed to the defendant on the theory that his foreman knew of the icy condition of steps over which the plaintiff had been ordered to go, and failed to warn him of their condition, the court said that it was a casual condition due to constantly recurring states of temperature, conditions that were observable by the most ordinary intelligence, and at such seasons requiring everywhere and at all times to be guarded against, and demanding only the most ordinary care to avoid their danger.

So, where water from a tank ran over the tracks of a railroad company, and the brakeman slipped and fell, it was held that the question whether the defendant was negligent in allowing the tank to become leaky, or whether the ice was formed from water which was unavoidably spilled upon the ground, should have been submitted to the jury. *McFall v. Iowa C. R. Co.* 96 Iowa, 723, 65 N. W. 321.

But, although a servant whose duty it is to superintend the placing of cars in position at a mill for loading, which necessitates his standing upon the steps of the mill, assumes the natural and necessary

WASHINGTON SUPREME COURT.

HATTIE HILGAR, Resp't.,

v.

CITY OF WALLA WALLA, Appt.

(50 Wash. 470, 97 Pac. 408.)

Master—work in ditch—responsibility.

1. One who puts his servant to work in a ditch is bound, when he takes upon himself the direction and control of the work, to see that the place is reasonably safe when the servant enters it, and is kept reasonably safe so long as the servant is required to stay there.

Trial—negligence—jury.

2. Whether or not a master, in attempting to remove a tongue of earth from between two ditches, renders the place where the servant is to work unsafe by attempting to throw down too long a section at one time without precautions to prevent accident in case of mistake of judgment, is for the jury, where there is a fair inference from the evidence that such is the fact.

Master—unsafe working place—duty of servant.

3. A servant called from other work to assist in a ditch, upon work of the manner of doing which the master assumes direction and control, is not bound to inquire into the safety of the place where he is told to stand while working.

Trial—obvious dangers—jury.

4. Whether the dangers of a place in which

hazards of his employment by reason of snow and ice, he does not assume the risk of slipping upon ice formed upon the steps from snow melting on the roof and the water running down upon the steps and freezing in ridges, where it remains for some three days before the accident. *Harding v. Railway Transfer Co.* 80 Minn. 507, 83 N. W. 395.

So, a railroad company may become liable for injury to a brakeman who, in the performance of his duty, slips upon a ridge of ice inside a rail upon a side track at a station, which forms several weeks before the accident; and the question of the company's negligence in such a case is properly submitted to the jury. *Sankey v. Chicago, R. I. & P. R. Co.* 118 Iowa, 39, 91 N. W. 820.

A railroad company which allows a narrow ridge of ice to accumulate between the rails of a track in a yard in a large city, and to remain concealed under a fall of snow for a week, so that a switchman slips upon it and is injured, is guilty of negligence in failing to keep the place reasonably safe for its employees to work in. *Rifley v. Minneapolis & St. L. R. Co.* 72 Minn. 469, 75 N. W. 704.

A brakeman does not assume the risk of injury caused by stepping upon a ridge of snow packed hard between the outside rail of a side track and perpendicular banks and 19 L.R.A. (N.S.)

a servant is directed to work were so plain and obvious that persons would not differ concerning it, so that the servant assumes the risk of working there over the positive assurance of the master that it is safe, is a question for the jury.

(October 3, 1908.)

APPEAL by defendant from a judgment of the Superior Court for Walla Walla County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. Affirmed.

The facts are stated in the opinion.

Messrs. Oscar Cain and John C. Hurspool, for appellant:

Any ordinarily prudent man would have adopted the method actually followed.

Anderson v. Oregon R. & Nav. Co. 28 Wash. 467, 68 Pac. 863; *O'Connell v. Thompson-Starrett Co.* 72 App. Div. 47, 76 N. Y. Supp. 296; *Welch v. Brainard*, 108 Mich. 38, 65 N. W. 667; *Roth v. Eccles*, 23 Utah, 456, 79 Pac. 918; *Welch v. Carlucci Stone Co.* 215 Pa. 34, 64 Atl. 392, 7 A. & E. Ann. Cas. 299; *Turner v. Southern P. Co.* 142 Cal. 580, 76 Pac. 384; *Rush v. Missouri P. R. Co.* 36 Kan. 129, 12 Pac. 582; *Wolfe v. New Bedford Cordage Co.* 189 Mass. 591, 76 N. E. 222; *Conway v. Hannibal & St. J. R. Co.* 24 Mo. App. 235.

Where work consists in changing the

coal docks at the side of the track, the snow having been accumulating for weeks, and there having been quite a fall within a few days of the accident, since the irregularity in the surface is one arising from negligent operation. *Cregg v. Chicago & W. M. R. Co.* 91 Mich. 624, 52 N. W. 62.

VI. Illustrative cases—obvious risks.

It should be observed in conclusion that many of the cases the facts of which are similar to those hereinbefore discussed have turned upon grounds which would absolve the master from liability, even if the condition of the working place were completed and unchanging. Most of these cases are decided against the servant on the ground that the risk was obvious. The following cases illustrate the point:

In *Cully v. Northern P. R. Co.* 35 Wash. 241, 77 Pac. 202, it was held that the safe-place rule does not apply in a case in which the servant is working in and about a gravel pit, and is injured by reason of a slide.

A servant employed in a stone quarry assumes the risk caused by the falling of a bank under which he is working at the time of the accident. *Western Stone Co. v. Musial*, 85 Ill. App. 82.

One who is engaged in digging a 20-foot bed of gravel from under a thin stratum of common earth is bound to know that

character of the place in which the work is done, the rule that the master is required to furnish a reasonably safe place does not apply.

Beesley v. F. W. Wheeler & Co. 103 Mich. 196, 27 L.R.A. 266, 61 N. W. 658; *Petaja v. Aurora Iron Min. Co.* 106 Mich. 463, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951; *Mielke v. Chicago & N. W. R. Co.* 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22; *Rolla v. McAlester Coal Co.* 6 Ind. Terr. 404, 98 S. W. 141; *Grayson-McLeod Lumber Co. v. Carter*, 76 Ark. 69, 88 S. W. 597; *Zeigenmeyer v. Goetz Lime & Cement Co.* 113 Mo. App. 330, 88 S. W. 139; *Gulf, C. & S. F. R. Co. v. Jackson*, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48; *Davis v. Trade Dollar Consol. Min. Co.* 54 C. C. A. 636, 117 Fed. 122; *Finalyson v. Utica Min. & Mill. Co.* 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507; *Armour v. Hahn*, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 434; *Beique v. Hosmer*, 169 Mass. 541, 48 N. E. 338; *Smith v. Hecla Min. Co.* 38 Wash. 454, 80 Pac. 779.

Plaintiff was guilty of contributory negligence barring recovery.

26 Cyc. Law & Proc. p. 1232; *Trudeau v. American Mill Co.* 41 Wash. 465, 83 Pac. 725; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 70 L.R.A. 999, 22 S. E. 869; *Klatt v. N. C. Foster Lumber Co.* 92 Wis. 622, 66 N. W. 791; *Steeple v. Panel & Folding Box Co.* 33 Wash. 359, 74 Pac. 475; *Griffiths v. Craney*, 38 Wash. 90, 80 Pac. 274; *Robare v. Seattle Traction Co.* 24 Wash. 577, 64

Pac. 784; *Baltimore & O. S. W. R. Co. v. Hunsucker*, 33 Ind. App. 27, 70 N. E. 556; *Parker v. Totten*, 2 N. Y. City Ct. Rep. 155; *Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80; *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594; *Rush v. Missouri P. R. Co.* 36 Kan. 129, 12 Pac. 582; *Last Chance Min. & Mill. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382; *Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351; *Brooks v. W. T. Joyce Co.* 127 Iowa, 266, 103 N. W. 91; *Meily v. St. Louis & S. F. R. Co.* 107 Mo. App. 466, 81 S. W. 639; *Illinois Steel Co. v. Rolewicz*, 113 Ill. App. 312; *Brown v. Oregon Lumber Co.* 24 Or. 315, 33 Pac. 557.

The danger was incident to the work, and was so open and obvious that plaintiff must be held to have assumed such risk upon entering upon such work.

26 Cyc. Law & Proc. p. 1177; *Griffiths v. Craney and Steeples v. Panel & Folding Box Co.* supra; *Diamond Plate Glass Co. v. De Horthy*, 143 Ind. 381, 40 N. E. 681; *Welch v. Brainard*, supra; *Christiansen v. William Graver Tank Works*, 223 Ill. 142, 79 N. E. 97, 7 A. & E. Ann. Cas. 69; *Schilling v. Bros. Co. v. Smith*, 225 Ill. 74, 80 N. E. 65; *Glenmont Lumber Co. v. Roy*, 61 C. C. A. 506, 126 Fed. 524; *Detroit Crude-Oil Co. v. Grable*, 36 C. C. A. 94, 94 Fed. 73; *Chicago & B. Stone Co. v. Nelson*, 32 Ind. App. 355, 69 N. E. 705; *Walsh v. St. Paul & D. R. Co.* 27 Minn. 367, 8 N. W. 145; *Olson v. McMullen*, 34 Minn. 94, 24 N. W. 318; *Fremont Brewing Co. v. Hansen*, 65

when the earth is undermined it will cave in and fall; and he therefore assumes the risk of injury from such cause. *Griffin v. Ohio & M. R. Co.* 124 Ind. 326, 24 N. E. 888.

A servant removing ensilage from a silo by taking out from the bottom of the mass assumes the risk of injury caused by the falling of a portion of the pile as it is undermined, since, said the court in *Welch v. Brainard*, 108 Mich. 38, 65 N. W. 667, it is evident that a portion would necessarily break and fall if its cohesiveness was overcome by the weight of the overhanging mass, in obedience to a law of nature that even children understand.

The liability of an embankment of sand and gravel to fall during the process of mining is one of the risks incident to the service of one employed as a common laborer to work in a pit to assist in the removal of the material. *Swanson v. Lafayette*, 134 Ind. 625, 33 N. E. 1033.

One who works in a gravel pit assumes the risk of a cave in. A servant entering an employment which is from its nature necessarily hazardous assumes all the usual risks and perils incident to the service. *Railsback v. Wayne County Turnp. Co.* 10 Ind. App. 622, 38 N. E. 221. In this case the court said that it was not controverted, but that the condition of the pit was open

alike to the observation of master and servant.

A common laborer engaged with others in loading flat cars with a steam shovel at a gravel pit assumes the risk of the danger of the bank caving in, constantly attending him when at work, since a person of ordinary intellect must know and understand the operation of the law of gravitation. *Reiter v. Winona & St. P. R. Co.* 72 Minn. 225, 75 N. W. 219. To the same effect are *Pederson v. Rushford*, 41 Minn. 289, 42 N. W. 1063, and *Griffin v. Ohio & M. R. Co.* 124 Ind. 326, 24 N. E. 888.

One engaged in shoveling dirt from a bank of earth assumes the risk of a portion of the bank falling upon him, where he assists in creating whatever danger there is in undermining the bank, and must know as clearly as anyone the results likely to ensue from the work. *Rasmussen v. Chicago, R. I. & P. R. Co.* 65 Iowa, 236, 21 N. W. 583.

A servant engaged in digging in a trench, who is injured by a cave in, cannot recover where the work is obviously dangerous. *Regan v. Palo*, 62 N. J. L. 30, 41 Atl. 364.

An employee on a construction train assumes the risk of derailment, the defects in the uncompleted tracks being clearly open to observation. *Evansville & R. R. Co. v.*

Neb. 456, 91 N. W. 279, 93 N. W. 211; Carlson v. Sioux Falls Water Co. 5 S. D. 402, 59 N. W. 217; Cothron v. Cudahy Packing Co. 98 Mo. App. 343, 73 S. W. 279; Lanyon Zinc Co. v. Bell, 64 Kan. 739, 68 Pac. 609; Dillenberger v. Weingartner, 64 N. J. L. 292, 45 Atl. 638; Choctaw, O. & G. R. Co. v. Jones, 77 Ark. 367, 4 L.R.A.(N.S.) 837, 92 S. W. 244, 7 A. & E. Ann. Cas. 430; Anderson v. Winston, 31 Fed. 528; Brown v. Miller (Tex. Civ. App.) 62 S. W. 547; Brown v. Oregon Lumber Co. and Brooks v. W. T. Joyce Co. supra; Degenhart v. Gent, 97 Ill. App. 145; Claybaugh v. Kansas City, Ft. S. & M. R. Co. 56 Mo. App. 630; Walker v. Scott, 67 Kan. 814, 64 Pac. 615; Regan v. Palo, 62 N. J. L. 30, 41 Atl. 364; Rocco v. F. A. Gillespie Co. 73 N. J. L. 591, 64 Atl. 117; McQueeney v. Chicago, M. & St. P. R. Co. 120 Iowa, 522, 94 N. W. 1124; Texas & P. R. Co. v. French, 86 Tex. 96, 23 S. W. 642; Ft. Worth Stock Yards Co. v. Whittenburg, 34 Tex. Civ. App. 163, 78 S. W. 363; Heald v. Wallace, supra; Gibson v. Midland Bridge Co. 112 Mo. App. 594, 87 S. W. 3; Griffin v. Ohio & M. R. Co. 124 Ind. 326, 24 N. E. 888; Vincennes Water Supply Co. v. White, 124 Ind. 376, 24 N. E. 747; Railsback v. Wayne County Turnp. Co. 10 Ind. App. 622, 38 N. E. 221; Peerless Stone Co. v. Wray, 143 Ind. 574, 42 N. E. 927; Salem-Bedford Stone Co. v. Hobbs, 144 Ind. 146, 42 N. E. 1022; Rasmussen v. Chicago, R. I. & P. R. Co. 65 Iowa, 236, 21 N. W. 583; Swanson v. Great Northern R. Co. 68 Minn. 184, 70 N. W. 978;

Reiter v. Winona & St. P. R. Co. 72 Minn. 225, 75 N. W. 219; Larsson v. McClure, 95 Wis. 533, 70 N. W. 662; Christenson v. Rio Grande Western R. Co. 27 Utah, 132, 101 Am. St. Rep. 945, 74 Pac. 876; Michaelson v. Sergeant Bluffs & S. C. Brick Co. 94 Iowa, 725, Appx. 62 N. W. 15; Naylor v. Chicago & N. W. R. Co. 53 Wis. 661, 11 N. W. 24; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257; Songstad v. Burlington, C. R. & N. R. Co. 5 Dak. 517, 41 N. W. 755; Livingstone v. Saginaw Plate Glass Co. 146 Mich. 236, 109 N. W. 431; Lenderink v. Rockford, 135 Mich. 531, 98 N. W. 4; Friel v. Kimberly-Montana Gold Min. Co. 34 Mont. 54, 85 Pac. 734; Lindsay v. Hollerbach & M. Contract Co. 29 Ky. L. Rep. 68, 4 L.R.A.(N.S.) 830, 92 S. W. 294; Mooney v. Lower Vein Coal Co. 55 Iowa, 671, 8 N. W. 652; Schlacker v. Ashland Iron Min. Co. 89 Mich. 253, 50 N. W. 839; Paule v. Florence Min. Co. 80 Wis. 350, 50 N. W. 189; Daniel v. Central R. Co. 119 Ga. 246, 46 S. E. 107; Cisney v. Pennsylvania Sewer Pipe Co. 199 Pa. 519, 49 Atl. 309; Frangiose v. Horton, 26 R. I. 291, 58 Atl. 949; Oleson v. Maple Grove Coal & Min. Co. 115 Iowa, 74, 87 N. W. 736; Allen v. Logan City, 10 Utah, 279, 37 Pac. 496; Thompson v. California Constr. Co. 148 Cal. 35, 82 Pac. 367; Hodgson v. Michigan C. R. Co. 146 Mich. 627, 109 N. W. 1125; Foley v. Grand Rapids Gaslight Co. 127 Mich. 671, 87 N. W. 53; Pederson v. Rushford, 41 Minn. 289, 42 N. W. 1063; Kletachka v. Minneapolis & St.

Henderson, 134 Ind. 636, 33 N. E. 1021, subsequent appeal, 142 Ind. 596, 42 N. E. 216.

A laborer digging a ditch through a soil composed mostly of sand and gravel assumes the risk of injury caused by the caving in of its sides, since the liability of a trench to cave in by reason of the peculiarity of the soil and the danger attending the work is alike open to the observation of all the parties. Vincennes Water Supply Co. v. White, 124 Ind. 376, 24 N. E. 747.

But a common laborer, while shoveling dirt dislodged from an embankment above him, does not assume the risk of a portion of the earth falling upon him which has become separated from the main bank by seams extending to a depth of 3 or 4 feet, which are not visible to him, since it is a danger not apparent to him, and not inherent to the employment. Gibson v. Midland Bridge Co. 112 Mo. App. 594, 87 S. W. 3.

A common laborer engaged in the work of removing earth from the surface of iron ore, the earth consisting of a sort of hardpan which has to be blasted before it can be removed in any quantity, does not, as a matter of law, assume the risk of the falling of a mass of earth which is loose in the bank above him, it not being apparent to a man of ordinary intelligence that this

mass of earth is liable to fall. Hill v. Winston, 73 Minn. 80, 75 N. W. 1030.

A green hand employed in leveling ground to lay a track for a steam shovel as it worked its way into a bank of gravel which was being excavated, where the danger was foreseen by the master and not by the servant, did not assume the risk of a cave in. Daly v. Kiel, 106 La. 170, 30 So. 254.

In Fitzgerald v. Connecticut River Paper Co. 155 Mass. 155, 31 Am. St. Rep. 537, 20 N. E. 464, the court declared that it could not be said, as a matter of law, that the servant assumed the risk of slipping on icy steps of a mill on going from work, although she knew that the steps were icy and that there was some danger of passing over them, their condition in regard to slipperiness constantly changing in different states of the weather, with spray falling daily from the steam pipe in the building and freezing upon them. The court is, however, here referring to the changing conditions only as they affect the question of obvious risk and as bearing upon the question of whether the servant knew just how slippery the steps were when she attempted to go down them, and is not referring to the changing conditions as to slipperiness as affecting the master's duty to furnish a safe working place.

H. C. S.

L. R. Co. 80 Minn. 238, 83 N. W. 133; *Brown v. Chattanooga Electric R. Co.* 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415; *Welch v. Carlucci Stone Co.* 215 Pa. 34, 64 Atl. 392, 7 A. & E. Ann. Cas. 299; *Aldridge v. Midland Blast Furnace Co.* 78 Mo. 559; *McCarthy v. Whitney Iron Works Co.* 48 La. Ann. 978, 20 So. 171; *Nourie v. Theobald*, 68 N. H. 564, 41 Atl. 182; *Stone v. Bedford Quarries Co.* 156 Ind. 432, 60 N. E. 35; *Regan v. Lombard*, 192 Mass. 319, 78 N. E. 476; *Carlson v. Sioux Falls Water Co.* 5 S. D. 402, 59 N. W. 217, and on rehearing 8 S. D. 47, 65 N. W. 419; *Missouri, K. & T. R. Co. v. Spellman* (Tex. Civ. App.) 34 S. W. 298; *Meixner v. Philadelphia Brewing Co.* 210 Pa. 597, 60 Atl. 259; *Allard v. Hildreth*, 173 Mass. 26, 52 N. E. 1061; *McCormick Harvesting Mach. Co. v. Zakzewski*, 220 Ill. 522, 4 L.R.A.(N.S.) 848, 77 N. E. 147; *Olson v. McMurray Cedar Lumber Co.* 9 Wash. 500, 37 Pac. 679; *Hoge v. Wilson*, 5 Wash. 160, 31 Pac. 469; *Week v. Fremont Mill Co.* 3 Wash. 629, 29 Pac. 215; *Lewis v. Simpson*, 3 Wash. 642, 29 Pac. 207; *Anderson v. Columbia Improv. Co.* 41 Wash. 83, 2 L.R.A.(N.S.) 840, 82 Pac. 1037; *Trudeau v. American Mill Co.* 41 Wash. 465, 83 Pac. 725; *Krickeberg v. St. Paul & T. Lumber Co.* 37 Wash. 63, 79 Pac. 492; *Jennings v. Tacoma R. & Motor Co.* 7 Wash. 275, 34 Pac. 937; *French v. First Ave. R. Co.* 24 Wash. 83, 63 Pac. 1108; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 42; *Brown v. Tabor Mill Co.* 22 Wash. 317, 60 Pac. 1126; *Imhoof v. Northwestern Lumber Co.* 43 Wash. 387, 86 Pac. 650; *Williams v. Ballard Lumber Co.* 41 Wash. 338, 83 Pac. 323; *Creamer v. Moran Bros. Co.* 41 Wash. 636, 84 Pac. 592; *Tham v. J. T. Steeb Shipping Co.* 39 Wash. 271, 81 Pac. 711; *Smith v. Hecla Min. Co.* supra.

The direction of Jones to plaintiff, in view of the obviousness and openness of whatever of danger there was involved in this method of work, would not render the doctrine of assumption of risk inapplicable to plaintiff.

Lee v. Northern P. R. Co. 39 Wash. 388, 81 Pac. 834; *Florence & C. C. R. Co. v. Whippa*, 70 C. C. A. 443, 138 Fed. 13; *Chicago G. W. R. Co. v. Crotty*, 4 L.R.A.(N.S.) 832, 73 C. C. A. 147, 141 Fed. 913; *Lindsay v. Hollerbach & M. Contract Co.* supra; *Kane v. St. Louis, K. C. & C. R. Co.* (Mo. App.) 87 S. W. 571; *Southern Kansas R. Co. v. Moore*, 49 Kan. 616, 31 Pac. 138; *Lamson v. American Axe & Tool Co.* 177 Mass. 144, 83 Am. St. Rep. 267, 58 N. E. 585.

Messrs. Garrecht & Dunphy for respondent.

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Fullerton, J., delivered the opinion of the court:

In January, 1907, the city of Walla Walla was engaged in putting in a pipe line for the purpose of conveying water from the source of supply down to the city. A large ditch had been dug in which to lay the pipe, which, at the place of the accident herein-after mentioned, was some 7 feet in depth. At that place, also, it was desired to put a fork in the pipe line, and to that end the ditch had been forked, leaving a tongue of earth between the forks, which ranged in width from a few inches at the point of junction to 4 or 5 feet at a point some 60 feet therefrom. In laying the pipe it was found necessary to remove this tongue of earth, and workmen under the direction of a foreman were placed at that duty. The method adopted was to cut it off into sections, undermine the section on one side, push it over, and throw the crumbled earth from the ditch. One such section, some 10 feet in length, had been thrown down, and the workmen were engaged on the second section when it fell, crushing and killing William H. Hilgar, the husband of the respondent, and the person for whose death she sues in this action.

The evidence concerning the surroundings and the conditions immediately preceding and at the time of the accident is conflicting. That most favorable to the respondent's contention, and which the jury must have believed in order to reach their verdict, tended to show that Hilgar was not a part of the crew who were originally put to work removing the earth, but that he was connected with the work of laying the pipe, and came to the ditch at the foreman's call after the first section had been thrown down, and after an unsuccessful effort had been made to throw down the second; that he was instructed to take a pick and undermine at a particular place; and that while he was doing so the earth fell on him and crushed him. The evidence also tended to show that the section they were attempting to throw down was too long to be handled with safety, unless braced or otherwise made secure while the process of undermining was being carried on, and that everything was done under the direct supervision of the appellant's foreman, who stood on the tongue just beyond the end of the section to be thrown down and directed the workmen when and where to dig, and when to make an effort to push the section over. The jury returned a verdict in favor of the respondent, and from the judgment entered thereon this appeal is taken. On the appeal no question of law is presented, save that

the evidence is insufficient to justify the verdict.

While counsel have filed able and exhaustive briefs, we do not feel that the case requires more than a brief discussion upon our part. We think that the questions whether the death of Hilgar was caused by the negligence of the city, and whether he was guilty of contributory negligence, in case negligence on the part of the city to be found to exist, were questions to be determined by the jury. A master who puts his servant to work in a ditch or other excavation stands under an obligation, when he takes upon himself the direction and control of the work, to see that the place is reasonably safe when the servant enters it, and is kept reasonably safe as long as the servant is required to stay therein. It seems to us that it is a fair inference from the evidence that this was not done in the present instance. It is a fair inference that the place was rendered unsafe because too long a section was attempted to be thrown down at one time and no precautions were taken to prevent accident in case of a mistake of judgment. These were questions, at least, on which the minds of men might reasonably differ; and, being so, it is the province of the jury, and not the court, to draw the inference.

So, likewise, on the question of the injured person's contributory negligence. Since the master called him from other work to assist in this particular work, and assumed to direct and control his manner of doing the work, he was under no primary duty to inquire into the safety of the place where he was told to stand while working. He had the right to assume that the master had already inquired into the conditions, and would either direct him into a reasonably safe place, or warn him of the dangers of the place into which he was directed, so that he could either refuse to work there or take his own precautions for safety. The servant has the right to rely on the assurance of the master, implied from the fact that he is directed to work in the particular place, that the place selected for him to work is reasonably safe. It is only when the danger is so plain and obvious that no two opinions can be had concerning it, that the servant assumes the risk of the conditions over the positive assurance of the master that it is a safe place. Whether the dangers of this place were thus plain and obvious was manifestly a question for the jury.

These are the only questions presented by the record, and we think the court did not
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err in submitting them to the determination of the jury.

The judgment is affirmed.

Rudkin, Crow, and Dunbar, JJ., concur.

FLORIDA SUPREME COURT.

LILLY NEAL, Plff. in Err.,

v.

STATE OF FLORIDA.

(55 Fla. 140, 46 So. 845.)

Embezzlement — master's property — servant — conversion.

Evidence that a laundress, upon discovering in a clothes basket committed to her a bag of money belonging to her employer, accidentally placed therein, recognized her duty to return the bag to its owner, but subsequently, and before so returning it, fraudulently converted the money, will support a conviction of embezzlement under Gen. Stat. 1906, § 3311, condemning the act by a servant as to anything of value which has come into his possession, care, custody, or control by reason of his employment.

(Taylor and Parkhill, JJ., dissent.)

(June 8, 1908.)

Headnote by COCKRELL, J.

Case Note. — Does wrongful appropriation of money received through mistake constitute embezzlement?

This question naturally depends upon the language of the particular statute under which the prosecution is had. No case other than NEAL v. STATE is found, however, wherein a statute defining and providing for embezzlement is construed to cover the wrongful appropriation of money or property received by mistake.

One of the leading cases on this subject is Com. v. Hays, 14 Gray, 62, 74 Am. Dec. 662. The statute under which prosecution was had in that case provided that, "if any person to whom any money, goods, or other property which may be the subject of larceny shall have been delivered, shall embezzle or fraudulently convert to his own use, or shall secrete with intention to embezzle or fraudulently convert to his own use, such money, goods, or property, or any part thereof, he shall be deemed, by so doing, to have committed the crime of simple larceny." In holding that one who received money, more than was due, paid to him by mistake, was not guilty of embezzlement under this statute, the court construed the statute as intended to embrace cases where property had been designedly delivered to a person as a bailee or keeper, and had been fraudulently conveyed by him.

ERROR to the Circuit Court for Marion County to review a judgment convicting defendant of embezzlement. Affirmed. The facts are stated in the opinion.

Mr. R. B. Bullock for plaintiff in error.

Cockrell, J., delivered the opinion of the court:

Upon application of the plaintiff in error, it being made satisfactorily to appear that the omission of the motion for new trial from the bill of exceptions was due wholly to an accidental and mechanical misplacing of the pages of the transcript, a correction has been allowed and a rehearing granted.

There was evidence from which the jury was permitted to find the following facts: Mrs. Henderson, the wife of the prosecuting witness, by accident put into the basket containing soiled clothes a cloth bag containing over \$2,000 in paper money, which was delivered to her laundress, Lilly Neal. Upon opening the bundle at her home, Lilly discovered the money, and at once exclaimed to one who was present, "Look here, Frank, what Mrs. Henderson put in the clothes; I will take it back to her now,"—but was afterwards persuaded or coerced by Frank not to do so. She subsequently denied having received the money. The single question presented is whether statutory embezzlement has been made out; the contention being that the acts constitute larceny rather than embezzlement.

In *Finlayson v. State*, 46 Fla. 81, 35 So. 203, we held that one who obtains possession by trick, device, or fraud with intent at the time to appropriate the property to his own use, the owner intending to part with the possession only, may be guilty of larceny; but in *Wilson v. State*, 47 Fla. 118, 36 So. 580, we refused to interfere with

a conviction of embezzlement, there being sufficient in the evidence upon which to base a finding that the original taking was innocent, and that the felonious intent was formed after the possession was innocently acquired.

In the case now before us no trespass of any kind was committed by Lilly when she discovered her accidental custody of the money; and her intent at once to restore that custody to the rightful owner was manifested and declared. So far the case lies clearly on the side of embezzlement rather than of larceny (see *R. v. Ashwell*, L. R. 16 Q. B. Div. 190); but does it yet measure up fully to the crime of which conviction was had?

In *Tipton v. State*, 53 Fla. 69, 43 So. 684, we said that one who is not lawfully the agent or servant of another, and does not pretend or hold himself out to be such, and holds no relation of trust or confidence towards his alleged principal or master, is not within the statute. Tipton was indicted on two counts, in the one for embezzling from R. A. Lamb, and in the other from the express company, and was convicted of the latter. The evidence showed plainly that Lamb's property was taken and that Lamb alone employed Tipton; the express company being concerned neither with the property converted nor with the employment of Tipton.

Lilly Neal acquired the custody of the cloth bag containing the roll of money only by virtue of her employment. We may admit that possession in its narrow, technical sense was never rightfully hers; but that admission does not help. Our statute is much broader than that of other states, and includes whatever may have come into an employee's possession, care, custody, or con-

In this class of cases it is said that there exists "the element of a trust or confidence reposed in a person by reason of the delivery of property to him, which he voluntarily takes for safe-keeping, and which trust or confidence he has violated by the wrongful conversion of the property. Beyond this the statute was not intended to go. Where money paid, or property delivered, through mistake, has been misappropriated or converted by the party receiving it, there is no breach of a trust or violation of a confidence intentionally reposed by one party and voluntarily assumed by the other. The moral turpitude is therefore not so great as in those cases usually comprehended within the offense of embezzlement; and we cannot think that the legislature intended to place them on the same footing."

This case was cited with approval in *State v. Heath*, 8 Mo. App. 99. The facts of that case, however, do not bring it within the scope of this note.
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In *Fulcher v. State*, 32 Tex. Crim. Rep. 621, 25 S. W. 625, the same construction was also placed upon a statute providing that "any person having possession of personal property of another, by virtue of a contract of hiring, or borrowing, or other bailment, who shall, without consent of the owner, fraudulently convert such property to his own use, with the intent to deprive the owner of the value of the same, shall be guilty of theft." It was accordingly held that one who mistakenly was overpaid a check could not be convicted of a fraudulent conversion under this statute; and it was said that money paid by mistake cannot be held to be a bailment, as there was no intent on the part of the payor to deliver the money for any purpose.

The general question of want of authority of defendant to receive money or property in the first instance, as affecting crime of embezzlement, is discussed in a note to *Smith v. State*, 17 L.R.A. (N.S.) 531.

trol by reason of his employment. The statute is not in terms restrictive to a conscious act on the part of the owner or employer, and there is here present the conscious act on the part of the employee voluntarily accepting for a time the custodianship of the money, recognizing her obligation to return it to its rightful owner, for whom she was then holding it, a self-imposed, but accepted, bailment, so to speak, imposed only by reason of the fact that the holder was intrusted with employment by the owner, and thereby had secured possession of the larger receptacle that contained the soiled clothes, as also the bag of money.

A search of the authorities has given us little or no assistance, because of the more limited definition of "embezzlement" usually obtaining. A close consideration of our own statute, however, leads us to the conclusion that the peculiar facts of this case come within its condemnation and that the verdict is not against the evidence.

The judgment is affirmed.

Shackleford, Ch. J., and Whitfield, J., concur.

Hocker, J., concurs in the opinion.

Taylor, J., dissenting:

After mature reflection, I am unable to agree to the conclusion reached in the opinion prepared in this case by Mr. Justice Cockrell that, under our statute, a case of embezzlement is made by the facts in proof. Those facts, in brief, are that the owner of quite a large sum of money exceeding \$1,000 unintentionally and carelessly placed the receptacle that contained it in a basket of soiled clothing. This clothing, but not the money, was intentionally sent to the defendant to be laundered; the owner not dreaming that he was at the same time sending her his money. She discovered the mine of wealth of which she had so accidentally come in possession, and, listening to the voice of a tempter, appropriated it to her own use. There was no intentional intrusting of the money by its owner to the defendant by reason of any confidence reposed in her in her capacity as his laundress, or in any other capacity, and in the course of her employment in such capacity there was nothing that called for, necessitated, or made it at all usual, proper, or customary for him to intrust her with a cent of his money, and neither did the defendant accept, obtain the custody, or control, or acquire the possession of, the money in any capacity of trust or confidence intentionally reposed in her. She did not, therefore, occupy at any time towards such money the attitude of a trustee that is 19 L.R.A. (N.S.)

necessary in embezzlement as distinguished from larceny. Suppose, *arguendo*, the owner of this money, after placing it in the soiled clothes basket purely through accident and without intending to do so, and really without knowing that he had done so, had then sent what he supposed and intended to be soiled clothes only by his hired man of all work to be delivered to the defendant, his laundress, and such hired man on the way had discovered the money and appropriated it to his own use, would it have been larceny or embezzlement? I think it would be larceny pure and simple. And, if so in his case, then it is equally so in the case of the laundress, because in both cases there is, with reference to such appropriated money, a total lack of that feature of trust reposed and trust accepted and violated that is necessary in embezzlement. I cannot conceive of such a state of things as a trust accidentally and unintentionally reposed by one person in another. Trust and distrust are both active sentiments, and cannot be exercised passively, accidentally, or unintentionally. I think the facts in proof make a case only of larceny here, and not embezzlement. Com. v. Hays, 14 Gray, 62, 74 Am. Dec. 662.

Parkhill, J., dissenting:

I think all the authorities without exception hold that the gist of the offense of embezzlement is a breach of trust, and the provisions of the statute do not apply to appropriation of property by a person, unless he held a relation of confidence or trust towards the owner, and had possession of the property by virtue of such relation, and converted it in violation of the trust reposed in him. Tipton v. State, 53 Fla. 69, 43 So. 684.

In writing of the confidence of the defrauded person in the one embezzling, Mr. Bishop says: "The leading doctrine under this subtitle is that the statutes are for the protection of employers against the frauds of those in whom they have confided; and, where no confidence is reposed, and none is violated, the offense is not committed." 2 Bishop, Crim. Law, 7th ed. § 352. Mr. Clark says: "The gist of the offense is a breach of trust; and it is held that the statutes do not apply to appropriation of property by any person unless he held a relation of confidence or trust towards the owner, and had possession of the property by virtue of such relation, and converted it in violation of the trust reposed in him." [Crim. Law, p. 274.]

In 10 Am. & Eng. Enc. Law, 2d ed. p. 990, it is said: "By some statutes it is required that the property shall have come into the possession of the servant by vir-

tue of his employment," or "in the course of his employment." Under such a statute as this, a person who receives money belonging to another and fraudulently converts the same to his own use is not guilty of embezzlement unless he received the same by virtue of or in the course of his employment, as the statute expressly requires this.

I am of the opinion that the breach of trust or violation of confidence here contemplated must have been intentionally reposed by one party and voluntarily assumed by the other. See *Com. v. Hays*, 14 Gray, 62, 74 Am. Dec. 662. In the *Hays* Case the court held that, where property delivered through mistake has been misappropriated or converted by the party receiving it, there is no breach of a trust or violation of a confidence intentionally reposed by one party and voluntarily assumed by the other.

Our statute provides that, if any servant embezzles or fraudulently disposes of or converts to his own use, or takes or secretes with intent so to do, anything of value which has been intrusted to him, he shall be punished as if he had been convicted of larceny. I do not think anyone could intrust anything to another through mistake. To intrust is to commit with confidence, give in trust, confide, to place in charge, to commit something to as a trust.

The other clause of our statutes, "or has come into his possession, care, custody, or control by reason of his employment," is equivalent to the preceding clause, "which has been intrusted to him." The words "by reason of his employment" must have reference to the property which came into his possession, care, custody, or control, and which was embezzled.

The soiled clothes were in the possession, care, custody, or control of the defendant by reason of her employment as laundress. Her employment had reference to the washing of the soiled clothes. A misappropriation of the clothes would be embezzlement clearly. The defendant's employment had no reference to the money put into the basket by accident. The conversion of the money by the defendant was larceny.

In *Hughes*, *Crim. Law & Proc.* § 493, the author says: "In order to constitute the crime of embezzlement, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes." In § 496 the same author says: "Before embezzlement can be maintained, it must appear that the property was delivered to the accused in some fiduciary capacity,—a relation of trust and con-

fidence." The very property converted, then, must have been delivered to the accused in a fiduciary capacity to make him guilty of embezzlement. The property converted, the bag of money, was not delivered to the accused in a fiduciary capacity. It was not delivered to the accused at all. The soiled clothes were delivered to the accused, and the money was taken with the clothes by mistake. The owner of the money did not intend that the defendant should take the money, only the clothes.

IOWA SUPREME COURT.

JAMES FOREMAN, Appt.,
v.

WESTERN UNION TELEGRAPH COMPANY.

(— Iowa, —, 116 N. W. 724.)

Damages—mental suffering—telegram—relative by affinity.

1. No presumption of mental suffering will arise in case of failure to deliver a telegram announcing the death of a relative by affinity only, such as a son's wife; and therefore to recover damage for such

Case Note.—Necessity and degree of relationship essential to recover for mental anguish for failure to deliver telegram announcing death or illness.

The earlier cases upon this subject are collected and discussed in a case note to *Randall v. Western U. Tel. Co.* 15 L.R.A. (N.S.) 277. In addition to the cases there cited, a few cases decided subsequently to the preparation of that note may be given.

Where damages are sought for the failure to transmit or deliver a telegram announcing the sickness or death of a relative, it was held, in *Lee v. Western U. Tel. Co.* (Ky.) 113 S. W. 55, that no recovery can be had unless the relationship existing between the parties is that of parent and child, husband and wife, sister and brother, or grandparent and grandchild.

And in *Johnson v. Western U. Tel. Co.* 81 S. C. 235, 17 L.R.A. (N.S.) 1002, 62 S. E. 244, it was held that mental anguish will not be presumed to exist for deprivation of opportunity to attend the funeral of a first cousin.

In *Western U. Tel. Co. v. McMorris* (Ala.) 48 So. 349, it was held that the relationship of brothers fell within that limited degree of relationship from which it might be said that mental anguish arose naturally and proximately from a breach of contract to transmit and deliver telegraphic messages. But an uncle or brother by marriage is not within such relationship. *Western U. Tel. Co. v. Long*, 148 Ala. 202, 41 So. 965.

suffering in such cases facts must be pleaded and proved showing special friendship or affection, although it is not necessary to show that the telegraph company had notice of such facts.

Telegraph company—notice of relationship.

2. The relationship of the parties need not appear on the face of the telegram announcing a death, to render the company liable for damages for mental suffering in case it fails to deliver it, if it had knowledge of such relationship.

Same—notice of suffering.

3. A telegraph company cannot escape liability for damages for mental suffering of a man because, through its failure to deliver a telegram to his father announcing the death of his wife, he is deprived of the presence of the father at the funeral, on the ground that it was not informed that its failure would cause such suffering.

(June 10, 1908.)

APPEAL by plaintiff from a judgment of the District Court for Buchanan County in his favor for a less sum than demanded in an action brought to recover damages for failure promptly to deliver a telegram. Reversed.

The facts are stated in the opinion.

Messrs. Cook & Cook for appellant.

Messrs. George H. Fearons, Parker, Hewitt, & Wright, and E. E. Hasner, for appellee:

The addressee of the undelivered message, having been related to the deceased by affinity only, cannot recover damages for alleged mental anguish caused him by the nondelivery of the message, because he failed to show notice to the defendant company, contemporaneous with the filing of the message, of the existence of special relations of cordiality and affection, from which special relations alone the alleged mental anguish could arise.

Western U. Teleg. Co. v. Ayers, 131 Ala. 391, 90 Am. St. Rep. 92, 31 So. 78; Western U. Teleg. Co. v. Long, 148 Ala. 202, 41 So. 965; Western U. Teleg. Co. v. Steenbergen, 107 Ky. 469, 54 S. W. 829; Davidson v. Western U. Teleg. Co. 21 Ky. L. Rep. 1292, 54 S. W. 830; Butler v. Western U. Teleg. Co. 77 S. C. 148, 57 S. E. 757; McDowell v. Western U. Teleg. Co. 79 S. C. 257, 60 S. E. 662; Little v. Western U. Teleg. Co. 79 S. C. 255, 60 S. E. 663; Capers v. Western U. Teleg. Co. 71 S. C. 29, 50 S. E. 537; Western U. Teleg. Co. v. Prevatt, 149 Ala. 617, 43 So. 106; Denham v. Western U. Teleg. Co. 27 Ky. L. Rep. 999, 87 S. W. 788; Street, Foundation of Legal Liability, pp. 435-451; Amos v. Western U. Teleg. Co. 79 S. C. 259, 60 S. E. 660; Western U. Teleg. Co. v. Coffin, 88 Tex. 94, 30 S. W. 806; Western U. 19 L.R.A. (N.S.)

Teleg. Co. v. McMillan (Tex. Civ. App.) 30 S. W. 298; Western U. Teleg. Co. v. Garrett (Tex. Civ. App.) 34 S. W. 649; Western U. Teleg. Co. v. Gibson (Tex. Civ. App.) 39 S. W. 198; Western U. Teleg. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482; Western U. Teleg. Co. v. Luck, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469; Western U. Teleg. Co. v. Weniski, 84 Ark. 457, 106 S. W. 486; Western U. Teleg. Co. v. Birchfield, 14 Tex. Civ. App. 664, 38 S. W. 635.

Deemer, J., delivered the opinion of the court:

The petition is in two counts. In the first plaintiff asks damages for pain and anguish resulting from the failure of defendant to deliver a telegram sent by plaintiff's son from Wausa, Nebraska, announcing the death of the son's wife; and, in the second, for pain and anguish suffered by the son resulting from the nondelivery of the message to plaintiff, the said claim having been assigned to plaintiff. It was alleged in each count that defendant, when it received the message, was informed that it related to the death of the son's wife. The message read as follows:

To James Foreman,

Independence, Iowa.

Sena died at 2:30 this P. M.

W. J. Foreman.

September 22nd, 1906.

—and the charge upon the same was \$1, which was paid by the son, W. J. Foreman. At the conclusion of plaintiff's testimony, the trial court directed a verdict for plaintiff in the sum of \$1, the amount paid for sending the message. The motion was sustained on the theory that the failure to deliver the message was not the proximate cause of the pain and suffering; that the relationship of the parties being by affinity only was, not such that pain and suffering would be presumed; that it did not appear from the message that it was desired that plaintiff should attend the funeral, and that the defendant had no notice that any such attendance was desired, or that any special relations existed between plaintiff and his daughter-in-law as that pain and suffering would follow from the nondelivery of the message. Neither count of the petition contains an allegation of any special relations of friendship or affection between plaintiff and his daughter-in-law; nor does it charge the defendant with notice or knowledge thereof.

It is contended for appellee that, as there was no blood relationship between the plaintiff and his daughter-in-law, no presumption of pain and suffering obtains, and that it

was incumbent on plaintiff to show by allegation and proof that such relations in fact existed between them as that pain and suffering in fact arose out of the nondelivery of the message, and that defendant had knowledge thereof. As to the second count of the petition, it is contended that, as the son did not notify the telegraph company when he filed the message that he would suffer if his father were prevented from attending the funeral, no damages are recoverable beyond the nominal sum paid for the message. It is further argued that the testimony shows that the son's suffering, if any, was due to the failure not only of the father to attend the funeral of his wife, but also to his sisters' absence from the funeral; and that the son did not distinguish the suffering sustained by reason of the failure of the father to attend from that of his anguish over the nonappearance of his sisters. The negligence of the defendant in failing to make delivery of the telegram is practically conceded, and our discussion will be confined to the propositions above stated.

That there may be recovery of substantial damages due to pain and suffering from the nondelivery of a death message is the rule of this court. See *Mentzer v. Western U. Tele. Co.* 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 204, 62 N. W. 1; *Cowan v. Western U. Tele. Co.* 122 Iowa, 379, 64 L.R.A. 545, 101 Am. St. Rep. 268, 98 N. W. 281; *Hurlburt v. Western U. Tele. Co.* 123 Iowa, 295, 98 N. W. 794. In each of these save the *Cowan* Case there was a blood relationship between the parties. In *Cowan's* Case the sender of the message was the wife of the deceased, and the message was to be delivered to her relatives. These cases also establish the rule that, when there is a close blood relationship, friendly, affectionate, and cordial relationships will be presumed, and that there need be no affirmative proof that they existed. The question we now have before us is: Will such relations be presumed in cases where the parties are not related by blood, but by affinity only? Upon this proposition there is a sharp and decided conflict in the authorities. The action being for tort, our rule is "that the party at fault must respond for all the injurious results which flow therefrom by ordinary and natural sequence without the interposition of any other negligent act or overpowering force." That one will suffer from failure to deliver a message relating to the death of a near relative is to be presumed, and damages therefrom follow as an ordinary and natural sequence; but, where the relationship is by affinity, and no facts are either pleaded or proved showing any special friendship or affection, no presumption of pain and suffering should arise for 19 L.R.A. (N.S.)

it is common knowledge that from such relationship alone no presumption arises which will justify an inference that for failure to deliver a message pain and suffering will result. Some cases, and perhaps a majority of them, go to the extent of holding that, even if such special relations of affection and friendship exist, there is no liability on the part of the telegraph company unless it has knowledge or notice thereof. But this rule does not appear to us to be sound. The question we regard as one of presumption of pain and suffering, rather than of notice to the company. If the special relations existed, damage followed as a necessary sequence, and it is not necessary to show that the defendant had knowledge of these special relations. The message related to the death of the son's wife, and of this defendant had knowledge. The relationship of the parties need not appear upon the face of the message, nor is it essential that defendant should know of the special relations existing between the parties interested. That some damage would likely be expected to follow from failure to deliver, defendant well knew; and it is not essential that it be advised of the exact damage to be anticipated. *Lyne v. Western U. Tele. Co.* 123 N. C. 129, 31 S. E. 350; *Cashion v. Western U. Tele. Co.* 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746; *Kennon v. Western U. Tele. Co.* 126 N. C. 232, 35 S. E. 468; *Bennett v. Western U. Tele. Co.* 128 N. C. 103, 38 S. E. 294; *Hunter v. Western U. Tele. Co.* 135 N. C. 458, 47 S. E. 745; *Western U. Tele. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western U. Tele. Co. v. Crocker*, 135 Ala. 492, 59 L.R.A. 398, 33 So. 45. The rule above announced seems to be sound in principle, although it is not in accord with that adopted in Alabama, South Carolina, and Texas. See *Western U. Tele. Co. v. Ayers*, 131 Ala. 391, 90 Am. St. Rep. 92, 31 So. 78; *Butler v. Western U. Tele. Co.* 77 S. C. 148, 57 S. E. 757; *Western U. Tele. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482. Of the South Carolina cases it may be said that they are based upon a statute allowing recovery by blood relatives. See *Amos v. Western U. Tele. Co.* 79 S. C. 259, 60 S. E. 660. And in Alabama the rule is somewhat in doubt in view of the decision in *Western U. Tele. Co. v. Crocker*, supra. By reason of plaintiff's failure to allege special, affectionate, friendly, and cordial relations between him and his son's wife, the trial court was right in directing a verdict on the first count of the petition.

2. The second count of the petition is for mental anguish suffered by the son because of his father's failure to attend the funeral of the wife. The defendant was notified, when the message was filed, that it related

to the wife of W. J. Foreman. It is contended that defendant is not liable on this count, for the reason that it was not notified that the son would suffer if his father should be prevented from attending the funeral. There is no merit in this contention, although it seems to have some support in the *casca*. See *Western U. Teleg. Co. v. Luck*, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469; *Western U. Teleg. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486. Our own case of *Cowan v. Western U. Teleg. Co.* supra, seems to settle this proposition in favor of appellant. Moreover, the cases relied upon by appellee are not strictly in point. In view of the holding in *Cowan's Case*, there is no need for further discussion of this matter. See also, as sustaining the same rule, *Western U. Teleg. Co. v. Crocker*, supra; *Western U. Teleg. Co. v. Griffin*, 27 Tex. Civ. App. 306, 65 S. W. 661. The trial court was in error in directing the verdict on this count.

3. One ruling on the admission of testimony is complained of. If there be error here, it was afterward cured, for the same matter was proved by another witness.

For the errors pointed out, the judgment must be, and it is, reversed.

Petition for rehearing denied.

ILLINOIS SUPREME COURT.

HENRY E. SAYLOR et al., Appts.,
v.

GEORGE C. DUEL et al.

(236 Ill. 429, 86 N. E. 119.)

Election — contest — appeal.

1. A provision in a local-option law that the county court shall have final jurisdiction to hear and determine the matter of contested elections under the statute makes inapplicable a general statute providing for appeals in contested-election cases, and prevents an appeal in such cases.

Same — denial of appeal — constitutionality.

2. A statute denying an appeal in proceedings to contest a local-option election does not unconstitutionally deprive contestants of the privileges and immunities of citizens, nor of property without due process of law, nor of the equal protection of the laws.

Same — special legislation.

3. A statute denying an appeal in a proceeding to contest a local-option election when an appeal is allowed in a proceeding to contest other elections is not unconstitutional special legislation.

Same — final determination.

4. An order sustaining a demurrer to 19 L.R.A. (N.S.)

a petition to contest a local-option election is a determination of the merits, from which no appeal can be taken, under a statute providing that the trial court shall have final jurisdiction to hear and determine the merits of such cases.

(October 26, 1908.)

APPEAL by contestants from a judgment of the Du Page County Court sustaining a demurrer to a petition to contest a local-option election. Dismissed.

The facts are stated in the opinion.

Messrs. Haight & Reuss and Botsford, Wayne, & Botsford, for appellants:

Where a statutory mode of procedure is provided in election contests, such mode must be followed.

Cavanaugh v. McConochie, 134 Ill. 516, 25 N. E. 674; *McCrary*, Elections, 4th ed. § 436; *Sellers v. Thomas*, 185 Ill. 384, 57 N. E. 10; *Schaumtoeffel v. Belm*, 77 Ill. 567; *French v. Willer*, 126 Ill. 611, 2 L.R.A. 717, 9 Am. St. Rep. 651, 18 N. E. 811; *Watts v. Dull*, 184 Ill. 86, 75 Am. St. Rep.

Case Note. — Constitutionality of statute denying right of appeal from decision of courts in certain classes of cases.

This note is confined to statutes denying the right to appeal from the decision of courts of law in a designated class of cases, and excludes cases involving the constitutionality of statutes which fail to provide for an appeal from the decision of local or state boards or commissioners, which act without the intervention of a court of law.

The power to take away a right of appeal so as to affect a pending action or proceeding is not within the scope of this note.

Legislative right in general as to finality of judgments.

Where the right to appeal from a judgment of an inferior court to one of superior jurisdiction is not secured by the Constitution, the legislature may, in its discretion, make the decision of the inferior court final. *People v. Fowler*, 9 Cal. 85; *Edwards v. Vandemack*, 13 Ill. 633; *Paducah v. Ragdale*, 28 Ky. L. Rep. 1057, 92 S. W. 13; *Sullivan v. Haug*, 82 Mich. 548, 10 L.R.A. 263, 46 N. W. 795; *Minneapolis v. Wilkin*, 30 Minn. 140, 14 N. W. 581; *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116; *Kohl v. Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304.

In Nebraska the right to a review in the court of last resort is secured by the Constitution and Bill of Rights. *State ex rel. Lincoln v. Babcock*, 19 Neb. 239, 27 N. W. 98; *Hurlburt v. Palmer*, 39 Neb. 158, 57 N. W. 1019; *School Dist. No. 6 v. Traver*, 43 Neb. 524, 61 N. W. 720.

It was said in *People v. Richmond*, 16 Colo. 274, 28 Pac. 929, that "the citizen has no natural or inalienable right to a hearing

141, 56 N. E. 303; *Donlin v. Hettinger*, 57 Ill. 348; *Swigart v. Chicago*, 223 Ill. 371, 79 N. E. 48.

Where the effect of a new act is to amend the general statutes of the state upon the subject, by adding to those statutes new provisions, so as to create out of the general statutes and the new act a new law upon the subject, the new act is clearly amendatory of the old statutes, and as such is unconstitutional without complying with § 13, art. 4, of the Constitution.

Badenoch v. Chicago, 222 Ill. 71, 78 N. E. 31; *People ex rel. Stuckart v. Knopf*, 183 Ill. 410, 56 N. E. 155.

Repeals by implication are not favored.

People ex rel. Akin v. Butler Street Foundry & Iron Co. 201 Ill. 236, 66 N. E. 349; 1 Kent, Com. p. 508.

A contest of an election held under this act, as against a contest of an election for

other purposes, would make the act class legislation.

Manowsky v. Stephan, 233 Ill. 409, 84 N. E. 365; *Strong v. Dignan*, 207 Ill. 391, 99 Am. St. Rep. 225, 69 N. E. 909; *Badenoch v. Chicago*, supra; *Jones v. Chicago*, R. I. & P. R. Co. 231 Ill. 308, 121 Am. St. Rep. 313, 83 N. E. 215; *Hecker v. Illinois C. R. Co.* 231 Ill. 578, 83 N. E. 456.

Messrs. *David F. Matchett* and *John S. Goodwin*, for appellees:

The county court had final jurisdiction of the proceeding under the statute, and the appeal is now improperly before this court. *Dramshop act*, § 19.

Vickers, J., delivered the opinion of the court:

At the election held in the city of Naperville, Du Page county, in April, 1908, the question was submitted to the voters of said

in the supreme court. If the right to such a hearing exists, it must be deduced from some constitutional guaranty. . . . The

declarations in § 6 of the Bill of Rights, 'that courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and that right and justice shall be administered without sale, denial, or delay',—simply bestow upon each individual the right to an intelligent, impartial, and speedy judicial hearing and determination of his grievances. They were not intended to confer the privilege of having each controversy tried by every court of the state.

. . . . The litigant cannot, as a matter of right, assert that he will come to this tribunal by appeal, for such appeals remain creatures of statute, and, in the absence thereof, do not exist. He cannot claim a vested right to bring his case to this court by writ of error; for, while this writ is in most cases a writ of right at the common law, it may by statute, unless the Constitution forbids, be limited or abolished altogether." Similar language was used by the court in *United States ex rel. Brightwood R. Co. v. O'Neal*, 10 App. D. C. 244.

And it was held in *McCue v. Com.* 103 Va. 870, 49 S. E. 623, that a writ of error or appeal is not the right of one convicted of crime, and is no part of due process of law, as there is no absolute right thereto in civil or criminal cases.

So, a statute providing that writs of error "in all criminal cases not punishable with death shall be considered as writs of right, and issue of course; and in criminal cases punishable with death writs of error shall be considered as writs of grace, and shall not issue but by the order of the chancellor,"—is not a denial of due process of law in a case punishable by death. *Andrews v. Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389.

A statute denying an appeal to persons convicted of certain misdemeanors in the police court of a designated city, when per- 19 L.R.A. (N.S.)

sons convicted of similar misdemeanors in justice's court elsewhere in the state, under the same circumstances and conditions, would be permitted to appeal, does not deny the former the equal protection of the laws, where all persons within the jurisdiction of the same court have the same right to appeal. *Sullivan v. Haug*, supra. The court said: "No person has a constitutional right to a second trial, after having been duly convicted before a court of competent jurisdiction, by an appeal to another tribunal; neither is there an inherent right to appeal from a judgment of an inferior to a court of superior jurisdiction, for the purpose of securing a second trial upon the merits. The right to an appeal is and always has been statutory, and does not exist at common law. It is a remedy which the legislature may, in its discretion, grant or take away; and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken."

So, an act denying an appeal to the supreme court from a judgment granting a divorce violates a constitutional requirement that "final judgments in inferior courts may be brought by writ of error, or on appeal, into the supreme court in such manner as may be prescribed by law." *Simpson v. Simpson*, 25 Ark. 487.

And a constitutional provision granting appeals to all persons aggrieved by any order, sentence, or decree of the orphans' court to a designated court cannot be taken away by the legislature by providing for an appeal to a different court. *Kitchell v. Beach*, 35 N. J. Eq. 446.

A statute providing that both the law and facts shall be open to review in the supreme court, where the appellate court reverses a judgment without awarding a trial *de novo*, because its finding of the facts differs from that of the trial court, creates an unconstitutional discrimination between parties litigant, and denies equal protection of the laws, and confers special privileges, by permitting the appellee to have the facts re-

city whether said city should become anti-saloon territory under the act of May 16, 1907, providing for the creation, by popular vote, of anti-saloon territory, and for the abolition, by like means, of territory so created. The city of Naperville consists of three wards, each of which constitutes a voting precinct. The result of this election, as declared by the city council acting on the returns made by the election judges, was 408 votes against the proposition submitted and 467 in favor of the city becoming anti-saloon territory. Within less than ten days after the election Henry E. Saylor, Albert Pringnitz, Mathias W. Sander, Samuel Wehrli, and Walter Weigand, legal voters of the city of Naperville, filed a bond for costs in the county court of Du Page county and a verified petition to contest the election upon the proposition submitted, on the following grounds: (1) Because of alleged

fraudulent and illegal proclamations and returns in the first and third wards; (2) because of irregular and unlawful arrangement and construction of the polling places in said first and third wards; (3) because of the loss of one regular, officially indorsed ballot in the first ward; (4) because of the casting of illegal votes in favor of said proposition in the first and third wards sufficient in number to change the result of the election in the city; (5) because of fraud and misfeasance of the election officers in said first and third wards. The city of Naperville, as a municipality, was not made a party defendant.

The prayer for process and answer to the petition is as follows: "That summons herein issued out of this court, addressed to George C. Duel, the city clerk of said city of Naperville, Du Page county, Illinois, notifying said city clerk of the filing of this

viewed if the judgment of the appellate court is against him, while the appellant has no such right if defeated. *Hecker v. Illinois C. R. Co.* 231 Ill. 574, 83 N. E. 456; *Jones v. Chicago, R. I. & P. R. Co.* 231 Ill. 302, 121 Am. St. Rep. 313, 83 N. E. 215; *Green v. Red Cross Medical Service Co.* 232 Ill. 616, 83 N. E. 1081; *Zolnowski v. Illinois Steel Co.* 233 Ill. 299, 84 N. E. 225; *Hackett v. Chicago City R. Co.* 235 Ill. 116, 85 N. E. 320; *Reinhardt v. Chicago Junction R. Co.* 235 Ill. 576, 85 N. E. 605.

But, under constitutional authority to create an appellate court "from which appeals and writs of error shall lie to the supreme court in [certain enumerated cases], and in such other cases as may be provided by law," the legislature is vested with discretion to make the judgment of the appellate court conclusive upon all questions of fact. *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L.R.A. 33, 38 N. E. 773. And this right is recognized in *People v. Fowler*, supra; *Fallon v. Johnson*, 51 Iowa, 206, 1 N. W. 478; *Hager v. Adams*, 70 Iowa, 746, 30 N. W. 36; *Fleshman v. McWhorter*, supra.

Right of appeal dependent on amount.

In the absence of a constitutional restriction, the legislature may deny the right of appeal in cases wherein the amount involved does not exceed a designated sum. *Lake Erie & W. R. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443; *Southern Indiana R. Co. v. Thompson*, 27 Ind. App. 367, 61 N. E. 595; *Leavenworth Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114; *Messenger v. Teagan*, 106 Mich. 654, 64 N. W. 499; *Tierney v. Dodge*, 9 Minn. 166, Gil. 153; *Moise v. Powell*, 40 Neb. 671, 59 N. W. 79; *Chicago, B. & Q. R. Co. v. Headrick*, 49 Neb. 286, 68 N. W. 489; *Butterfield v. Rudde*, 58 N. Y. 489; *Chattanooga v. Keith*, 115 Tenn. 588, 94 S. W. 62, 5 A. & E. Ann. Cas. 859; *Garcia v. Free*, 31 Utah, 389, 88 Pac. 30.

An act prohibiting appeals to the court 19 L.R.A. (N.S.)

of appeals in cases wherein the matter in controversy does not exceed \$500 is authorized by a constitutional provision conferring such appellate jurisdiction on that court "as now, or may be, prescribed by law." *Butterfield v. Rudde*, supra.

So, an act denying the right of appeal where the judgment does not exceed a certain amount is not open to the objection of special or unequal legislation. *Garcia v. Free*, supra.

So, a municipal charter denying appeals in civil cases where the fine imposed does not exceed \$10 is not prohibited by a constitutional provision that the jurisdiction of the supreme court "shall be appellate, under such restrictions and regulations as may from time to time be prescribed by law." *Chattanooga v. Keith*, supra.

And an act providing that all judgments of the county courts, on appeals from justices', mayors', or recorders' courts, when the judgment rendered, or the fine imposed, or the amount in controversy shall not exceed \$100, exclusive of costs, shall be final, is authorized by a constitutional provision empowering the legislature to "increase, diminish, or change the civil and criminal jurisdiction of county courts." *Gerald v. State*, 4 Tex. App. 308.

So, an act denying the right to appeal to the supreme or appellate court in any civil case within the jurisdiction of a justice of the peace, except cases involving a question as to the validity of a franchise, or ordinance of a municipal corporation, or the constitutionality of a state or Federal statute, or the proper construction thereof, or of a right guaranteed by the state or Federal Constitution, does not violate a constitutional provision that "the supreme court shall have jurisdiction coextensive with the limits of the state in appeals and writs of error, under such regulations and restrictions as may be prescribed by law." *Lake Erie & W. R. Co. v. Watkins*, supra.

And a provision of the Bill of Rights that the courts shall be open to every person,

petition, and directing him to appear in this court on behalf of said city of Naperville on the 5th day of May, A. D. 1908, at the hour of 10 o'clock in the forenoon, in the county court room in the courthouse in the city of Wheaton, in the county of Du Page and state of Illinois, then and there to answer this petition, in conformity with the statutes in such case made and provided." George C. Duel, city clerk of the city of Naperville, entered his appearance, as did eight other citizens and legal voters of said city, and filed a demurrer to the petition, setting out the following causes of demurrer: First, that neither the city of Naperville, Du Page county, Illinois, nor any other person, is made a defendant in or to the said petition; second, as to the matters

and things contained in said bill wherein it is alleged that the polling places in the various precincts were not arranged in form as provided by law, the same and each and every one the allegations of said petition are wholly insufficient, because said petition does not allege that said illegal arrangement of the polling places resulted or in any manner tended to prevent a free and fair election as so arranged; third, because said petition is wholly insufficient to confer any jurisdiction on this court to grant the whole or any part of the relief prayed for by said petition. The county court sustained the demurrer and dismissed the petition, to which ruling of the court the petitioners duly excepted and prayed and obtained an appeal to this court. The errors assigned

and a speedy trial afforded for every injury, and right and justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay,—is fully satisfied by a trial in a court of competent jurisdiction in which the right to a jury, in proper cases, as guaranteed by the Constitution, is afforded. *Ibid.*

A statute of Missouri, providing that there shall be an appeal from a final judgment of the circuit court to the supreme court, except in certain designated counties, wherein an appeal shall lie to the court of appeals, from whose decision an appeal shall lie to the supreme court only in cases where the amount in dispute, exclusive of costs, exceeds \$2,500, or involves the construction of the Constitution of the state, or of the United States, and in some other enumerated special cases, does not contravene the 14th Amendment of the United States Constitution, although a case involving a lesser amount, which originated in another county, would be appealable to the supreme court. *Missouri v. Lewis (Bowman v. Lewis)* 101 U. S. 22, 25 L. ed. 989. The court said that the 14th Amendment "could never have been intended to prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion. . . . It is the right of every state to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions; provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States; and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction as to the equal protection of the laws is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right in 19 L.R.A. (N.S.)

like cases and under like circumstances to resort to them for redress."

But in *Morton v. Gordon, Dallam (Tex.)* 396, an act of the Congress of the Republic of Texas denying the right of appeal to the supreme court unless the amount in controversy exceeded \$300 was held invalid, in the absence of express authority for its adoption, where the Constitution conferred appellate jurisdiction on the supreme court "co-extensive with the limits of the Republic."

The right to an appeal from a judgment involving less than a designated sum is denied by the constitutions of some states. *Myers v. Mitchell*, 20 La. Ann. 533; *Cherry v. State*, 4 Tex. App. 4; *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469.

As affected by other mode of review.

An act conferring jurisdiction upon probate courts in matters pertaining to services rendered by agricultural laborers is not rendered unconstitutional by not providing for an appeal, where a different statute permits an appeal from the final judgment, decree, or order of the probate court. *Thomas v. Bibb*, 44 Ala. 721.

So, a municipal charter denying the right of appeal upon conviction before a justice of the peace for assault, where the judgment or fine imposed is less than \$25, does not conflict with a constitutional provision giving the supreme court appellate jurisdiction in all cases of such character, as it does not deny the right to obtain a review by the writ of certiorari. *Tierney v. Dodge*, *supra*. The court said: An appeal is a statutory right, and may be granted or withheld in all or any class of cases which may be determined by the character of the proceeding or the amount of fine or judgment, as the limitation of such right operates equally upon all suitors in such court, and this is all that is required.

So, it was held in *Moise v. Powell*, *supra*, that an act denying an appeal to the district court where the case was tried by a jury, unless the amount involved exceeded \$20, did not violate a constitutional provi-

call in question the ruling of the court in sustaining the demurrer and dismissing the petition.

Section 19 of the act of 1907 (Laws 1907, p. 304), under which this election was held, after providing for a contest of such election by five legal voters of any political division in which an election shall have been held as provided for in that act, provides: "The county court shall have final jurisdiction to hear and determine the merits of such cases." Under the language of this statute, we are met with the question whether any appeal lies from the judgment of the county court to this court from a judgment rendered in a proceeding to contest an election held under the statute of 1907. This question is raised by appellees

sion that "the right to be heard in all civil cases in a court of last resort, by appeal, error, or otherwise, shall not be denied;" as a person against whom such a judgment is rendered may obtain a review thereof by petition in error, such act merely depriving a litigant of one method of review, and leaving another adequate remedy open to him.

Nor does such act violate the provisions of the Bill of Rights prohibiting the taking of property without due process of law, as it does not deprive a litigant of a review of questions of law by petition in error. *Chicago, B. & Q. R. Co. v. Headrick*, 49 Neb. 286, 68 N. W. 489.

Failure to provide for an appeal from an order of a magistrate ordering the destruction of intoxicating liquors unlawfully kept does not take property without due process of law, as the right to a review by error is not denied. *Sothman v. State*, 66 Neb. 302, 92 N. W. 303.

Denial of appeal in proceedings not according to common law.

As the right to a review of civil cases in the court of appeals is not a natural and inherent one, which cannot be taken away by the legislature, an act providing that the judgment of the supreme court in summary proceedings to recover possession of land shall be final, unless such court shall allow an appeal, is valid. *People v. Fowler*, 9 Cal. 85.

So, a statutory declaration that the decision of a court in a special or summary proceeding unknown to the common law, created to afford temporary relief, shall be final, is valid in the absence of constitutional restriction. *Mau v. Stoner*, 14 Wyo. 183, 83 Pac. 218.

So, an act providing that the decision of the circuit court in a contested election case shall be final does not contravene a constitutional provision that the supreme court shall have jurisdiction of certain enumerated cases, and "shall have appellate jurisdiction in all other cases," as a proceeding to contest an election is not a "case," within the meaning of the Constitution, but 19 L.R.A. (N.S.)

in their brief, but is not discussed. It is discussed at some length by appellants in their reply brief. Since, in our views, this is a question of controlling importance, we regret that we have been compelled to investigate it without any brief on one side and with but little assistance from the one filed by the other. In this state the right of appeal in any case is purely statutory, with the possible exception of certain classes of cases enumerated in § 11 of article 6 of the Constitution of 1870, in which the right of appeal from the appellate to the supreme court in certain enumerated cases seems to be guaranteed by the Constitution. Section 123 of chapter 46 of Hurd's Revised Statutes of 1905 provides for appeals to be taken to the supreme court from

merely a proceeding for a recanvass of the votes cast and the finding of the result. *Moore v. Mayfield*, 47 Ill. 167; *People v. Smith*, 51 Ill. 177.

But an act making the judgment of a justice of the peace final in certain actions not according to the course of the common law and expressly forbidding the allowance of appeal, certiorari, writ of error, or injunction, and declaring that the litigants shall abide the judgment, violates a constitutional provision vesting in the supreme court power to issue writs of certiorari, and to hear and determine the same. *Ex parte Anthony*, 5 Ark. 358.

So, it was held in *St. Louis & S. E. R. Co. v. Lux*, 63 Ill. 523, that an act permitting the condemnation of land for a railway right of way by the circuit court, and making its jurisdiction final and conclusive, violated the provision of the Constitution of 1848 that the supreme court should have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus proceedings, and appellate jurisdiction in other cases; as such proceeding involves the question of damages in condemning land for such purpose, and is a contest between two parties as to what amount one shall pay for the use of the other's lands, and must be considered a "case" within the meaning of the Constitution.

And so an act authorizing the district judge to appoint a board of referees to pass upon claims and demands theretofore issued, by a provisional municipal government whose decision is to be affirmed by such court, and which makes no provision for an appeal, does not constitute due process of law to which every person, including the city government of the municipality subsequently formed, is entitled. *Guthrie Nat. Bank v. McEl Hinney*, 5 Okla. 107, 47 Pac. 1082.

An act declaring the decision of the circuit court to be final upon appeals to it from the orders of the board of police in opening section lines does not violate a constitutional provision conferring upon the high court of error and appeals "such jurisdiction as properly belongs to a court of error and appeals," which is not a limita-

county and circuit courts in all contested election cases, "in the same manner and upon like conditions as is provided by law for taking appeals in cases in chancery from the circuit courts." There is no provision in the act under which this election

was held granting to either party a right of appeal. Appellants contend that an appeal lies under § 123 of the general election law. Whether § 123 of the general election law could be held to apply to an election held under this statute, in the absence

tion upon the authority of the legislature to prohibit appeals in certain classes of cases. *Dismukes v. Stokes*, 41 Miss. 430.

In *State Tax-Law Cases*, 54 Mich. 350, 20 N. W. 493, Cooley, Ch. J., and Champlin, J., held that no principle of constitutional law was violated by an act declaring the decision of the circuit court in chancery in a proceeding by the state to foreclose liens upon land for nonpayment of taxes to be final on questions as to the admissibility of evidence. Campbell and Sherwood, JJ., dissented, on the ground that the right of appeal in a chancery cause could not be thus taken away.

The granting of the right to appeal to a court in a proceeding to annex territory to a city, to resident property owners of such territory, but not to nonresident property owners, is not a grant to any citizen or class of citizens of privileges or immunities which, upon the same terms, do not equally belong to all citizens. *Taggart v. Claypool*, 145 Ind. 500, 32 L.R.A. 586, 42 N. E. 18.

Neither does such act violate the 14th Amendment to the United States Constitution, providing that "no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws." *Ibid*.

Finality of decisions pertaining to local improvements.

Statutes providing that an appeal shall lie from the decision of local boards, vested with the power of making public improvements, to a designated court, the decision of which shall be final, have been upheld in the absence of constitutional restrictions to the contrary. *Houghton's Appeal*, 42 Cal. 58; *People ex rel. Henberg v. Cohen*, 219 Ill. 200, 76 N. E. 388; *Dismukes v. Stokes*, supra, overruling *Yalabusha County v. Carbry*, 3 Smedes & M. 529; *McAllister v. Albion Plank Road Co.* 10 N. Y. 353; *New York C. R. Co. v. Marvin*, 11 N. Y. 276; *Re Canal & Water Streets*, 12 N. Y. 406; *Re Palmer*, 40 N. Y. 561; *People ex rel. Grissler v. Fowler*, 55 N. Y. 675; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 110, rehearing denied in 44 Or. 160, 75 Pac. 222; *Mau v. Stoner*, supra.

So, a provision of a city charter permitting an appeal from an assessment for public improvements to the circuit court, and making the latter's decision final, does not contravene a constitutional provision that "all judicial power, authority, and jurisdiction not vested by this Constitution or by laws consistent therewith exclusively in some other court shall belong to the circuit courts; and they shall have appellate jurisdiction and supervisory control over the county courts and all other inferior 19 L.R.A. (N.S.)

courts;" as the right of appeal is wholly statutory, and, unless expressly secured by the Constitution and such constitutional provisions, does not confer such right. *Kadderly v. Portland*, supra.

And an act prohibiting appeals from the court of general term to the court of appeals in matters pertaining to assessments for local improvements is not unconstitutional, even as to appeals pending at the time of its passage which must be dismissed. *Re Palmer*, 40 N. Y. 561.

But an act giving appeal to the county court from the decision of commissioners in erecting and establishing highways, and making the decisions of that court final, violates a constitutional provision conferring appellate jurisdiction in all cases upon the supreme court, as the right to an appeal is a constitutional one which must be allowed when claimed. *Schlattweiler v. St. Clair County*, 63 Ill. 449, overruling *Coon v. Mason County*, 22 Ill. 666; *Marion County v. Harper*, 44 Ill. 482.

Effect of failure to provide for an appeal.

The failure of an act empowering magistrates to issue warrants for the destruction of intoxicating liquors unlawfully kept, which is of a criminal nature, to provide for an appeal from such order, does not violate a constitutional guaranty of "the right to be heard in all civil cases in a court of last resort, by appeal, error, or otherwise," which is applicable to civil cases only. *Sothman v. State*, 66 Neb. 302, 92 N. W. 303.

So, the failure to provide for an appeal from an order removing a cause to another court does not render unconstitutional a statute providing that, when the plaintiff is entitled to some relief, but not in the court in which he has brought his action, the cause may, in the discretion of the court, be removed to the proper tribunal, where such amendments may be made as may be necessary to a hearing of the case according to its practice. *Insurance Co. of N. A. v. Schall*, 96 Md. 225, 61 L.R.A. 300, 53 Ati. 925.

But, an act providing that certain defaults of overseers of highways shall be misdemeanors and triable by justices of the peace, which does not provide for an appeal upon conviction, violates a constitutional requirement that the right of appeal shall be secured in all cases tried by justices of the peace. *Tims v. State*, 26 Ala. 165. And this decision was followed in *Ex parte Houghton*, 38 Ala. 570, declaring unconstitutional an act conferring jurisdiction in vagrancy cases upon justices of the peace, and not providing for an appeal upon conviction.

of any provision in the law of 1907 in relation to such appeal, is not involved; since in our view the language already quoted from § 19 must be held to take elections held under said act out of the operation of said § 123. The provision that the county court shall have "final jurisdiction" to hear and determine the merits of such cases must, we think, be construed as a denial of the right to an appeal from the judgment of the county court in contests arising under this statute. Jurisdiction is the power vested by the law in a tribunal to hear and determine causes properly coming before such tribunal. "Final" means "last; conclusive; pertaining to the end." Bouvier's Law Dict. By conferring upon the county court "final jurisdiction," the jurisdiction of all other courts subsequent to the determination in the county court is *ex vi termini* excluded.

The case of *Lampson v. Platt*, 1 Iowa, 558, is an authority for the construction which we place on this statute. In that case § 12 of an act of the legislature of the state of Iowa (Laws 1854-55, p. 231, chap. 156), under which the proceeding was had, provided "that any person feeling aggrieved by the decision of the county judge, under the 9th section of this act may appeal therefrom to the district court of the proper county, which shall have final jurisdiction over the matter and shall make such decision in the premises as justice and equity may require." An appeal was prosecuted from the district court to the supreme court of Iowa, and, in holding that no appeal could be taken from the judgment of the district court, the supreme court of Iowa, on page 558 of 1 Iowa, uses this language: "The language of the statute is not that such district court shall have power, in such cases, to enter final judgment, but that it shall have final jurisdiction. If the term 'final judgment' had been used, the right to appeal, in view of the general provisions of the Code, could scarcely be questioned. Between judgment and jurisdiction there is, however, a clear distinction. The one is the decision or the law given by the court as the result of proceedings therein instituted; the other has reference to the power conferred to take cognizance of and determine causes according to law, and to carry the same into execution." That court, in dismissing the appeal, made the further remark that "to our minds, the language of the law can scarcely admit of two interpretations." In *Coon v. Mason County*, 22 Ill. 666, this court construed a provision in § 38 of chapter 93 of the Revised Statutes of 1845, providing that "either party may appeal to the circuit court, where, the case being fully heard, such judgment or order shall be made there-

on as the court shall deem right and which shall be a final decision," as conferring upon the circuit court the power to finally determine the cause. This court there said: "We are of the opinion that the legislature intended to prohibit the prosecution of a writ of error as well as an appeal." *Moore v. Mayfield*, 47 Ill. 167, was an election contest. The statute then in force provided that the contest should be heard, in the first instance, by three justices of the peace, and allowed an appeal from the decision of the three justices to the circuit court under a provision that "the decision of which court shall be final." Rev. Stat. 1845, chap. 37, § 49. It was there held that the judgment of the circuit court was final, and the writ of error was dismissed. See *Loomis v. Hodson*, 224 Ill. 147, 79 N. E. 590.

Appellants contend that to construe this act as denying an appeal would be to single out a contest of an election held under said act from a contest of an election held for any other purpose, and that to do so would render the act unconstitutional, as being contrary to the 14th Amendment of the Federal Constitution and in violation of § 22 of article 4 of the Constitution of this state. The particular part of the 14th Amendment of the Federal Constitution which is supposed to be violated by the construction we have placed upon this statute reads as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Appellants have no privileges or immunities which are abridged by denying them a right of appeal in this case, nor are they deprived of life, liberty, or property without due process of law. Even if it could be said that a proceeding to contest an election held for the purpose of determining whether a municipality should or should not become anti-saloon territory in some undefinable way involved the life, liberty, or property of the particular citizens who, availing themselves of the statutory privilege, take the initiative in bringing about such contest, the fact that the legislature has seen proper to withhold the right of appeal would not be a deprivation of such constitutional right without due process of law. "One hearing," the Supreme Court of the United States has said, "if ample before judgment, satisfies the demand of the Constitution in this respect. . . . If a single hearing is not due process, doubling it will not make it so." *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup Ct.

Rep. 1114. In the case above cited Mr. Justice Brewer uses language which seems to us applicable to the other contention of appellants in this case. On page 427 of 154 U. S., the learned justice said: "The power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing." The decision above cited appears to be a sufficient answer to appellants' views, not only as to the point made that the statute as thus construed violates the 14th Amendment of the Federal Constitution, but also as to the other contention that the act is special legislation within the meaning of § 22 of article 4 of the Constitution of Illinois. This court has held in many cases that it is not necessary that a law shall apply to all the people of the state under this clause of our Constitution. Where a class is composed of persons possessing in common some disability, attribute, or qualification, or are under some conditions marking them as proper objects in whom to vest the specific rights granted unto them, the legislature may pass a law applicable only to such class. *Vogel v. Pekoc*, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386. A law is general, not because it embraces all of the governed, but because it may do so when they occupy the same position as those who are embraced in its terms. *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610. The legislature, in adopting the law granting the right to determine by vote whether a political subdivision shall become or shall continue to be anti-saloon territory, has seen proper to differentiate in several particulars the procedure for contesting such elections from the corresponding provisions found in the general election law. Thus it is provided in § 117 of the general election law that any five electors may contest an election upon any subject which may be by law submitted to a vote of the people of a county upon filing a petition in the circuit court within thirty days after the result of the election shall be determined. In a contest, for instance, of an election for the removal of a county seat, any five electors may make such contest. In respect to the number and qualifications of those who may contest, this section is similar to § 19 of the act of 1907, but in other respects there are wide differences. Under the general election law the contest is in the circuit court, while under the law of 1907 it is in the county court. Under the general law, the petitioners have thirty days in which to file the petition, while under this special statute it 19 L.R.A. (N.S.)

must be filed in ten days; and, under the general law, the petitioners are not required to give a bond for costs, while, under the new act, a bond for costs must be filed by the petitioners before filing their petition. Besides these differences, the legislature, for reasons which it deemed sufficient, has seen proper to provide for appeals from decisions in all contested election cases under the general law, while as to contests of election under the law of 1907 it has conferred final jurisdiction upon the county court. In doing so the legislature has exercised its power to determine that special elections upon this particular subject shall constitute a special class, which are subject to all the provisions of the statute under which they are conducted. The act in question is not open to the constitutional objections urged against it.

There being no authority of law for taking an appeal in this case, the appeal must be dismissed.

Petition for rehearing denied December 3, 1908,

ILLINOIS SUPREME COURT.

JOSEPHINE LONG, Appt.,
v.

JOHN M. BARTON et al., Exrs., etc., of
Philip H. Barton, Deceased.

(236 Ill. 551, 86 N. E. 127.)

Divorce — antenuptial contract.

Acceptance, by a wife, of a sum allowed her by a decree of divorce in lieu of dower, bars her rights under an antenuptial contract which provides for payment to her, at her husband's death, of a certain sum of money in lieu of dower.

(October 26, 1908.)

APPEAL by petitioner from a judgment of the Appellate Court, Third District, reversing a judgment of the Circuit Court for Vermillion County, which in turn af-

Note. — In numerous cases the question is raised whether or not any provision in lieu of dower in a decree of divorce is valid, and the courts are not harmonious upon the question. But, assuming that such a provision is valid, *LONG v. BARTON* presents the further question of the effect of such a provision, or rather of the acceptance of such a provision, upon an antenuptial settlement made in lieu of dower; in other words, whether an acceptance of a provision in lieu of dower would revoke something else provided in lieu of dower.

A search has failed to reveal any other case which is in point.

firmed a judgment of the County Court allowing a claim against the estate of Philip H. Barton, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Mabin & Morris, for appellant:

Marriage is a valuable consideration for a contract or conveyance between the husband and wife, who are deemed purchasers for a valuable consideration.

6 Am. & Eng. Enc. Law, p. 724; 1 Bouvier's Law Dict. 14th ed. title "Consideration," p. 331; Rockafellow v. Newcomb, 57 Ill. 187; Dunlop v. Lamb, 182 Ill. 324, 55 N. E. 354; 19 Am. & Eng. Enc. Law, p. 1240; 10 Am. & Eng. Enc. Law, p. 209; Huguley v. Lanier, 86 Ga. 636, 22 Am. St. Rep. 487, 12 S. E. 922; Barth v. Lines, 118 Ill. 374, 59 Am. Rep. 374, 7 N. E. 679; McGee v. McGee, 91 Ill. 553.

Alimony is a provision for the wife's support, and the term is equally applicable to all allowances, whether annual or in gross.

2 Am. & Eng. Enc. Law, p. 92, ¶1, note 1; Wheeler v. Wheeler, 18 Ill. 40; Plaster v. Plaster, 47 Ill. 294; Clarke v. Lott, 11 Ill. 114.

Mr. J. B. Mann, for appellees:

A contract to pay a sum of money in lieu of dower is a substitute or equivalent for dower, and can be claimed by the wife only when she becomes the widow of the promisor.

Jordan v. Clark, 81 Ill. 465; Clarke v. Lott, 11 Ill. 105; 2 Bishop, Marr. & Div. 1873 ed. § 720.

The court has the power to make the payment of alimony a bar to dower.

Armstrong v. Armstrong, 35 Ill. 109; Adams v. Storey, 135 Ill. 448, 11 L.R.A. 790, 25 Am. St. Rep. 302, 26 N. E. 582; Marvin v. Collins, 48 Ill. 156.

Appellant cannot claim under the antenuptial agreement after availing herself of the benefit of the decree for alimony.

Adams v. Storey, supra; Ruckman v. Alwood, 44 Ill. 183; 2 Bishop, Marr. & Div. 1873 ed. § 722.

Any circumstance which bars dower also bars that which is the equivalent of dower.

Jordan v. Clark, supra.

Vickers, J., delivered the opinion of the court:

This is an appeal from a judgment of the appellate court for the third district reversing, without remanding, a judgment of the circuit court of Vermilion county.

The facts, which are not in dispute, are as follows: On October 1, 1901, appellant, Josephine Long, and Philip H. Barton, in contemplation of a marriage thereafter to

be celebrated between them, entered into the following antenuptial contract:

Know all men by these presents, that I, Philip H. Barton, of Danville, Vermilion county, Illinois, hereinafter known as the party of the first part, and Miss Tonie Long, of the city of Danville, county of Vermilion, state of Illinois, hereinafter known as the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the second party being joined with the first party in wedlock, and after said marriage said first party hereby agrees that said second party shall after his death, in lieu of dower, have the sum of \$5,000, to be paid out of the estate of the said first party after all just debts and funeral expenses of the said first party have been paid. Second party agrees, in consideration of said \$5,000 to be paid as above recited, to relinquish and waive all her dower rights of the estate of the said first party that may accrue to her by reason of the marriage of the said first party to the said second party under the laws and statutes of the state of Illinois. Witness our hands and seals this first day of October, 1901.

Philip H. Barton. [Seal.]
Tonie Long. [Seal.]

On the day following the execution of this contract the parties thereto were married. They lived together as husband and wife until 1904, when appellant obtained a divorce from her husband in the circuit court of Vermilion county on the charge of extreme and repeated cruelty. By the decree appellant was allowed \$2,000 as a gross sum in full of all of her claim in and to the property of her husband. The payment of the \$2,000 to appellant was directed to be made upon the execution and delivery to her husband of a quitclaim deed releasing all her interest in the real estate of her said husband. It was further provided in said decree: "The payment of the said sum of \$2,000 by defendant to complainant shall also be considered as in lieu of and in full satisfaction of complainant's contingent right of dower and all other rights in the lands and tenements of defendant now owned by him and by him hereafter acquired." The appellant accepted the \$2,000 awarded her by the decree. Philip H. Barton died testate, and appellees, John M. Barton and Charles L. English, were appointed executors of his will. Appellant, claiming that she was entitled to receive the \$5,000 named in the antenuptial contract, filed a claim against the estate of Philip H. Barton for that sum. The county court of Vermilion county allowed said claim, and, upon an appeal to the circuit court by the execu-

tors, the same result was reached. The appellate court, as already indicated, reversed the judgment of the circuit court and refused to remand the cause, and it is this latter judgment that appellant seeks to have reviewed by this appeal.

By her acceptance of the \$2,000 under the provisions of the divorce decree, appellant must be held to have waived her right to dower in her husband's lands. The antenuptial contract is not an unconditional promise to pay \$5,000, but it is to be paid in lieu of dower. If appellant had died before her husband, all rights under the antenuptial contract would have been extinguished. The effect of the antenuptial contract was to substitute a sum of money for appellant's right of dower in her husband's land. Anything that would extinguish her right of dower would extinguish that which, by agreement, was substituted in its place. This rule has been recognized in the following decisions of this court: *Clarke v. Lott*, 11 Ill. 105; *Jordan v. Clark*, 81 Ill. 465; *Lennahan v. O'Keefe*, 107 Ill. 620; *Adams v. Storey*, 135 Ill. 448, 11 L.R.A. 790, 25 Am. St. Rep. 392, 26 N. E. 582. In the last case cited it was held that the right to dower was barred by an annuity given for life in a divorce decree which makes the annuity a lien and charge upon the husband's real estate, where the wife has taken her support and maintenance under the decree. Appellant, having accepted the provisions made for her by the decree in lieu of dower, must be held to have abandoned all claim to that which, under the contract, represented her dower.

The judgment of the Appellate Court for the Third District is affirmed.

Petition for rehearing denied December 3, 1908.

ILLINOIS SUPREME COURT.

CHICAGO TITLE & TRUST COMPANY,
Appt.,
v.

JEROME J. DANFORTH et al.

(236 Ill. 554, 86 N. E. 364.)

Records—abstract—right to copy.

Copies of books containing abstracts of title to property in the county, which are required to be made by the recorder, and for copies of which made by him he is required to charge a fee, may be made by private abstract companies under a statute providing

Note.—As to right to copy real-estate records for the purpose of compiling independent set of abstract books, see case note to *State ex rel. Nevada Title Guaranty & T. Co. v. Grimes*, 5 L.R.A. (N.S.) 645. 19 L.R.A. (N.S.)

that all abstract and other books kept in the recorder's office shall be exhibited to those who wish to inspect them, and all persons shall have a right to take abstracts thereof, although the result will be to give such companies the advantage of labor performed by the recorder in competing with him for business.

(October 26, 1908.)

APPEAL by complainant from a judgment of the Appellate Court, First District, affirming a decree of the Circuit Court for Cook County dismissing a bill filed to enjoin the copying of the books containing the abstracts of title to real estate in Cook county. Affirmed.

Statement by Vickers, J.:

The Chicago Title & Trust Company, in its capacity of a taxpayer of Cook county, filed a bill against Jerome J. Danforth, the Abstract Construction Company, the Real Estate Title & Trust Company, Abel Davis, as recorder of Cook county, and the county of Cook, to enjoin the three first-named defendants from copying the abstract books or tract indices belonging to Cook county, and to enjoin the last-named two defendants from permitting the other defendants to make any such copies, either verbatim or substantial. The bill also prayed for a return to the county of Cook of all such copies of said books as may have been made, and for an accounting for any compensation that may have been received for the making of abstracts of title from the copies of the abstract books or tract indices which may have wrongfully come into the hands of the three defendants first above named. All of the defendants below, other than the county of Cook and the recorder, filed a general demurrer to the bill in its amended form, which was sustained by the circuit court and the bill dismissed for want of equity. The recorder and Cook county answered the bill. The former admits all of the allegations of the bill, and joins in the prayer for relief, and the latter, by its answer, admits the substance of the bill, but denies that the complainant is entitled to any relief. Upon an appeal from a decree dismissing the bill for want of equity, the appellate court for the first district affirmed the decree below. This appeal is prosecuted by the complainant below from the judgment of affirmance in the appellate court. From the averments of the amended bill, it appears that the recorder of Cook county caused to be made, at the expense of the county, a set of abstract books, and that the recorder used such abstract books in supplying the public with abstracts of land titles in that county, in accordance with the provisions of, and for the

compensation provided in, "An Act to Authorize Recorders of Deeds in Counties where Recorders of Deeds are Elected to Keep Abstract Books, Make Abstracts, and Fixing the Fees and Compensation Therefor" approved June 16, 1887, in force July 1, 1887. The bill sets out in detail when and how these abstract books were made, and the cost of the same to the county. It appears, further, from the bill, that the Abstract Construction Company is a corporation organized in 1904, with a capital stock of \$200,000, and that Jerome J. Danforth is president of said company; that said company has been engaged in copying the abstract books for something over a year; that, a short time before the filing of the bill, the Real Estate Title & Trust Company, another corporation, was organized, with a capital stock of \$1,000,000, and that the Abstract Construction Company has assigned and transferred to the Real Estate Title & Trust Company all of the abstract books, tract indices, and other information which had been compiled by the Abstract Construction Company from the abstract books belonging to Cook county. The bill is framed on the theory that a private person or corporation engaged in the abstract business has no legal right to copy the abstract books belonging to the county, for the purpose of making and selling abstracts to its customers in competition with the recorder. Appellant's contention is that the abstract books are a species of public property, and that the copying of such books by a private abstract company for use in its business is such a misappropriation of public property as will give a taxpayer standing in a court of equity to prevent by injunction. Appellees' contention is that the abstract books are public records, and that any person has the legal right to inspect such records, and make copies or memoranda thereof, and that, conceding that the books themselves are public property, the mere making of copies from the books is not in any sense an appropriation of the property itself; and, finally, appellees contend that appellant has no such interest, by virtue of being a taxpayer, as will enable it to maintain this bill.

Messrs. Wilson, Moore, & McIlvaine, with Messrs. Harrison B. Riley and Charles L. Bartlett, for appellant:

The collated information contained in the tract books, and other books of compiled information in the recorder's office, constitutes property which is entitled to the protection of the courts.

7 Am. & Eng. Enc. Law, 2d ed. pp. 513, 514; Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177; Drone, Copyright, pp. 100, 123; 19 L.R.A. (N.S.)

Gray v. Russell, 1 Story, 16, Fed. Cas. No. 5,728; Emerson v. Davies, 3 Story, 768, Fed. Cas. No. 4,436; Wyatt v. Barnard, 3 Ves. & B. 77; Matthewson v. Stockdale, 12 Ves. Jr. 270; Longman v. Winchester, 16 Ves. Jr. 271; Kiernan v. Manhattan Quotation Teleg. Co. 50 How. Pr. 194; Kelly v. Morris, L. R. 1 Eq. 697; Cox v. Land & Water Journal Co. L. R. 9 Eq. 324; Board of Trade v. C. B. Thomson Commission Co. 103 Fed. 902; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Banker v. Caldwell, 3 Minn. 94, Gil. 46; Vernon Abstract Co. v. Waggoner Title Co. (Tex. Civ. App.) 107 S. W. 919; Exchange Teleg. Co. v. Gregory [1896] 1 Q. B. 147; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204.

Independent of statutory enactment, no right to copy or to make up a set of tract books, even from the original records, existed.

Mechem, Off. & Pub. Off. §§ 738, 739; Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318; State ex rel. Nevada Title Guaranty & T. Co. v. Grimes (Nev.) 5 L.R.A. (N.S.) 545, 84 Pac. 1061; Hanson v. Eichstaedt, 69 Wis. 538, 35 N. W. 30; Cormack v. Wolcott, 37 Kan. 391, 15 Pac. 245; State ex rel. Clay County Abstract Co. v. McCubrey, 84 Minn. 439, 87 N. W. 1126; State ex rel. Colscott v. King, 154 Ind. 621, 57 N. E. 535; Scribner v. Chase, 27 Ill. App. 36; Bean v. People, 7 Colo. 200, 2 Pac. 909; Buck v. Collins, 51 Ga. 391, 21 Am. Rep. 236; Davis v. Abstract Constr. Co. 121 Ill. App. 121; Barber v. West Jersey Title & Guaranty Co. 53 N. J. Eq. 158, 32 Atl. 222, 371; Fidelity Trust Co. v. Clerk of Supreme Ct. 65 N. J. L. 495, 47 Atl. 451; Newton v. Fisher, 98 N. C. 20, 3 S. E. 822.

No right to copy the books, or to use them for the purpose of making abstracts of title for private gain, exists.

Schell v. Stein, 76 Pa. 398, 18 Am. Rep. 416; Pyles v. Brown, 189 Pa. 164, 69 Am. St. Rep. 794, 42 Atl. 11; Brockway v. Cook County, 15 Ill. App. 560; Wagner v. Rock Island, 146 Ill. 153, 21 L.R.A. 519, 34 N. E. 545; Chicago v. Cicero, 210 Ill. 298, 71 N. E. 356; Chicago v. Selz, S. & Co. 104 Ill. App. 381; Hollenbeck v. Winnebago County, 95 Ill. 148, 35 Am. Rep. 151; Hanson v. Eichstaedt and Bean v. People, supra; Stocknan v. Brooks, 17 Colo. 248, 29 Pac. 746; State ex rel. Cole v. Rachac, 37 Minn. 372, 35 N. W. 7; State ex rel. Clay County Abstract Co. v. McCubrey; Cormack v. Wolcott and Barber v. West Jersey Title & Guaranty Co.,—supra; Lum v. McCarty, 39

N. J. L. 287; *Fidelity Trust Co. v. Clerk of Supreme Ct. supra*; *State ex rel. Cook v. Reed*, 36 Wash. 638, 79 Pac. 306.

Messrs. **Darrow, Masters, & Wilson and Kraus, Alschuler, & Holden**, for appellees:

Books required by law to be kept are not to be construed as provided for the personal benefit or convenience of the officer keeping them.

Bell v. Commonwealth Title Ins. & T. Co. 189 U. S. 134, 47 L. ed. 744, 23 Sup. Ct. Rep. 569; *Fidelity Trust Co. v. Clerk of Supreme Ct.* 65 N. J. L. 495, 47 Atl. 451; *Brockway v. Cook County*, 15 Ill. App. 566.

The common-law limitation on the right of inspection was and is merely for the protection of the custodian and the preservation to him of a discretion as to the use of, or access to, such records by others than interested persons.

Bean v. People, 7 Colo. 200, 2 Pac. 909; *Scribner v. Chase*, 27 Ill. App. 36; *Davis v. Abstract Constr. Co.* 121 Ill. App. 128.

The abstract maker, as agent of his clients, has the common-law right of access.

State ex rel. Nevada Title Guaranty & T. Co. v. Grimes (Nev.) 5 L.R.A. (N.S.) 545, 84 Pac. 1061; *Bell v. Commonwealth Title Ins. & T. Co.* 189 U. S. 131, 47 L. ed. 741, 23 Sup. Ct. Rep. 569; *Buck v. Collins*, 51 Ga. 393, 21 Am. Rep. 236; *Boylan v. Warren*, 39 Kan. 301, 7 Am. St. Rep. 551, 18 Pac. 174; *Burton v. Tuite*, 78 Mich. 363, 7 L.R.A. 73, 44 N. W. 282; *Day v. Button*, 96 Mich. 600, 56 N. W. 3; *State ex rel. Davis v. McMillan*, 49 Fla. 243, 38 So. 666, 6 A. & E. Ann. Cas. 537.

The right of access given generally includes the right of a private abstractor to copy generally for the purposes of his business.

State ex rel. Cole v. Rachac, 37 Minn. 372, 35 N. W. 7; *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. 30; *State ex rel. Davis v. McMillan, supra*; *Stocknan v. Brooks*, 17 Colo. 248, 29 Pac. 746; *Warvelle, Abstracts*, 1892, pp. 63-67; *Kopp v. Reiter*, 146 Ill. 437, 22 L.R.A. 273, 37 Am. St. Rep. 156, 34 N. E. 492; *Wright v. Weeks*, 25 N. Y. 161.

The public right is not determined or limited by the possibility that the right that exists at common law or under a statute may be one that will, if exercised, lessen the fees of the custodian.

Barber v. West Jersey Title & Guaranty Co. 53 N. J. Eq. 158, 32 Atl. 222, 371; *Bell v. Commonwealth Title Ins. & T. Co. supra*; *State ex rel. Davis v. McMillan, supra*.

Mr. Charles T. Farson in support of a petition for rehearing on behalf of Abel Davis, recorder.
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Vickers, J., delivered the opinion of the court:

The labor of the court has been greatly increased in this case by the unnecessary length of the briefs counsel have seen fit to file. There are no questions of fact involved, and the questions of law are not more difficult than the majority of questions with which this court is required to deal, yet appellant has filed a brief of more than 200 pages, and appellees have filed one equally as large. In addition to the main briefs, appellant has filed a reply brief consisting of 77 pages, which is largely made up of a mere reiteration of what is contained in its main brief. Thorough and painstaking investigation is in all cases to be encouraged and commended, and, when properly and intelligently carried on, it ought to result in the elimination of collateral and immaterial matters, and the presentation of the controlling questions involved so clearly that they can be readily decided. The mistake counsel in this case have made is in attempting to make a compilation of all the law that can be found upon the subjects treated. The result of their efforts is that they have gotten together the material out of which proper briefs and arguments might have been constructed, leaving the court to cull, out of the nearly 500 pages of printed matter, such arguments and authorities as are helpful in determining the question involved. If the briefs in this case had been limited to one third their length, they would have been more useful and less burdensome to the court.

The principal question presented in this record is the proper construction to be given to the statutes passed in 1887 in relation to the keeping of abstract books by recorders. Before coming directly to the acts of 1887, it is important to have before us the state of the law prior to the enactments in question. In the revision of our statutes of 1874 (*Hurd's Rev. Stat.* 1905, chap. 115), the legislature passed an act to revise the law in relation to recorders, § 12 of which provided that the recorder shall keep an entry book, a grantors' index, a grantees' index, and an index to each book of records. The fifth clause of said § 12 reads as follows: "When required by the county board, an abstract book, which shall show by tracts every conveyance or encumbrance recorded, the date of the instrument, time of filing the same, the book and page where the same is recorded; which book shall be so kept as to show a true chain of title to each tract and the encumbrances thereon, as shown by the records of his office." It will be noted that there are several defects in clause 5 above quoted, the most important of which

is that the statute only authorizes the keeping of abstract books showing a chain of title as "shown by the records of his office." The act made no provision for keeping any records of judgment liens, execution and tax sales, and other judicial proceedings which are essential to a complete abstract. The act not only failed to define the duties and fix the compensation for the performance thereof, but it left the right of the public to inspect and use such books to be determined without the aid of legislation. These defects in the law of 1874 no doubt led the legislature in 1887 to pass an act, entitled "An Act to Amend the Act of 1874 by Adding Thereto Another Section," which is found as § 21 of chapter 115 of Hurd's Revised Statutes of 1905, and is as follows: "All records, indices, abstract and other books kept in the office of any recorder, and all instruments filed for record therein, shall, during office hours, be open for public inspection and examination; and all persons shall have free access for inspection and examination to such records, indices, books, and instruments which the recorders shall be bound to exhibit to those who wish to inspect or examine the same; and all persons shall have the right to take memoranda and abstracts thereof without fee or reward." The above act was approved May 31, 1887 (Laws 1887, p. 258), and in force July 1, 1887.

At the same session of the legislature another act was passed, entitled "An Act to Authorize Recorders of Deeds in Counties where Recorders of Deeds are Elected to Keep Abstract Books to Make Abstracts of Title, and Fixing the Fees and Compensation Thereof," which was approved June 16, 1887, and in force July 1, 1887 (Laws 1887, p. 256). This act makes it the duty of the recorder, in a county where the recorder is elected, to keep abstract books showing all conveyances and encumbrances and judicial proceedings affecting the title to real estate, indices to tax-sale books, forfeiture records, and, in short, a complete set of books, so as to enable the recorder to furnish perfect abstracts of title to real estate. The act fixes the fees that the recorder shall charge for abstracts, and requires him to give a bond in the sum of \$20,000, conditioned to secure the accuracy and correctness of any and all such abstracts as he might make, to indemnify any and all persons purchasing abstracts from the recorder for loss or damage which they might sustain by reason of any errors, mistakes, or omissions in such abstracts. A proviso was added to § 1 of this act, as follows: "Provided, that nothing in this act shall be construed to empower the recorder to prevent the public from examining and taking

memoranda from all records and instruments filed for record, indices and other books in his official custody; but it shall be his duty at all times, when his office is or is required by law to be open, to allow all persons without fee or reward to examine and take memoranda from the same." This act was amended in 1903 by the addition of two new sections (Laws 1903, p. 291), one of which reduced the amount of the bond required to be given by the recorder from \$20,000 to \$10,000, and provided that the bond was to be for the indemnity of the county, to reimburse the county for any loss or damage which the county might be required to pay by reason of errors or omissions of the recorder in any abstract that he might make. This section made the county liable directly to parties injured or damaged through errors, mistakes, or omissions of the recorder in making abstracts. The other added section provided for setting apart 5 per cent of all fees received by the recorder for abstracts, in a special indemnity fund, until such fund should reach the sum of \$100,000, when the payments thereto were to be reduced to 2½ per cent and continue at the rate of 2½ per cent as long as said fund remained \$100,000 or more, and, whenever it should fall below said sum, the payments at the rate of 5 per cent should be resumed. This fund was required to be paid to the county treasurer, who was to invest such fund in United States, state, county, or municipal bonds, and report annually the amount of interest received; and it was provided that said fund should be held to satisfy judgments obtained against the county for loss or damage, as aforesaid, and the payment thereof was to be made only upon the order of the county board.

The main contention of the parties is whether, under the law, a private abstract company has the right to make up a set of abstract books from the data obtained from the abstract books of the recorder. In the view that we take of this controversy it is not necessary to resort to common-law authorities or analogies, since it is one to be determined exclusively under the statutes above referred to. In the outset it is to be observed that the act of June 16, 1887, does not attempt to create a new office, but the duty in relation to keeping abstract books and making abstracts of title is added to the duties of the recorder. Original abstract books, whether made by the recorder or by a private individual, must be made from an examination of the original records kept in the various public offices in the county. Appellant admits, both in its bill and briefs, that any private person or corporation desiring to do so may make a set of abstract

books from the original sources of information. In its bill appellant avers that "it is perfectly practicable to make up from the records of instruments, and court and other records, a complete set of such abstract books or tract indices, in the same manner and by the same methods that the said recorder's abstract books have been made up, and every subsisting set of such abstract books or tract indices, whether in public or private hands, excepting those of defendants hereinafter named, have been so made up." It is conceded that the expense of making up a set of abstract books from the original sources of information would be five times the amount that it would cost to make such abstract books from the compiled data of the records. The supposed injury which is sought to be prevented by the injunction is the loss to the county in revenue which may result from competition if appellants are permitted to go into the abstract business with books made by copying those kept by the recorder. The logic of appellant's contention is that the recorder should enjoy a monopoly of the abstract business in Cook county, excepting in so far as his competitors might divide the business by the use of books made from the original records. There is no averment in the bill from which it may be assumed that, if appellees are enjoined from the use of the abstract books, they will not resort to the original records and make such abstract books therefrom. In fact, the bill shows that there are other sets of abstract books, whether few or many, that are in use in Cook county, and have thus been made from the original records. Presumably the only effect of granting the injunction in this case would be to compel appellees to resort to the original records, instead of the abstract books, for their material. The increased cost of compiling abstract books from the original records, which is suggested in the bill, would have no effect upon the competition with the recorder's office after such books were completed. If it had any effect, it would tend to increase the efforts of such competing abstract company, for the reason, upon appellant's showing here, it would have five times as much capital invested in its abstract plant, and therefore under the necessity of doing a larger business in order to make a profit. If appellant desired to increase the revenue of the recorder's office for the making of abstracts, then logically it ought to file a bill to enjoin all persons from making abstract books from the original records. If such a bill could be maintained, then the monopoly of the recorder would ultimately become complete, and that office would have entire control over the business of furnishing all abstracts of title; but, confessedly, 19 L.R.A. (N.S.)

this cannot be done. The right of any person to inspect and make memoranda from the original records, with a view of engaging in the furnishing of abstracts of title for compensation, is, as already indicated, an admitted fact upon the record of this case. Is there, then, any warrant in law for discriminating between the public records which the recorder keeps in connection with his abstract business and the original records from which these books were made?

Until the passage of the act of May 31, 1887, there was no statute purporting to give any person the right to examine any of the records in the recorder's office. The right existing prior to that time was only the right guaranteed by the common law. The extent and limitation of this right is not involved here. The act above referred to provides that "all records, indices, abstract and other books kept in the office of any recorder, and all instruments filed for record therein, . . . the recorders shall be bound to exhibit to those who wish to inspect or examine the same; and all persons shall have the right to take memoranda and abstracts thereof, without fee or reward." This statute enlarged the common-law right by extending it to all persons, regardless of whether such persons had a special interest, which was required as a basis of the right at common law. It will be noted that by this statute the right to inspect, examine, and take memoranda and abstracts therefrom extends to all the public records in the recorder's office, including the abstract and other books. We are wholly unable to differentiate between the right to inspect and examine and take memoranda and abstracts from abstract books and the other records required by law to be kept in the recorders' office. There is as much reason for granting the one as the other, and we are unable to see how it can be said, as appellant contends, that the law will freely permit the inspection and examination of all public records kept by the recorder, save and except only one particular record known as the "abstract book," and yet such appears to be the logic of appellant's bill.

The right to inspect records and make memoranda therefrom is limited to such records as the recorder is required by law to keep and as to these the right must necessarily be exercised subject to such reasonable regulations as the recorder sees proper to make for the orderly government of his office. There is no charge that appellees are not conforming to such regulations, if any have been made. In the view that we take of this case appellees are simply exercising the rights which they have under the statute of May 31, 1887, and the proviso in the act of June 10, 1887. This view of the case

renders it wholly unnecessary to discuss the right of appellant, in its capacity of taxpayer, to file this bill. On this question we do not find it necessary to express any opinion.

The judgment of the Appellate Court will be affirmed.

Carter, J., specially concurring:

I agree with the conclusion, but not in all that is said in the opinion.

Petition for rehearing denied December 2, 1908.

IOWA SUPREME COURT.

G. H. FRANCE, Admr., etc., of Jessie K. Little, Deceased, Appt.,
v.

FLORENCE MUNRO et al.

(— Iowa, —, 115 N. W. 577.)

Usury — broker's commission.

1. A usurious loan, by one, of money in his possession belonging to another, which he handles entirely according to his own judgment, cannot be freed from the usurious taint whether he bears to the owner the

Case Note. — Commissions charged borrower by lender's agent as usury.

The reported cases on this subject are not altogether in harmony. By the great weight of authority such commissions render the transaction usurious only when the lender participates in them, or has knowledge actual or constructive that his agent is making such charge. The lender may ratify his agent's acts; but it is generally held that bringing suit on a note in which the agent charged the borrower a commission does not constitute such ratification. Some cases, however, go farther, and hold the transaction usurious, even though knowledge of the agent's acts is not brought home to the lender.

The cases are by no means definite and clear as to just what charges the agent may, with the lender's knowledge and consent, make against the borrower without rendering the transaction usurious.

It has been held that a loan is not rendered usurious by the lender's agent charging the borrower, for his own benefit, a commission or bonus for procuring the loan, in excess of the highest legal rate of interest, where the commission was charged without the lender's knowledge or consent, and there were no circumstances to charge him with such knowledge; the court saying that, in making such charge, the agent was acting in his own individual capacity, for it will not be presumed that the lender authorized his agent to do an illegal act. This rule was adopted by a divided court in *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137, 19 L.R.A. (N.S.)

relation of debtor or that of attorney, by the device of calling himself in the papers the agent of the borrower, and designating the excess over legal interest commission for his services.

Evidence — varying written contracts — usury.

2. The rule against parol testimony to vary written contracts does not apply to usurious agreements.

(March 19, 1908.)

APPEAL by plaintiff from a judgment of the District Court for Polk County in his favor for a less amount than demanded in a proceeding to foreclose a mortgage. Affirmed.

Statement by Weaver, J.:

Action in equity to recover upon a promissory note and to foreclose a chattel mortgage. The defendants admitted the note, alleged usury in the consideration therefor, and pleaded partial payment. The trial court sustained the plea of usury, and after applying payments made, found plaintiff entitled to recover the remainder of \$50.50, and to a foreclosure of the mortgage to that extent. The plaintiff appeals.

Chief Justice Comstock writing a very strong dissenting opinion. This case was followed in *Bell v. Day*, 32 N. Y. 165, on the principle of *stare decisis*. And the same rule is applied in the following cases: *Friedman v. Bruner*, 25 Misc. 474, 54 N. Y. Supp. 997; *Van Wyck v. Watters*, 81 N. Y. 352; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379 (in which the court said: "It is not sufficient in this case for the defendants to show that the plaintiff knew of the usurious exaction after she had made the loan and the note had been given; she must have known of it at the time. Nor is it sufficient to show that she supposed that her agent was to receive some compensation for services which he rendered to the defendants"); *Call v. Palmer*, 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. Rep. 301; *Gokey v. Knapp*, 44 Iowa, 32; *Ammerman v. Ross*, 84 Iowa, 359, 51 N. W. 6; *Greenfield v. Monaghan*, 85 Iowa, 211, 52 N. W. 193; *Ballinger v. Bourland*, 87 Ill. 513, 29 Am. Rep. 69; *Cox v. Massachusetts Mut. L. Ins. Co.* 113 Ill. 382; *Haldeman v. Massachusetts Mut. L. Ins. Co.* 120 Ill. 390, 11 N. E. 526; *Abbott v. Stone*, 172 Ill. 634, 64 Am. St. Rep. 60, 50 N. E. 328; *Sherwood v. Haney*, 63 Ark. 249, 38 S. W. 15; *Short v. Pullen*, 63 Ark. 385, 38 S. W. 1113; *Sherwood v. Swift*, 64 Ark. 662 Appx., 43 S. W. 507; *Brainard v. Prouty*, 66 Minn. 343, 69 N. W. 3; *Williams v. Bryan*, 68 Tex. 593, 5 S. W. 401; *Carden v. Short* (Tex. Civ. App.) 31 S. W. 246; *Barger v. Taylor*, 30 Or. 228, 42 Pac. 615, 47 Pac. 618 (in

Mr. J. K. Macomber, for appellant:

An agent for another can receive from the borrower a commission for his services in procuring the loan and looking after the same.

Gokey v. Knapp, 44 Iowa, 32; Wyllis v. Ault, 46 Iowa, 46; Smith v. Wolf, 55 Iowa, 555, 8 N. W. 429; Greenfield v. Monaghan, 85 Iowa, 211, 52 N. W. 193; Ammerman v. Ross, 84 Iowa, 359, 51 N. W. 6; Barthell v. Jensen, 86 Iowa, 739, Appx., 53 N. W. 124; Richards v. Purdy, 90 Iowa, 502, 48 Am. St. Rep. 458, 58 N. W. 886; Weiser v. McKay, 51 Iowa, 417, 1 N. W. 603; Call v. Palmer, 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. Rep. 301.

Messrs. Brown & Dille, for appellees:

The relation that France bore to Jessie K. Little was that of debtor to creditor,

and the money loaned to appellees belonged to France.

Chappell v. Craig, 96 Iowa, 273, 65 N. W. 146; Richards v. Schreiber, C. & W. Co. 98 Iowa, 437, 67 N. W. 569; Smith v. Des Moines Nat. Bank, 107 Iowa, 628, 78 N. W. 238; Marine Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; School District v. First Nat. Bank, 102 Mass. 174; Com. v. McAlister, 28 Pa. 480; Shuford v. Ramsour, 63 N. C. 622; Cartmell v. Allard, 7 Bush, 482; Kimmel v. Bean, 68 Kan. 598, 64 L.R.A. 785, 104 Am. St. Rep. 415, 75 Pac. 1118.

Notice to the agent is notice to the principal.

Merrill v. Packer, 80 Iowa, 542, 45 N.

which it was held that the fact that the borrower, in previous transactions, had acted as agent of this lender, and had exacted commissions for the benefit of his principal, was not sufficient to establish knowledge on the part of the lender that his agent had exacted a commission in this case); McLean v. Camak, 97 Ga. 804, 25 S. E. 493; McCall v. Herrin, 118 Ga. 522, 45 S. E. 442; Muir v. Newark Sav. Inst. 16 N. J. Eq. 537; Conover v. Van Mater, 18 N. J. Eq. 481; Manning v. Young, 28 N. J. Eq. 568; Franzen v. Hammond (Wis.) 116 N. W. 169.

In *Brigham v. Myers*, 51 Iowa, 397, 33 Am. Rep. 140, 1 N. W. 613, the above rule was followed where a husband, as agent of his wife, loaned money, charging the borrower a commission in excess of the legal rate of interest, of which commission the wife never knew, nor did she authorize it; and the court held the loan was not usurious, though near relationship might authorize a finding that the unlawful act was authorized by the principal, upon slighter evidence than if the parties were strangers.

In *Estevez v. Purdy*, 66 N. Y. 446, the lender's agent charged the borrower a commission for procuring the loan in excess of the legal rate of interest, of which charge the lender never knew, nor did he authorize it, although the agent professed to take the commission for his principal, the court holding that the fact that the agent professed to act for the lender in exacting the commission did not render the transaction usurious if the lender did not know of his agent's acts at the time the loan was made, and did not ratify the same.

In *Philips v. Mackellar*, 92 N. Y. 34, plaintiff sought to recover on a bond and mortgage to which the defense of usury was pleaded, in that a premium, in addition to the legal rate of interest, was given to plaintiff's attorney and by him paid to the mortgagee; but it further appeared that the alleged premium was taken by the mortgagee, as he understood, because the security was not a first loan on the property in 19 L.R.A. (N.S.)

question; and, in reversing a judgment for the defendant, the court said that, as the contract was made by the plaintiffs attorney, the defense of usury was not established till the plaintiff was shown to have known or consented to his attorney's acts, or to have ratified the same.

In *Jordan v. Humphrey*, 31 Minn. 495, 18 N. W. 460, the assignee of the purchaser of property under a foreclosure sale sought to enjoin the mortgagor in possession from committing waste during the time allowed for redemption, the defense being usury in that the mortgagee's agent reserved a fee for searching title and a bonus for procuring the loan, the evidence seeming to show that the mortgagee never knew of, or consented to, such charge; and, in sending the case back for a new trial, the court said: "A bonus thus taken out by agents for their own benefit, and without any collusion with the lender, who neither authorizes nor ratifies the act, nor derives any benefit from it, is not presumptively a cover for usury on his part, and does not make the loan usurious. And receiving the mortgage and attempting to enforce it for the amount actually loaned, with lawful interest, does not amount to a ratification."

A transaction is rendered usurious in which the lender's agent charges the borrower a commission in excess of the legal rate of interest with the lender's knowledge, or under circumstances making him chargeable with such knowledge. *Demarest v. Vandenberg*, 41 N. J. Eq. 63, 3 Atl. 69 (in which the lender knew that his agent charged the commission, but received no part of it); *Pfenning v. Scholer*, 43 N. J. Eq. 15, 10 Atl. 833; *Brown v. Brown*, 38 S. C. 173, 17 S. E. 452 (in which the loan was negotiated by the general agent of the lender); *Land Mortg. Invest. & Agency Co. v. Gillan*, 49 S. C. 345, 26 S. E. 990; *New England Mortg. Secur. Co. v. Gay*, 33 Fed. 636 (writ of error dismissed in 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815); *Vahlberg v. Keaton*, 51 Ark. 534, 4 L.R.A. 402, 14 Am. St. Rep. 73, 11 S. W. 878.

W. 1076; *Slater v. Irwin*, 38 Iowa, 261; *Huff v. Farwell*, 67 Iowa, 298, 25 N. W. 252; *Delaware County Bank v. Duncombe*, 48 Iowa, 488; *Crumb v. Davis*, 54 Iowa, 25, 6 N. W. 53; *Shoemaker v. Smith*, 80 Iowa, 655, 45 N. W. 744.

Miss Little is charged by the circumstances with notice that her agent was exacting usury.

Vahlberg v. Keaton, 51 Ark. 534, 4 L.R.A. 465, 14 Am. St. Rep. 73, 11 S. W. 878; *Banks v. Flint*, 54 Ark. 40, 10 L.R.A. 464, 14 S. W. 769, 16 S. W. 477; *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 70; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Bell v. Day*, 32 N. Y. 165; *Ammondson v. Ryan*, 111 Ill. 506; *Fowler v. Equitable Trust Co.* 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; *Stein v. Swensen*, 46 Minn.

360, 24 Am. St. Rep. 234, 49 N. W. 55; *Borchertling v. Trefz*, 40 N. J. Eq. 502, 2 Atl. 369; *Thompson v. Ingram*, 51 Ark. 546, 11 S. W. 881; *McNeely v. Ford*, 103 Iowa, 508, 64 Am. St. Rep. 195, 72 N. W. 672.

Weaver, J., delivered the opinion of the court:

At the time of the loan in controversy the appellees, husband and wife, were in straitened circumstances, their household furniture and other personal property being encumbered by a mortgage, which was about to be foreclosed. Mrs. Munro applied for advice or assistance to their neighbor, Judge Miller, and he introduced her to the plaintiff, a money lender and broker. There appear to have been two interviews between the parties, the first being on August 10,

The circumstances necessary to charge the lender with knowledge of his agent's acts is a question of fact, and each case must be decided on its own merits.

In *Wyeth v. Braniff*, 84 N. Y. 628, it was held, in an action to set aside an assignment of a judgment to foreclose a mortgage, and also a sale thereunder, that the assignment, and consequently the sale, were usurious, inasmuch as the assignment was made in consideration that the mortgagor pay to the assignee's agent a bonus or commission for procuring payment of the mortgage debt; the court saying that, as there was no evidence that the assignee did not know of the commission, or that he did not participate in the same, he would be charged with his agent's acts. This case distinguishes the case of *Condit v. Baldwin*, *supra*.

In *Bliven v. Lydecker*, 130 N. Y. 102, 28 N. E. 625, reversing 55 Hun, 171, 7 N. Y. Supp. 867, a husband, as agent of his wife, loaned money on mortgage security, exacting of the borrower a bonus in excess of the legal rate of interest, apparently negotiating the loan for himself, though the mortgage was taken in the wife's name, and it seems the wife, who received the benefits of the transaction from year to year, was the real lender. The court held the transaction usurious, for, by accepting the benefits of the loan for so long, the wife was deemed to have ratified her agent's acts, and was charged therewith.

In *Braine v. Rosswoog*, 13 App. Div. 249, 42 N. Y. Supp. 1098 (appeal dismissed in 153 N. Y. 647, 47 N. E. 1105), it was held, where the lender's father acted as her agent, and charged the borrower a commission in excess of the legal rate of interest, that the transaction was usurious, although the borrower signed certain papers acknowledging that she retained the father as her agent; it further appearing that the father and daughter lived in the same house, the commissions going to support them both, so that the whole transaction showed a mere cover for usury.

In *Borchertling v. Trefz*, 40 N. J. Eq. 502, 19 L.R.A. (N.S.)

2 Atl. 369, a borrower paid to the lender's son, who also acted as agent of his father, one fourth the sum loaned, as a commission for procuring it; and the court, in following the general rule, said, the facts that the lender left the room just as the loan was about to be completed, the money paid, and securities transferred, and, as soon as he was out of sight, the commissions were paid to the son, would tend to show that the father did not want to know of the commissions; and he would be charged with knowledge of the same.

In *McFarland v. Carr*, 16 Wis. 259, it was held, where the lender's agent loaned money to a borrower on mortgage security, charging the borrower a certain bonus or commission for his services in obtaining the loan, which, in addition to the interest charged, made the rate in excess of the legal one, that the transaction was usurious; the inference from the existing circumstances seeming to be that the lender knew of his agent's acts, inasmuch as the agent testified that he always made loans under the direction of his principal, and, in this case, that the lender sent the money especially for this borrower.

In *Dayton v. Dearholt*, 85 Wis. 151, 55 N. W. 147, where the lender's agent charged the borrower a commission or bonus for procuring the loan in excess of the legal rate of interest, the court held that a finding of usury was proper; that the agency existing between the parties, being of long standing, together with their intimate relations, left little doubt that the lender knew of the commissions charged; it further appearing that there was evidence from which the jury might have found that the agent was the real lender.

In *Sherwood v. Roundtree*, 32 Fed. 113, it was held that the lender would be charged with knowledge of his agent's acts, and the transaction be held usurious, inasmuch as the business relations had existed between them for a long time.

In *Meers v. Stevens*, 106 Ill. 549, it was held, where the son, as agent of his father, loaned money to a borrower, charging a com-

1904, and the second on the following day, when the transaction was consummated. At first the plaintiff made some objection to the character of the security offered, but finally agreed to loan the appellees the sum of \$350. In closing the deal appellant prepared, and the appellees executed at the same time, and as a part of the same transaction, three separate documents. The first of these was the statement of the desire of appellees to procure a loan of \$363.50 on certain specified security, which statement was followed by a clause in the following form: "I authorize G. H. France, as agent for me, to negotiate for said loan, for which I agree to pay \$13.50 cash in hands as commission and interest. The lawful contract rate of interest that my note bears for the

payee above described time is to first be taken from the \$13.50 above described, and the remaining amount to go to G. H. France, my authorized agent, as commission or pay for his services for procuring the loan for me for said time, for examining the securities, the records of the county, writing the papers, collecting and paying over the money, and such additional work and trouble as he is required to do in procuring said loan."

The next paper was a promissory note for the sum of \$363.50, payable one month after date to J. K. Little, or bearer, with interest at 8 per cent per annum at appellant's office in Des Moines. Payment of this note was secured by the third of the papers mentioned, a chattel mortgage on a list of house-

mission in excess of the legal rate of interest, also charging for certain extensions, that the loan was usurious, the lender not denying in fact that he knew such charge had been made; the court seeming to think the whole matter was a family arrangement to cover usury under the guise of commissions.

A loan was held usurious in which the lender's agent, in addition to the highest legal rate of interest, exacted of the borrower a bonus or commission for his own benefit, by virtue of an agreement between himself and the lender that he would look to the borrower for his compensation. *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Thompson v. Ingram*, 51 Ark. 546, 11 S. W. 881; *Fowler v. Equitable Trust Co.* 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1, followed with approval in 141 U. S. 408, 35 L. ed. 793, 12 Sup. Ct. Rep. 7; *Ammondson v. Ryan*, 111 Ill. 506; *Texas Loan Agency v. Hunter*, 13 Tex. Civ. App. 402, 35 S. W. 399.

In *Payne v. Henderson*, 106 Ky. 135, 50 S. W. 34, it was held that a commission charged the borrower by the lender's agent might be recovered back as usury; the court saying that the lender must have known that her agent was being paid by the borrower, inasmuch as she herself did not pay him.

In *Clarke v. Havard*, 111 Ga. 242, 51 L.R.A. 499, 36 S. E. 837, an agent of the lender loaned money to the borrower, charging a commission in addition to the legal rate of interest. The court held the loan usurious if it was established that the lender intended to give his agent no compensation for making the loan, and the circumstances were such as to charge the lender with actual or constructive notice that his agent charged such commissions.

In the following cases it has been held, that a loan was rendered usurious, where the lender's general agent, vested with full power to loan and collect his principal's money, exercising his own discretion therein, exacted from the borrower a commission in excess of the legal rate of interest, it being presumed that the lender authorized such charge. In most of these cases an understanding existed between the lender and his agent that the agent might make all he could out of the

loans. This presumption, however, is generally treated as one of fact, and may be rebutted. *Avery v. Creigh*, 35 Minn. 456, 29 N. W. 154; *Lewis v. Willoughby*, 43 Minn. 307, 45 N. W. 439 (in which the bonus was included in the securities, and, the mortgagor having given no evidence as to his knowledge or consent to such charge, the court said, as a matter of law, the lender would be charged with his agent's acts); *Adamson v. Wiggins*, 45 Minn. 448, 48 N. W. 185 (in which the court said: "The bonus was included in the note, and presumptively the agent was authorized by the plaintiff to so include it"); *Hall v. Maudlin*, 58 Minn. 137, 49 Am. St. Rep. 492, 59 N. W. 985; *Horkan v. Nesbitt*, 58 Minn. 487, 60 N. W. 132; *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55; *Hawkins v. Sauby*, 48 Minn. 69, 60 N. W. 1015.

In *Austin v. Harrington*, 28 Vt. 130, it was held, where a general agent of the lender, in consideration of procuring the loan, charged the borrower a price in excess of their true value, for a span of horses, the loan was usurious, although the lender had no knowledge of such charge; her knowledge being presumed from the fact that the loan was made by her general agent, who was also her son.

In *Rogers v. Buckingham*, 33 Conn. 81, a general agent of the lender lent money to a borrower, charging a commission or bonus in excess of the legal rate of interest, it appearing that the lender had no knowledge of such charge; but, upon the death of the agent, the additional sum was paid each subsequent year to the agent's representative, and the court held the loan usurious from the date of the agent's death, inasmuch as there was no evidence that the lender did not then know of the charge; but before this time the knowledge could only be presumed from the general agency, which in this case was rebutted.

In *McNeely v. Ford*, 103 Iowa, 508, 64 Am. St. Rep. 195, 72 N. W. 672, a husband acting as his wife's agent loaned money, charging the borrower a commission in excess of the legal rate of interest; and the court held the loan usurious inasmuch as the wife left

hold furniture, silverware, and glassware. The testimony of the appellees, corroborated by that of Judge Miller, is to the effect that during these negotiations appellant made no claim to be acting as agent for another or otherwise than in his own right. According to the statements of these witnesses, appellant said to them that he could not lend the money at 8 per cent, but must have \$12.50 per month instead, payable monthly, but mentioned nothing about commission. These terms having been agreed to, the papers were made out, and appellant paid over to Mrs. Munro, or to Judge Miller for her, the sum of \$350. Miller did not read the papers, and Mrs. Munro, who conducted the business for appellees, signed them, as she says, without reading them, and without

hearing them read, assuming them to be all right, as she was assured by the appellant; and it was not until a considerably later date that appellees or Judge Miller became aware that appellant, claimed to have been acting as an agent only, and that the written evidences of the transaction had been made to indicate a third person as the real party in interest. It is true appellant testified that he informed the appellees that he was acting as agent for J. K. Little, and that the excess which he charged over the lawful rate of interest was his commission for procuring the loan; but in this a decided preponderance of the testimony is against him. Though the note is made payable in one month, it is very clear from the evidence that there was no expectation on

all the business to her husband, authorizing him to make whatever terms he could; and, having ratified his acts by suing upon the note in which were included the commissions, she was then charged with his acts.

In *Western Storage & Warehouse Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917, it was held, where the lender's agent charged the borrower a commission for procuring the loan in excess of the legal rate of interest, that the transaction was usurious whether the lender knew of the charge or not, the agent having been given full authority, at his discretion, to make loans. But the doctrine of this case was questioned in the concurring opinion in *Little v. Hooker Steam Pump Co.* 122 Mo. App. 620, 100 S. W. 561, where the general agent of the lender lent money charging the borrower a commission in excess of the legal rate of interest, the loan being held usurious, although the lender had no knowledge that such commission had been charged; a statute providing that a party exacting usurious interest cannot recover more than the principal and interest at the legal rate, after deducting all payments of usurious interest, whether paid as commissions or as interest.

In *Stein v. Swensen*, 44 Minn. 218, 46 N. W. 360, a general agent exacted a commission of the borrower for making the loan, in excess of the legal rate of interest, and a like commission for making extensions which latter commissions the evidence showed were unreasonable; and, in sending the case back for a new trial, the court said: "But, in the absence of proof to the contrary, the acts of a general agent in making such loans may be presumed, as a matter of fact, to have been authorized by the principal."

In *Stephens v. Olson*, 62 Minn. 295, 64 N. W. 898, a note, made by the cashier of the lender's private bank was held usurious because the cashier charged the borrower a commission in excess of the legal rate of interest and included the same in the note, although the lender had instructed his cashier, who was also his general agent, to make no charge in excess of the legal rate of interest, and had no knowledge that such charge had been made until the note fell due; it al-

so appearing that the agent did not assume to charge the commission for himself, but for his principal.

In *Robinson v. Blaker*, 85 Minn. 242, 89 Am. St. Rep. 541, 88 N. W. 845, money was loaned by an agent, who charged a commission in addition to the highest legal rate of interest, the lender not having authorized such charge, and knowing nothing about it. The agent was not a general agent; but the court held such transaction usurious, inasmuch as the lender knew the amount to be loaned, and who the borrower would be, and gave his agent authority to make the loan, he thereby being charged with his agent's acts; the court saying that there was no magic charm about the term "general agent."

By the great weight of authority, the burden of proof is upon the borrower to show that the lender knew, or was chargeable with knowledge, that his agent exacted a commission from the borrower in excess of the legal rate of interest. *Friedman v. Bruner*, 25 Misc. 474, 54 N. Y. Supp. 997; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379; *Ammerman v. Ross*, 84 Iowa, 359, 51 N. W. 6; *Jordan v. Humphrey*, 31 Minn. 495, 18 N. W. 450; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Olmsted v. New England Mortg. Secur. Co.* 11 Neb. 487, 9 N. W. 650.

It has been held, where the lender's agent had general authority to make loans at his own discretion, that the burden of proof was upon the lender to overcome the presumption that he knew of, or consented to, his agent's charging the borrower a commission in excess of the legal rate of interest. *Lewis v. Willoughby*, supra; *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55 (in which, in effect, the above rule was followed, though the court did not expressly say that the burden of proof was upon the lender); *Hawkins v. Sauby*, supra.

In the following cases it has been held, where a lender places funds in his agent's hands to loan, that the principal is bound by his agent's acts; and, if the agent charges the borrower a commission or bonus in excess of the legal rate of interest for procuring the loan, the transaction will be usurious, although he appropriates the same to

part of either that it would be paid when due. At the end of the month, and at the end of each succeeding month thereafter down to and including September, 1906 (with one or two slight variations in the regularity of dates and amounts), Mrs. Munro paid or sent to the plaintiff the sum of \$12.50, and at the time of each payment, or very soon thereafter, appellant prepared and obtained her signature to a paper in one of the following forms; the date of the period of extension being varied according to the date of the payment made, but on no occasion was the extension for more than one month:

G. H. France, Loan Broker,
Des Moines, Iowa.

This is to certify that I owe on my note of \$363.50, made and executed by me August 11, 1904, in favor of J. K. Little, which note matured September 11, 1904, \$363.50; that I have paid to apply on the principal no dollars; that what payments I have made to G. H. France from time to time, including payment made this day, have been made to him as commission or pay for his services as my authorized agent to procure loan and extension of time on same to February 11, 1905, for examining the records and securities at such time

as he might deem proper, and such additional work as he has been required to do in procuring said loan and extension of time for me to said date, and interest due to said payee at 8 per cent per annum; that I have no claim or defense against said note, and will pay the same in full when due; that no part of the money paid is to apply on the debt due payee, except as described above.

Mrs. W. D. Munro.

G. H. France, Loan Broker,
Des Moines, Iowa.

I desire an extension of time on my note of \$363.50, made and executed by me August 11, 1904, in favor of J. K. Little, which note matured September 11, 1904. I authorize G. H. France, as agent for me, to negotiate for said extension of time to October 11, 1904, for which I agree to pay \$12.50 as commission and interest. The annual rate of interest that my note bears for the payee for the above-described time is to be first taken from the \$— above described, and the remaining amount to go to G. H. France, my authorized agent, as commission or pay for his services for attending to said loan for me for said time, for re-examining the records and the securities at such times as he may deem proper, and such additional work as he is required to do in procuring said ex-

his own use, whether with or without his principal's knowledge and consent. In many of these cases the borrower signed application blanks prepared by the lender, in which the borrower made the lender's agent his own agent for procuring the loan; but the courts held that such papers did not constitute the agent an agent of the borrower, where evidence showed that such arrangement was a mere cover for usury. *Cheney v. White*, 5 Neb. 261, 25 Am. Rep. 487; *Cheney v. Woodruff*, 6 Neb. 151; *Cheney v. Ebehardt*, 8 Neb. 423, 1 N. W. 197; *Olmsted v. New England Mortg. Secur. Co. supra*; *Courtney v. Price*, 12 Neb. 188, 10 N. W. 698; *New England Mortg. Secur. Co. v. Hendrickson*, 13 Neb. 157, 12 N. W. 916; *Joslin v. Miller*, 14 Neb. 91, 15 N. W. 214; *Anderson v. Vallery*, 39 Neb. 626, 58 N. W. 191; *Hare v. Hooper*, 56 Neb. 480, 76 N. W. 1055.

In *Hare v. Winterer*, 64 Neb. 551, 90 N. W. 544, the lender, residing in New York, loaned money through his agent in Nebraska, who charged the borrower a commission in excess of the legal rate of interest; and the court sustained a finding of usury on the ground that, where one through whose agent a loan is negotiated renders valuable services to the lender, and there is no reason to suppose that such services are gratuitous, the court or jury will ordinarily be justified in presuming that the lender knew the borrower had been required to pay for such services.

Most of the cases thus far cited have turned upon the question as to the effect of 19 L.R.A. (N.S.)

the lender's knowledge or ignorance of the charges exacted by his agent from the borrower; and there is comparatively little direct authority upon the question as to what charges the lender's agent may make, with his knowledge and authority, without rendering the transaction usurious.

It has been held, however, that the lender's agent may, with his principal's knowledge and consent, receive from the borrower a reasonable compensation for examining securities, making abstracts of title when the loan is secured by mortgage, etc., without rendering the transaction usurious. *Ammondson v. Ryan*, 111 Ill. 506 (expressly holding that a reasonable charge may not render the loan usurious, though made with the lender's knowledge); *Sanders v. Nicolson*, 101 Ga. 739, 28 S. E. 976; *McCall v. Herrin*, 118 Ga. 522, 45 S. E. 442; *Thomas v. Miller*, 39 Minn. 339, 40 N. W. 358; *Landis v. Saxton*, 89 Mo. 380, 1 S. W. 359; *New England Mortg. Secur. Co. v. Gay*, 33 Fed. 636.

In *Acheson v. Chase*, 28 Minn. 211, 9 N. W. 734, a lender authorized his agent to loan money, charging the borrower a reasonable compensation for making the loan; and it was held, where such agent charged the borrower an unreasonable sum, that the loan was not thereby rendered usurious, for it was proper for the agent to charge the borrower a reasonable sum for services rendered, and in charging an unreasonable sum, of which the lender had no knowledge, the

tension of time for me. I still owe to the payee on said note \$363.50. I have no claim or defense against said note, and will pay the same in full when due.

Florence A. Munro.

The payments thus made amounted to \$303.50, or, if we included the sum deducted in advance, they aggregated \$317. Appellant's explanation of these transactions and of his own manner of doing business is substantially as follows: He says that the payee named in the note was his niece, who resided in Wisconsin, and whose money he had been handling and investing in Iowa since the year 1893. Miss Little has since died, and appellant is the duly appointed administrator of her estate in Wisconsin. During all of the period named he held Miss Little's power of attorney to make loans and to make and enforce collections due her in this state. Indeed, the money in appellant's hands, or a large part thereof, appears to have originally belonged to his father (Miss Little's grandfather) for whom he was handling and loaning it out in this state. On the death of his father the money descended to his sister, and upon her death to Miss Little. During this long period, and through all of these changes in ownership, the fund remained in the possession and immediate control of the appellant, and he made loans

therefrom according to his own judgment. He alone passed upon the sufficiency of the security taken, and, so far as appears, none of the loans taken by him were ever submitted to her for approval. When the balance of cash on hand belonging to his niece was insufficient to make the desired loan, he sometimes supplemented it with his own money. At other times he admits having loaned his own money and taken the securities in Miss Little's name, and that \$3,000 or \$4,000 of such loans were outstanding, or at least uncanceled of record, at the time of her death. As administrator he had listed the note in suit as belonging to the estate; but there were other outstanding mortgages taken by him in her name which he did not so list. It is a significant fact that appellant professed to be unable to produce any of the correspondence between himself and his niece or any books showing his account with her prior to the year 1904, the year in which this loan was made. The account shown of dealings since that date and appellant's statement as a witness indicates that he kept a book account with her in which she was credited with moneys received and collections made, and charged with loans made from her funds and with moneys sent by him to her. The collections made were kept and cared for by him, except small sums remitted occasionally, as she might

agent was not acting as the agent of the lender, but for himself.

In *Mackey v. Winkler*, 35 Minn. 513, 29 N. W. 337, a loan broker had made a loan to defendant of plaintiff's money, which he was authorized to loan, charging, in addition to the highest legal rate of interest, a commission for making the loan; and the court held that the loan was not usurious, the lender neither having knowledge of, nor in any manner consenting to, such commission, which was a reasonable one for the services performed.

In *Avery v. Creigh*, 35 Minn. 456, 29 N. W. 154, *Borcherling v. Trefz*, 40 N. J. Eq. 502, 2 Atl. 369, and *Pfenning v. Scholer*, 43 N. J. Eq. 15, 10 Atl. 833, the transactions were held usurious; but the doctrine was apparently recognized that the lender's agent might charge the borrower a reasonable sum for services without rendering the transaction usurious, although the lender was aware of such charge.

In *Stein v. Swensen*, supra, the lender's agent charged the borrower a commission for procuring the loan in excess of the legal rate of interest, and, in reversing the judgment of the lower court for error in excluding certain evidence, the court said that because the agent charged the borrower an unreasonable compensation for services does not, of itself, render the transaction usurious; but the unreasonableness is of greater or less weight to show that such amount was taken, in part, at least, as compensation for the use of the money.

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In *Courtney v. Price*, supra, the lender's agent charged the borrower a commission of 5 per cent for procuring the loan, in excess of the legal rate of interest, and retained another 5 per cent for drafting papers, etc.; and the court held the loan usurious as to the 5 per cent commission, although the lender had no knowledge of such charge; but did not say whether the 5 per cent charge for drafting papers was usurious or not.

In *Williams v. Bryan*, 68 Tex. 593, 5 S. W. 401, the lender's agent charged the borrower a commission for procuring the loan in excess of the legal rate of interest; and the court held that the loan was not usurious, as the principal never knew of such charge; and further said: "Whether, in a transaction of this character, a payment by the borrower to the agent of the lender of a fair compensation for his services in effecting the loan, though with the knowledge and consent of the latter, should in any case be held to make the contract usurious, may be doubted."

In *Ridgeway v. Davenport*, 37 Wash. 134, 79 Pac. 606, it was held that, where an agent of the lender charged the borrower a commission in excess of the legal rate of interest, the loan was usurious, although the lender never authorized such charge, nor had knowledge of it; a statute forbidding interest in excess of 12 per cent, either directly or indirectly, and providing that the principal shall be held for the acts of any person contracting therefor.

need. So far as shown, she had no more actual knowledge of the individual loans, and exercised no more judgment or choice in relation thereto, than a perfect stranger to the transactions. It was wholly left to the appellant to exercise his own judgment and discretion and to protect her interests as he might deem wise or best, and, so far as the record shows, she did not undertake to pay him any compensation for his services, unless we may infer from the situation that he was to receive his profit in what he could obtain from borrowers in excess of the lawful interest charged. In short, if we give full credit to everything he says, he occupied the relation of attorney and personal representative of his niece, and his acts with reference thereto were her acts. If there be any alternative conclusion from the conceded facts, it is that as to the money placed in his hands by her the uncle and niece stood in the relation of debtor and creditor. Accepting either conclusion, the result is the same. If the latter were their true relation, the appellant, in making the loan, though taking the securities in her name, was acting in his own right, and his exaction of the equivalent of more than 40 per cent interest was usury. If, as claimed, he occupied a more intimate and fiduciary relation of attorney and personal representative, and made the loan for and in her behalf, prescribing its terms, passing upon the security offered, and doing all things with reference thereto which she might have done if personally present, he was her *alter ego* in the transaction, and his exaction of the exorbitant rate was her exaction. Either result reveals the taint of usury. It is no answer to say that this conclusion involves a disregard of the rule against parol testimony to vary the terms of a written contract. The game of hide and seek between the usurer and the law is not the product of recent evolution, and the rule has long been settled that, as in case of fraud in general, the rule referred to will not be allowed to exclude proof of the true nature of a contract into which the usurer is alleged to have entered. *Seekel v. Norman*, 71 Iowa, 264, 32 N. W. 334; *Train v. Collins*, 2 Pick. 145; *Scott v. Lloyd*, 9 Pet. 418, 9 L. ed. 178. Says the Minnesota court: "All that is required to establish a case of usury is a fair preponderance of the evidence, and there is no device or shift on the part of the lender to evade the statute under or behind which the law will not look for the purpose of ascertaining the real character of the transaction." *Phelps v. Montgomery*, 60 Minn. 303, 62 N. W. 260.

As is well known, perhaps the most frequent device employed to effect usury is through the use of the name of some person-

al or family friend for whom the lender acts as ostensible agent; and all of the excess which can be exacted from the distress or recklessness of the borrower is sought to be accounted for as "commission." The ease with which this fraud is practised requires that courts scrutinize with care business dealings presenting such phases to see that the law is not evaded. It should not, however, be permitted to place the brand of illegality upon the conduct of one who acts in good faith as the agent of the borrower in securing for him a loan of money for which he charges and receives a reasonable compensation. Such transactions, when exhibiting no evidence of being a mere scheme to conceal usury, have often been upheld in our decisions. *Gokey v. Knapp*, 44 Iowa, 32; *Greenfield v. Monaghan*, 85 Iowa, 211, 52 N. W. 193; *Richards v. Purdy*, 90 Iowa, 502, 48 Am. St. Rep. 458, 58 N. W. 886, and other cases cited in the decisions here referred to. But the case at bar differs very radically from these and other precedents cited in behalf of the appellant. It comes much more nearly within the rule applied by this court in *McNeely v. Ford*, 103 Iowa, 508, 64 Am. St. Rep. 195, 72 N. W. 672. There the borrower, desiring a loan, applied to one McNeely, who furnished him \$600, and took from him his promissory note payable to McNeely's wife for \$642, bearing the highest legal rate of interest from date. The excess was embodied in the note, and the borrower testified that it was for additional interest; but McNeely claimed that it was simply his commission as agent for procuring the loan. When the note became due the time of payment was extended, and an additional payment was exacted in excess of the legal rate. It was shown upon the trial that the husband did have money belonging to the wife, which she trusted him to manage and lend in her name at his discretion, and that he invested it as best he could, and did not consult her as to the terms of loans so made. Upon this showing, we said there was "no doubt that in this transaction McNeely acted solely as agent for his wife, and was not entitled to any commission from the defendant for effecting the loan, and that the several amounts added to the notes over and above the amount received by the defendant were usurious." Directly in point is the case of *Hall v. Maudlin*, 58 Minn. 137, 49 Am. St. Rep. 492, 59 N. W. 985. There, as here, a nonresident left money in the hands of one Evarts, a resident agent, to whom he gave full power to invest it according to his best judgment. Stating the case, the court says: "He took no part in the business himself, but left everything to the sole discretion of Evarts, who never consulted him, but loaned money when, to whom, and upon

such terms as he saw fit, and, when it was repaid, loaned it again as he pleased. Everts's general mode of doing business was to charge the borrowers, in addition to the interest provided for in the note, a bonus or commission. . . . There is no evidence that plaintiff gave Everts any express authority to charge more than the legal rate of interest, and no direct evidence that he knew that he was doing so; but it does appear that he paid Everts nothing for his services, and that the understanding between them was that he 'would get his commissions out of the charges, that whatever he realized from the business would be from commissions that people would pay him for getting the money for them.' . . . When the loan was made to the defendants, Everts, in accordance with his usual custom, retained out of the amount loaned \$25, giving the defendants only \$225. It is idle to claim from the evidence that Everts was in this transaction a loan broker, or in any sense the agent of defendants. He was acting solely as the agent of plaintiff, and performed no services beyond what any lender would do in his own behalf. . . . If the business had been conducted by plaintiff personally, no one would question the usurious character of the transaction. No one would claim that, where a man is lending his own money, he can charge to the borrower, in addition to the maximum legal rate of interest, all the expenses of transacting his own business, including compensation for his own services in attending to it. But, if he can cast all this burden upon the borrowers by merely turning over the business to a general agent, there would be very little left of the statute against usury. . . . Where the lender thus places his business under the exclusive and unlimited control of a general agent, if the agent exacts usury, the case stands precisely as if it had been done by the principal personally, and such an agent has no right to exact from the borrower, either for alleged services or otherwise, anything which the principal might not have lawfully exacted had he transacted the business in person." In all essential particulars the facts here stated parallel the facts in the case at bar, and we are content to follow the rule there announced as eminently righteous and just. To the same general effect, see *Dayton v. Dearholt*, 85 Wis. 151, 55 N. W. 147; *Horkan v. Nesbitt*, 58 Minn. 487, 60 N. W. 132; *Kemmitt v. Adamson*, 44 Minn. 121, 46 N. W. 327; *Banks v. Flint*, 54 Ark. 40, 10 L.R.A. 459, 14 S. W. 769, 16 S. W. 477; *Fowler v. Equitable Trust Co.* 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; *Olmsted v. New England Mortg. Secur. Co.* 11 Neb. 487, 9 S. W. 650; *Pfenning v. Scholer*, 43 N. J. 19 L.R.A. (N.S.)

Eq. 15, 10 Atl. 833; *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Cheney v. White*, 5 Neb. 261, 25 Am. Rep. 487; *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55; *Note to Bank of Newport v. Cook*, 46 Am. St. Rep. 198; *Dade v. Spalding*, 52 Minn. 356, 54 N. W. 591.

It is not necessary to go to the extent of some of these decisions to support our conclusions in the present case; but we cite them to show the general tendency of the courts to penetrate the masks under which evasions of usury laws habitually hide, and to say that contracts so tainted shall be enforced no further than the statute permits. In *Dade v. Spalding*, supra, the circumstances of the loan by an alleged agent with the exaction of a bonus or commission at the outset, and for each monthly extension, and the careful procurement of a written statement from the borrower with each monthly renewal, were after the manner or plan pursued by the appellant herein. Upon this showing, Mr. Justice Mitchell very aptly observed: "The formalities and contrivances resorted to to clothe the transaction on Hoffman's part with the appearance of that of an agent were so unusual and yet so transparent as to fully warrant the jury in concluding that he, and not Webster, who never once appeared either in the transaction or on the trial, was the real principal. If transparent contrivances of this sort to evade the statute should prove effectual, the administration of the law would fall into deserved disrepute. We never met with a case where the maxim 'that unusual clauses always excite suspicion' was more applicable." It would be hard to imagine a case to which that animadversion could be more fitly directed than the one here presented. The workmanship of the plan employed is entirely too elaborate and artistic to be the natural accompaniment of an ordinary business transaction, in which there is nothing to conceal.

That the trial court reached the correct conclusion is not open to any reasonable doubt.

The judgment appealed from is affirmed.

WISCONSIN SUPREME COURT.

FERDINAND FRANZEN et al., Appts.,
v.

MARTHA M. HAMMOND, Respt.

(— Wis. —, 116 N. W. 169.)

Usury — knowledge of lender.

1. There is no conclusive presumption that a mother knew that her son, in investing her money for her without compensation,

was securing compensation for his services from the borrower.

Same—agent's bonus.

2. A loan is not rendered usurious by the fact that the agent of the lender, without his knowledge or consent, exacts from the borrower a bonus for his service in addition to the highest legal rate of interest, which the contract reserves for the benefit of the lender.

Same — enforcement of contract — knowledge.

3. The attempt by a principal to enforce a loan contract made by an agent on his behalf which covers the exact amount of money loaned and shows on its face that the loan was legitimate does not render the contract usurious, although he has obtained knowledge that the agent retained from the loan, solely for his own benefit, a sum which, added to the rate of interest reserved, would be usurious.

(May 8, 1906.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Brown County in defendant's favor in an action brought to cancel a mortgage alleged to be invalid for usury. Affirmed.

Statement by Marshall, J.:

Action to set aside and cancel a mortgage on the ground that the same was tainted with usury and before the commencement of the action plaintiffs duly tendered to the defendant the entire sum to which she was entitled. The issues were decided thus: April 14, 1905, plaintiffs gave defendant their note secured by mortgage for \$790, due one year from date with 8 per cent interest per annum. April 30, 1906, plaintiffs duly tendered in payment of said note \$750, and demanded a satisfaction of the mortgage. The loan was made through a son of defendant, who had authority to make loans for her and draw checks therefor on her bank account. He received no compensation from her for his services and was responsible for all loans he made. He took from plaintiffs the note and mortgage in question for the defendant, giving two checks on her account signed by him as agent, one for \$750, and one for \$40, the last of which was duly indorsed and given back to the agent. She had no further knowledge of the transaction than that her son accounted to her for \$790, drawn from her bank account, by delivering the note and mortgage. She did not make or authorize an usurious contract.

Note. — As to whether commissions charged by lender's agent will characterize the loan as usurious, see case note to *France v. Munro*, ante, 391. 19 L.R.A. (N.S.)

Upon such facts, the conclusion was reached that plaintiffs were not entitled to recover. Judgment was entered accordingly in defendant's favor.

Mr. Max H. Strehlow, with Mr. O. G. Erickson, for appellants.

Mr. Orlando E. Clark, for respondent:

To constitute usury there must be an intention on the part of the lender to contract for or take usurious interest, or authority to an agent to take, or knowledge that the agent is taking, such for the benefit of the lender.

Call v. Palmer, 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. Rep. 301; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 144; *Bank of Newport v. Cook*, 46 Am. St. Rep. 197, note; *Fay v. Lovejoy*, 20 Wis. 407; 29 Am. & Eng. Enc. Law, 2d ed. p. 463; *Greenfield v. Monaghan*, 85 Iowa, 211, 52 N. W. 193; *Acheson v. Chase*, 28 Minn. 211, 9 N. W. 734.

The rule is not affected by the fact that the relation between principal and agent is that of parent and child.

29 Am. & Eng. Enc. Law, 2d ed. p. 503; *Brigham v. Myers*, 51 Iowa, 397, 33 Am. Rep. 140, 1 N. W. 613.

The authority to loan money does not, by implication, include authority to loan it at an illegal rate.

Gokey v. Knapp, 44 Iowa, 32.

The burden of proof is on the one alleging usury.

Abbott v. Stone, 172 Ill. 634, 64 Am. St. Rep. 60, 50 N. E. 328.

Marshall, J., delivered the opinion of the court:

We are unable to discover any warrant for disturbing the findings of fact. The only question raised in regard thereto is whether respondent knew her son exacted from the borrower a sum of money in addition to lawful interest for the loan, and retained the same as compensation for his services. The direct evidence is to the effect that she had no such knowledge; but the claim is made that, from the circumstance of the agent not receiving compensation from the lender, a presumption arises that she knew he received such from the borrower; and many authorities are cited to that effect. None of them hold that such circumstance is more than evidentiary. Where it is of such probative character as to create a presumption of knowledge, it is subject to be rebutted as it was sufficiently in this case to warrant the finding. Because of the relationship existing between respondent and her agent, he being her son, it was most natural that she did not expect

to pay him any pecuniary consideration for his services, nor suspect that he would receive any secret benefit from handling her money; that she trusted him to conduct her business in consideration of their relationship.

Rogers v. Buckingham, 33 Conn. 81, is a good illustration of many cases that might be cited supporting the suggestion that the presumption referred to, when it arises, is merely one of fact which yields readily to evidence showing the contrary. The court said: "It may be presumed, where the agency is general, and embraces the business of making, managing, and collecting the loans of a moneyed man," and he makes an usurious loan, that it was authorized by the lender. "But it is a presumption of fact, and may be rebutted."

The presumption did arise in that case; but it was held rebutted by circumstances authorizing a finding that the action of the agent was unauthorized, and that the exaction of the excessive amount for the use of the money was for his benefit only, and must have been so understood by the borrower.

It is useless to review the many cases cited where it has been held that in case of the exaction of a bonus by the agent of the lender, which, with the interest charged, exceeded the lawful rate of interest, the transaction was usurious. None of them involved exactly such circumstances as characterized this case. In substance, all of the excessive exactions, though ostensibly as commissions, were in fact cloaks for the real purpose of obtaining more than legal interest for the money.

The proposition submitted here is this: If a person intrusts another with money to loan, and such other loans the same, charging and receiving from the borrower a sum of money in addition to legal interest as compensation for his services, but without any direction by, or knowledge of, the lender, is the contract between the lender and borrower tainted with usury?

The cases cited to our attention to support the affirmative do not seem to be in point. In *Kemmitt v. Adamson*, 44 Minn. 121, 46 N. W. 327, the lender actually participated in the transaction. In *Avery v. Creigh*, 35 Minn. 456, 29 N. W. 154, the agent was expressly authorized to make all he could for himself out of the borrower, and, pursuant thereto, he charged and received a sum in excess of a reasonable commission. In *Joslin v. Miller*, 14 Neb. 91, 15 N. W. 214, the agent and the lender shared in the exaction which in the whole, added to the interest agreed upon in the note, was excessive. In *Stephens v. Olson*, 62 Minn. 295, 64 N. W. 898, the principal had the

benefit, though without his knowledge, of the excessive charge. It was included in the note, and the lender, after learning of the fact, ratified the agent's act by insisting upon payment of the note as written. In *Meers v. Stevens*, 106 Ill. 549, it was found as a fact that the transactions of the agent were resorted to for the very purpose of circumventing the usury law.

All the other cases referred to by appellants' counsel outside of this state are similar to those we have mentioned, except *Austin v. Harrington*, 28 Vt. 130, and one or two others of that class, holding that, where one makes another a general agent for the loaning of money, he is bound by all such other does within the apparent scope of the agency, though he has no knowledge thereof; and that such apparent scope includes the charging of a commission so large as to render the contract usurious. There are two lines of cases on the subject, one holding that the making of usurious loans is not within the apparent scope of a general agency to loan money; and it seems that such is the better rule. The following belong to such class: *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Estevez v. Purdy*, 66 N. Y. 446; *Rogers v. Buckingham*, 33 Conn. 81; *Gokey v. Knapp*, 44 Iowa, 33; *Muir v. Newark Sav. Inst.* 16 N. J. Eq. 537; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Manning v. Young*, 28 N. J. Eq. 568; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379; *Baldwin v. Doying*, 114 N. Y. 452, 21 N. E. 1007.

The rule laid down in *Condit v. Baldwin*, supra, is followed in all of the cases cited, and, with few exceptions, has been adopted by the courts of this country. It is stated thus: If "an agent intrusted with money to invest at legal interest" exacts "a bonus for himself as the condition of making a loan, without the knowledge or authority of his principal," such circumstance does "not constitute usury in the principal, nor affect the security in his hands." The court said, in effect, that it is only where the agent or the lender takes a sum in excess of legal interest under such circumstances that the sum so taken can be considered as obtained in whole or in part for the lender that the contract is tainted with usury, and, even in that case, it is not so tainted unless the lender knows of the taking and ratifies it; that, when the sum taken is for the agent exclusively and so understood by the borrower, there is no taint of usury; that acceptance of the note by the lender and assertion of a right to recover thereon according to its terms, only ratifies the contract as expressed in the paper.

The doctrine above stated seems to be sound. It is not within the apparent scope

of a legitimate business agency to violate the law. So, where an agent loans money, exacting a bonus for himself, the presumption is rather that it is without the knowledge of the principal than with such knowledge. It logically follows that the circumstance of a principal accepting securities from his agent covering the exact amount of money loaned and showing on their face that the loan was legitimate, and insisting upon enforcing the same after obtaining knowledge of the excess the agent charged solely for his own benefit, does not make the transaction, as to the lender, usurious. A very large array of authority to that effect is found cited to the text of Webb on Usury, at § 93, and Tyler on Usury, at page 170.

The latter author, after reviewing the authorities, and particularly *Austin v. Harrington*, supra,—one of the few cases out of harmony with the foregoing,—said: "The doctrine is well settled, and universally recognized, that an agent may lawfully take a reasonable commission or bonus from the borrower for his expenses and services in effecting a loan; and, whenever the lender is not privy to the arrangement between the borrower and agent, or in no way participates in the commission or bonus, the transaction will be regarded as free from the taint of usury. . . . If an agent, in making a loan of money, accepts from the borrower a bonus beyond the legal rate of interest, such act of the agent will not render the contract usurious, if the bonus was taken without the knowledge of the principal, and was not received by him."

That is stated as the law declared in New Jersey, New York, and elsewhere.

The same subject was treated in *Acheson v. Chase*, 28 Minn. 211, 9 N. W. 734, the court holding, under circumstances similar to those here, that the contract was not tainted with usury, and that in such a case the exaction of the bonus and receipt of the same was not within the apparent scope of the agency contract and so not ratified by the lender's insisting upon the validity of the securities according to their tenor after obtaining knowledge of the fact.

But counsel for appellants contend that this court is committed to the very limited line of authorities not in harmony with what has been said, of which *Austin v. Harrington*, supra, is a good sample. Such is not the opinion of the court.

In *McFarland v. Carr*, 16 Wis. 259, the agent made the loan under directions of the lender, and received the bonus, not as his own, but as the money of his principal. The court distinctly held that in such circumstances as we have here the contract would not be tainted with usury. The case 19 L.R.A. (N.S.)

was distinguished from those we have cited, particularly *Condit v. Baldwin*, supra. The ground of the decision is stated in these words: "We must assume that Warden, in making the loan and exacting the payment of the \$50, acted as agent of *McFarland*" (the lender). If that were so no one will contend that the contract was not usurious. In this case it must be kept in mind, though respondent's son acted as her agent, he did not as such agent exact the bonus. He exacted it independently of his agency. He demanded it, not for his principal, but for himself, as the court found.

In *Ottillie v. Wächter*, 33 Wis. 252, the agent acted solely for the borrower, and it was held that in such a case the exaction by the agent from his principal with knowledge of the lender of a bonus does not constitute usury. *McFarland v. Carr*, supra, was referred to inadvertently, in a way to indicate that its scope is other than that which we have stated as to the circumstance being that the exaction was with the knowledge and by the direction of the principal. *Condit v. Baldwin*, supra, was referred to and the rule thereof stated without approval or disapproval.

It is the opinion of the court that *Condit v. Baldwin*, so far as it holds that the exaction by the agent of a lender, without his knowledge or participation, of the borrower, of a sum as commission for doing the business, such exaction being a private matter between the agent and the borrower, does not make the loan contract as to the lender usurious; that it is not within the apparent scope of such an agency to violate the law, and that the receipt by the lender of the security, regular upon its face, and assertion of a right to enforce it according to its tenor, does not constitute ratification of any act of the agent in violation of law, is sound. The result is that the judgment must be affirmed.

So ordered.

Petition for rehearing denied.

KANSAS SUPREME COURT.

B. VOGELI

v.

FIRST STATE BANK OF SCOTT CITY,
Plff. in Err.

(— Kan. —, 96 Pac. 490.)

Banks — forged check — findings — material issues.

1. In an action by a depositor against a bank to recover the amount of a check

Headnotes by PORTER, J.

which it was alleged was forged, the jury returned a verdict for the plaintiff, and a special finding that they were unable to agree whether the signature to the check was written by the plaintiff. Held, that it was error to refuse to set aside the verdict and to render judgment thereon.

Same — check — payment — negligence.

2. It is not negligence for a bank to pay a check written on the blank of another bank without making inquiry.

Same — writing.

3. Neither any rule of law, nor the ordinary course of business, renders it a matter of suspicion that the body of a check is not written in the handwriting of the maker.

Same — negligence.

4. None of the facts found by the jury were sufficient to constitute negligence on the part of the bank.

(June 6, 1908.)

ERROR from the District Court for Scott County to review a judgment for plain-

Case Note. — Paying check written on the blank of another bank as negligence.

The only case found aside from *VOGELI v. FIRST STATE BANK* which considers directly the question of the liability of a bank for paying a check written on the blank of another bank, with the name of the latter erased, is *Morris v. Beaumont Nat. Bank*, 37 Tex. Civ. App. 97, 83 S. W. 36. Here a depositor in the First National Bank of Beaumont gave two checks on that bank for a subscription to corporation stock. For some reason they were at once countermanded and the bank notified not to pay them. The holder of the checks was also notified, but they were never surrendered. At the suggestion of the bank, and in order to guard against their payment through inadvertence, the entire deposit was withdrawn and placed with the Beaumont National Bank. The checks were written upon the printed blanks of the first-named bank, and in that manner they were presented for payment to that bank, which, however, was refused. Thereupon the holder ran a pencil through the printed word "First" and substituted in pencil "Bmt." and, upon their presentation to the last-named bank, they were paid in full and charged against the deposit. On discovery of the facts, the drawer demanded the full balance of the deposit without reference to the checks, which were denounced as forgeries. The bank defended on the ground that they were innocent holders of the checks without notice of the forgery, and that it was the local custom for banks to pay checks where the printed name of the payor was erased and another inserted in writing, and that in fact they had paid other checks of the drawer written the same way, which were genuine. The court, however, took occa-

sion in an action brought to recover the proceeds of a check. Reversed.

Statement by Porter, J.:

The plaintiff, B. Vogel, brought this action against the bank to recover the proceeds of a check for \$1,800, the signature to which he claims was forged. The facts, briefly stated, are as follows: On May 4, 1904, plaintiff had on deposit in defendant bank the sum of about \$4,000. At that time he informed the cashier of the bank that he was going to Illinois and Missouri on a visit, and requested drafts or a letter of credit so that he might get his checks cashed anywhere, and was given a letter of credit good for the amount of \$400. The petition alleges that the check which the bank paid was not drawn on a form of its bank, but on a blank of the American National Bank of Kansas City, Missouri; that the plaintiff never signed the check, and that defendant carelessly, negligently, and without any authority from him cashed the check

sion to say: "We understand the law to be in line with the contention of plaintiffs. As between the depositor and defendant, the latter is held to a knowledge of the signature and handwriting of its customer, and, in the absence of some fault on the part of the customer affecting the question of liability, a forged check, whether the forgery was accomplished by material alteration or the forgery of the signature, is honored by the depositee at its peril. There can be no question as to the materiality of the alteration. The plaintiffs are not shown to have been guilty of any negligence in respect to these checks, and it certainly cannot be contended with any show of reason that it was their duty to foresee Turner's fraudulent act and notify defendant as against checks which had not been drawn against it. No local custom can give vitality to a forged check." It appears in this case that the date of the checks had not been altered, and thus it clearly was shown that they were drawn prior to the time there was a deposit in the bank. However, if this was a factor in the decision of the case, it was not brought out, for the court, aside from mentioning that fact, takes no further notice of it.

Leavitt v. Stanton, Hill & D. Supp. 413, also involved the payment of a forged draft written on a blank of another bank. Here, however, the signature was forged, and the fact that it was written on the blank of another bank was considered an element in favor of the drawee bank, since it appeared that all of the drawer's business was done with the same kind of checks, and the negligence complained of was the fact that the check book was left in such a place that the forger was permitted to get hold of one. It was held, however, that this, with various other circumstances, was insufficient to excuse the drawee bank.

without making any inquiry of the plaintiff as to its genuineness, and, if the defendant bank had exercised due diligence, and had made inquiry, it could have ascertained before paying it that the same was forged and fraudulent. The petition alleges that the plaintiff returned to Scott City on the 15th day of September, 1904, had his bank book balanced and his checks returned, and immediately notified the bank that the check in controversy was fraudulent and forged, and demanded of the bank the repayment of the amount.

There was a conflict in the evidence as to the genuineness of the signature to the check, expert testimony being offered on both sides. The plaintiff was asked if the signature to the check was his, and answered as follows: "Don't look like my signature; I never signed my signature to no check." In his testimony he admitted that while in Sedalia, Missouri, he met a stranger who offered to send him some seed wheat if he would sign his name in a book; that he wrote his name in what appeared to be a blank book with a fountain pen which the stranger handed to him, and that he signed it while standing in the street; that he did not have his glasses on at the time though he generally used glasses when he wrote; that he had no place on which to rest his arm at the time of writing; that in the conversation he had informed the stranger that he lived in Scott City and had sold his farm. The officers of the bank and others testified that after he returned home he admitted in different conversations that his signature to the check was genuine, but that he had no intention of signing a check when he wrote his name. On September 19th he signed a statement for the bank to this effect. On October 28th he signed another statement as follows:

Scott City, Kansas, Oct. 28, 1904.

Relative to the check in favor of J. O. Montgomery on the First State Bank of Scott City, Kansas, given August 15, 1904, and indorsed by J. O. Montgomery and others is fraudulent except my signature, which is genuine, but the said signature was obtained by fraud by the said J. O. Montgomery or J. O. Logan as he represented himself to be at the time of obtaining the signature.

B. Vogeli.

The plaintiff denied that he knew the contents of these papers when he signed them, but this was contradicted by several witnesses. One of the officers of the bank went to Kansas City at different times for the purpose of attempting to recover the money. He was accompanied by the plaintiff on one of these trips, and the bank officers tes-

tified that the foregoing papers were signed by the plaintiff in order to be used in recovering the money. The plaintiff had been a depositor of the bank for a number of years. He was sixty-seven years of age, rather illiterate, and frequently had the cashier of the bank write his checks for him, which he would sign. The jury returned a verdict for the plaintiff for the amount of the check, upon which the court rendered judgment.

In addition to the general verdict, the jury returned the following findings:

(1) Was the signature to the check in controversy written by the plaintiff?

Answer: Can't agree.

(2) Was the defendant guilty of negligence in paying said check?

Answer: Yes.

(3) If you answer that the defendant was guilty of negligence, state what the negligence consists of?

Answer: In paying a check that was written on a blank of another bank without making inquiry, and for an amount in excess of letter of credit, and after having paid the check written by Vogeli on a bank check of defendant bank for \$100 and seeing that the check sued on was not filled up by Vogeli.

(4) Was the plaintiff guilty of negligence in signing his name to some blank paper or partly filled-out paper in the hands of a stranger?

Answer: Yes.

The bank brings these proceedings in error.

Messrs. F. V. Martin and J. S. Simmons for plaintiff in error.

Messrs. W. B. Washington and Peters & Peters for defendant in error.

Porter, J., delivered the opinion of the court:

The instructions properly told the jury that the burden was upon the plaintiff to prove that the signature was not genuine, and that he must do so by a preponderance of the evidence. On this very material issue the jury were unable to agree, but, for some reason which is not apparent, the court refused to set aside the verdict, and rendered judgment. This was error. If the signature was genuine the bank was obliged to pay unless there was something in the appearance of the check to excite suspicion, or there was some fact known to the bank sufficient to put it upon inquiry. True, the jury found that the bank was guilty of negligence in paying the check, but they also found in what the negligence consisted, and no one of the things or all of them com-

bined would constitute negligence. It is not negligence for a bank to pay a depositor's check written on the form of another bank. There is no invariable rule by which customers of a bank are required to use a blank check prepared by the bank, and in the ordinary course of business it is of very common occurrence to use a check of another bank, erase the name and insert that of the bank in which the depositor's account is kept. This occurs every day in all banks.

Nor did the fact that the check was for an amount in excess of the \$400 letter of credit tend to prove negligence or put the bank upon inquiry. The letter was given the plaintiff to establish credit with other banks or persons with whom he might have business. His account was subject to check, and he needed no letter of credit to oblige the bank to pay checks drawn by himself. Again, the fact that, some days previously, the bank had paid a check for \$100 drawn by the plaintiff on a regular blank of the defendant was wholly immaterial, and not sufficient to excite suspicion as to the genuineness of the check in controversy. The last circumstance found by the jury is that the check was not filled out by the plaintiff; but there was nothing unusual in this, even if the plaintiff had not been in the habit of having others fill out his checks. "The rule requiring the bank to know the customer's handwriting was always confined to requiring a knowledge of his signature. Neither any rule of law, nor the ordinary course of business, renders it a matter of suspicion that the body of the check or bill is not written in the handwriting of the maker or drawer." 2 Morse, Banks & Banking, § 480. The rule is stated in 2 Dan. Neg. Inst. § 1654, as follows: "But a bank is not bound to know more than the signature of the drawer of the check; for in the ordinary course of business the body of the check is as often as otherwise filled up by a clerk, and it is by no means a matter of suspicion that it is not filled up in the handwriting of the drawer. If the rule were otherwise, a bank could never safely pay a check filled up in a handwriting not the drawer's until it had inquired of the drawer whether it was properly filled up. And to require this would greatly embarrass commercial transactions." To the same effect, see *Redington v. Woods*, 45 Cal. 400, 419, 13 Am. Rep. 190; *Bank of Commerce v. Union Bank*, 3 N. Y. 230, 234; *National Park Bank v. Ninth Nat. Bank*, 55 Barb. 87, 124.

If this check had been genuine, and the failure of the bank to pay it resulted in loss to the plaintiff, the bank would have been liable to him for all damages resulting therefrom, and none of the circumstances

mentioned by the jury would have relieved the bank from its liability. Of course, a false or fraudulent alteration in any material matter in the body of the check after signature would have constituted technical forgery, and the bank would have been liable to the plaintiff, unless by some act of negligence upon his part he furnished the opportunity for the fraud which deceived the bank, in which case he must suffer the just consequences of his own carelessness, and bear the loss. The jury found that the plaintiff was guilty of negligence in signing his name to some blank or partly filled out paper in the hands of a stranger; and it is insisted that, on the facts found, judgment should be directed for the defendant. There was no motion or request for judgment notwithstanding the verdict, and it is unnecessary to consider the effect of this finding.

The motion to strike from the petition all allegations with reference to the payment of the \$100 check and the giving of the letter of credit should have been sustained, since they were averments of immaterial facts which added nothing to the plaintiff's cause of action.

The failure of the jury to agree upon one of the most material issues in the case, as well as the inconsistent findings as to the negligence of the bank, require that the judgment be reversed, and a new trial ordered.

KANSAS SUPREME COURT.

CITY OF KINSLEY

v.

J. N. DYERLY, Appt.

(— Kan. —, 98 Pac. 228.)

Interstate commerce — sale by agent.

1. In a prosecution for the violation of a city ordinance imposing a license tax upon persons soliciting orders for the sale of goods, where it is shown that the defendant is the agent of a merchant of another state, and carries samples of goods, and solicits orders, which he sends to his principal for approval, the mere fact that

Headnotes by PORTER, J.

Note. — The question involved in the above case, whether the interstate character of a transaction is affected by the circumstance that goods ordered from a non-resident vendor are delivered through his agent, is discussed, with other related questions, in a case note to *State v. Bayer*, ante, 297, on, License or occupation tax on hawkers and peddlers, and persons engaged in soliciting orders, by sample or otherwise, as a violation of the commerce clause.

the principal, after accepting the order, ships the goods to the same agent, with authority to deliver them to the purchaser and collect the price, will not prevent the transaction from being "interstate commerce."

Same—sale and delivery by agent.

2. The right of a merchant of another state to sell his goods in this state carries with it the right to deliver them, and to employ for that purpose any agency he may deem proper, provided that at no time before the delivery the goods become so mingled with the common mass of property here as to deprive the transaction of its interstate features.

Same — license — ordinance — violation — burden of proof.

3. In a case like that referred to in the first paragraph, if there be a doubt as to whether the sale was completed by the acceptance of the orders by the principal and his shipping the goods, the contrary cannot be assumed in order to sustain a conviction. The prosecution must establish its case.

(November 7, 1908.)

APPEAL by defendant from a judgment of the District Court for Edwards County convicting him of violating a city ordinance prohibiting the peddling of goods at retail without a license. Reversed.

Statement by Porter, J.:

J. N. Dyerly was charged with the violation of an ordinance of the city of Kinsley in peddling goods in the city at retail, and soliciting persons to buy goods, without first having obtained a license therefor. He was convicted in the police court, and appealed to the district court, where there was a trial without a jury. The district court adjudged him guilty, and he was sentenced to pay a fine of \$10 and stand committed until the fine and costs were paid. From this conviction he appeals. His defense is that he was engaged in interstate commerce. The validity of the ordinance is not involved. The ordinance imposed a fee of \$20 a day on "peddlers and soliciting agents selling goods at retail." The court made findings of fact as follows: "First, that the defendant, J. N. Dyerly, had no license to peddle goods or merchandise in the city of Kinsley; second, that the defendant was in the city of Kinsley at the time stated, and did make the sale to Mrs. Erwin as testified by her; third, that the defendant was at that time and on that date engaged in the business of soliciting orders for rugs for future delivery, which orders were to be sent by him to Kansas City, and to the L. B. Price Mercantile Company, and the goods shipped to him at Kinsley, and by 19 L.R.A. (N.S.)

him delivered to the parties who had ordered same, who were to make payment to him for the same upon delivery." The court held as conclusions of law: "First, that the single sale to Mrs. Erwin would not be sufficient to establish the guilt of the defendant of the charge of peddling within the limits of the city of Kinsley without a license; second, that the method of transacting the business by defendant, as described by him, left the sale incomplete until the goods had been received by him in Kinsley, and by him delivered, which method deprives the transaction of its interstate features, and renders it liable to the ordinance of the city."

The method by which the business of the defendant was conducted is described by him in his testimony as follows:

Q. What business are you engaged in?

A. Soliciting for the L. B. Price Mercantile Company, Kansas City, Missouri.

Q. What was the nature of your soliciting business, the work you did?

A. We took orders and sent them in to the company, and, when the company approved of it, they sent the goods, and we delivered them.

Q. You didn't carry any goods around with you for delivery?

A. No, sir.

Q. You carried samples?

A. Yes, sir.

Q. You worked for a house in Missouri?

A. Yes, sir.

Q. Did you sell and deliver any rugs in this city?

A. No, sir; I did not. . . .

Q. What were you doing,—merely taking orders?

A. Taking orders.

Q. What was done with those orders when you took them?

A. Sent them to Kansas City, and when the goods came, I came and delivered them.

[On cross-examination.]

Q. Were you peddling rugs in town here?

A. No, sir.

Q. Didn't have any rugs here at all?

A. I had rugs here for samples.

Q. Weren't you around trying to sell rugs?

A. No, sir.

Q. What were you doing with them?

A. Trying to take orders from them.

Q. What did you do with those orders?

A. Sent them to Kansas City.

Q. And those rugs would be shipped to you?

A. Yes, sir.

Q. You delivered them?

A. Yes, sir.

Q. And collected the money?

A. Yes, sir.

Q. That was your business?

A. Yes, sir.

Q. For instance, if you had sold the rugs to Mrs. Erwin, you would take the order and send it to Kansas City for approval, and when they came, you would deliver them and collect the money?

A. Yes, sir.

Mr. J. M. Harris for appellant.

Mr. F. Dumont Smith, for appellee:

The sale was completed in Kansas, and is not interstate commerce.

Re Pringle, 67 Kan. 364, 72 Pac. 864.

Porter, J., delivered the opinion of the court:

On the authority of *Kansas City v. Collins*, 34 Kan. 434, 8 Pac. 865, the court properly held that the single sale made by the defendant failed to establish the fact that he was a peddler, but found the defendant guilty of selling goods at retail as a soliciting agent, contrary to the provisions of the ordinance. The court expressly held that the fact that the goods were shipped to the person who solicited the orders, and that he delivered them and collected the purchase price, necessarily deprived the transactions of their interstate character. To this we cannot agree. It is contended that the ruling in this respect follows what was decided in *Kansas City v. Collins*, *supra*. That case presented the following facts: A firm of wholesale dealers in Kansas City, Missouri, sent their traveling agent into this state, who visited various places of business in the city of Kansas with samples, and solicited orders from merchants. The orders were taken by him to the dealer in Kansas City, Missouri, and, when approved by the dealer, the latter packed the goods at his place of business, and sent them to the purchasers in Kansas, where they were delivered, and paid for. In the opinion Justice Valentine observes that the evidence shows that the goods were not delivered by the defendant, and that the payments for the goods were not made to him. But the opinion nowhere holds that, if such had been the case, it would have necessarily deprived the transaction of its interstate character. The syllabus reads as follows: "Where an agent, such as is usually denominated a 'drummer' or 'commercial traveler,' simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are afterward to be delivered by the principal to the purchasers, and payment for the goods is to be made by the purchasers to the principal on such delivery, such agent is neither a peddler nor a merchant." See also *State v. Hickox*, 64 Kan. 650, 68 Pac. 35. To hold 19 L.R.A. (N.S.)

that the principal may not make delivery and collect payment by an agent duly authorized for that purpose is to deny the law of agency. In the case of *Re Spain* (C. C.) 14 L.R.A. 97, 3 Inters. Com. Rep. 738, 47 Fed. 208, the agent who sold the goods by sample afterwards delivered them, and made settlement by collection or by notes for the principal. In the opinion it is said: "The right to sell implies the obligation and right to deliver. It is as much interstate commerce to do one as the other." The right to sell includes the right to sell by an agent. *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725. And it must be true that the right to deliver includes the right to deliver by an agent. Delivery by an express company, where the goods are shipped C. O. D., has been held to be interstate commerce. *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693. So, when the goods are shipped into the state with a draft attached to the bill of lading, the transaction is interstate commerce. 17 Am. & Eng. Enc. Law, 2d ed. pp. 65, 66, and cases cited. In *Huntington v. Mahan*, 142 Ind. 695, 51 Am. St. Rep. 200, 42 N. E. 463, delivery was made by another agent, and an ordinance attempting to impose a license tax upon him was held invalid.

It is apparent that the case at bar was only partially tried. There is no finding, nor is there any evidence to support a finding, with respect to the method by which the shipments and delivery of the goods were made. When the orders were approved by the company at Kansas City, Missouri, were such orders filled by the appropriation of specific articles for that purpose, which were sent to the defendant as the agent of the company for delivery? Where a purchaser was dissatisfied with the quality of the goods, and refused to accept them, what became of them? Were they returned to the dealer, or were they left with and did they become the property of the defendant? Did the Missouri company require the defendant to pay for the goods before they were shipped or delivered to him? Were the circumstances under which the goods were shipped such that, when received by the defendant, they became mingled with the general mass of property in the state? The trial court held that the delivery of the goods by the agent constituted the sale, and that all these questions were answered by that fact. The only evidence as to the methods under which the business was transacted is that of the defendant. He testified that he made sales by sample only; that he was the agent of the L. B. Price Mercantile Company of Kansas City, Missouri; that he carried rugs and solicited

orders by sample; that he sent the orders for approval to his principal; that the principal sent him the goods to be delivered and to make collection for payment,—all of which might be true and the transaction be interstate commerce. On the other hand, other facts might exist, not appearing in the evidence nor in the findings, which would deprive the transactions of their interstate character. *Re Pringle*, 67 Kan. 364, 72 Pac. 864; *Croy v. Obion County*, 104 Tenn. 525, 51 L.R.A. 254, 78 Am. St. Rep. 931, 58 S. W. 235; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165. In *Gill v. Kaufman*, 16 Kan. 571, and in *McCarty v. Gordon*, 16 Kan. 35, it was held that, where the drummer or agent merely solicits and transmits the order, the transaction or sale does not become complete until the order is accepted by the principal. The place of the contract is where the proposal is accepted. In *State v. Willingham*, 9 Wyo. 290, 52 L.R.A. 198, 87 Am. St. Rep. 948, 62 Pac. 797, the business was held to be interstate commerce, and the only difference in the facts is that the principal shipped the goods into the foreign state consigned to itself, but the agent who solicited the order delivered them and collected the price. It was said in the opinion: "The delivery of the articles to the persons ordering did not constitute a sale by the agent making the delivery; but the manufacture, shipment, and delivery of the goods were simply steps taken by the Chicago company in the performance of its contract. The shipment of them by the company to itself at Cheyenne had no greater significance than if they had been sent by the company from one of its warehouses to another in the city of Chicago. They were still the subject of interstate commerce, and the arrest of the agent was not authorized by law."

The Supreme Court of the United States in a recent case had its attention directed to practically the same question. *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159. The statement of facts from the opinion is as follows: "An Ohio corporation employed an agent to solicit in Sunbury retail orders to the company for groceries. When the company had received a large number of such orders, it filled them at its place of business in Columbus, Ohio, by putting up the objects of the several orders in distinct packages, and forwarding them to the defendant by rail, addressed to him 'For A. B.,' the customer, with the number of the order also on the package for further identification. The company ultimately kept the orders, but it kept no book accounts with the customers, looking

only to the defendant. The defendant alone had authority to receive the goods from the railroad, and, when he received them, he delivered them, as was his duty, to the customers for cash paid to him. He then sent the money to the corporation. The customer had the right to refuse the goods if not equal to the sample shown to him when he gave the order. In that or other cases of nondelivery the defendant returned the goods to Columbus. No shipments were made to the defendant except to fill such orders, and no deliveries were made by him except to the parties named on the packages." It was contended in the argument that the order was not accepted, and did not bind the Ohio corporation until the delivery took place, which is practically the contention here. Commenting on this the court says in the opinion: "The fair meaning of the agreed fact that the orders were given to agents employed to solicit them is that the company offered the goods, and that the orders were acceptances of offers from the other side. If there were the slightest reason to doubt that the contracts were made with the company, through its authorized agent, at the moment when the orders were given, which we do not perceive that there is, certainly the contrary could not be assumed in order to sustain a conviction. It is for the prosecution to make out its case." It will be observed that some important facts in that case do not appear in this. There is no showing here how the goods were shipped to the defendant; that is, whether there was an appropriation by the dealer in Kansas City, Missouri, of specific goods to be delivered to certain purchasers. We cite the case, however, because it holds that the agent who solicits the order may be made the agent to deliver and collect, without destroying the interstate character of the transaction. It also recognizes the doctrine that the contract of sale was complete, in that case, at the moment when the orders were given (as in this case when the orders were accepted), and further holds that, if there be a doubt with respect to this, the contrary cannot be assumed in order to sustain a conviction.

It is also urged that the case of *Re Pringle*, supra, is to the contrary and decisive; but nothing there decided conflicts, in our opinion, with this. There the methods of the business carried on were shown in detail. True, the person who took the orders delivered the goods and collected the money; but these were by no means the controlling facts upon which the case turned. There the goods were shipped in bulk, in one box, by express, C. O. D., to the person who claimed to be the agent. When the

goods arrived, he paid the charges, and distributed the contents to his various customers. Moreover, the orders which he sent to his alleged principal did not "disclose the names of any of the purchasers of any of the goods, or the kind or quantity desired by any one of them." And, "when shipped, none of the goods was marked or otherwise designated for any particular individual." When he received the goods, he treated them as his own, and allowed customers to select indiscriminately from the goods such as they desired to purchase. Under these facts, the inevitable conclusion was reached by the court that the goods lost their distinctive character, "and were blended with the common property of the state as soon as he received his box," and that "the foreign merchant had no trade relations whatever with the ultimate purchasers." In distinguishing the case from *State v. Hickox*, 64 Kan. 650, 68 Pac. 35, Mr. Justice Burch said: "In that case the salesman actually represented a merchant of another state. The purchaser's order was sent to that merchant. That merchant reserved the right to accept or reject the orders sent in, and did pass on them. The identical order given by the purchaser was filled. When the goods were shipped, they were shipped to the actual purchaser. At no time did the agent deliver any of the goods. In this case the petitioner merely took orders for himself for goods which he intended to purchase, and which he did afterwards purchase, and which he paid for and received in this state. The orders of the final recipients of the goods were never transmitted beyond the state, or accepted or filled by anyone beyond the state, and the goods were not delivered to the carrier for transportation to them." It is true that in the *Hickox* Case the goods were shipped to the actual purchaser, and the agent delivered none of them; but it is apparent that the case turned upon other facts than these. The salesman actually represented a merchant of another state, and solicited orders which he sent to his principal for approval. The principal had the right to accept or reject the orders, and actually passed upon them. The identical order given by the purchaser was filled. There is no intimation in the opinion that it might not have been filled by sending the goods to the same salesman as agent for the purpose of delivery. In *McLaughlin v. South Bend*, 126 Ind. 471, 10 L.R.A. 357, 26 N. E. 185, a similar ordinance was held invalid, as applied to an agent who solicited orders in Indiana for books to be delivered at a future time. The books were in the city of Chicago. He procured orders, which he transmitted to the publishers in 19 L.R.A. (N.S.)

Chicago, where the order was filled by sending the books ordered to him, and he delivered them to the purchaser. It has often been declared by the Supreme Court of the United States that an ordinance imposing a license fee upon agents representing citizens of another state, who offer goods in this state for sale by sample, is void, because it assumes to establish a regulation affecting commerce between the states. *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 7 Sup. Ct. Rep. 592.

The conviction in this case is predicated squarely upon the fact that the goods were shipped to the defendant, that he made the delivery and collected the price. We cannot affirm the judgment without declaring the law to be that these facts deprive the transaction of its interstate features. No case decided by this court, and none that we have been able to find, goes to that extent.

For these reasons the judgment will be reversed, and the cause remanded for another trial

KENTUCKY COURT OF APPEALS.

WESTERN UNION TELEGRAPH COMPANY, Appt.,

v.

J. M. WILLIAMS.

(— Ky. —, 112 S. W. 651.)

Deposition — before trial — right.

1. A defendant has the right to take plaintiff's deposition before trial, under a statute providing that a party may be examined at the instance of the adverse party

Case Note. — What evidence admissible to show mental anguish.

This note is confined to cases in which a recovery was sought for mental anguish alone, and does not include cases in which mental suffering was one of the elements of the damages suffered by the plaintiff.

In the great majority of the cases evidence as to mental anguish has been held admissible; in a number of the cases it is held that mental anguish is a matter of inference, and not of proof, and in a few cases such evidence is held inadmissible. But the general rule is to the effect that evidence as to the mental anguish is admissible.

Thus, in the following cases, in actions for negligence in the transmission and delivery of telegrams, the evidence indicated was held admissible:

Western U. Teleg. Co. v. Carter (Tex. Civ.

by deposition, as any other witness, where the circumstances are such as to entitle him to take the deposition of a witness other than a party to the suit.

Continuance — refusal — statutory right — error.

2. Refusal to continue a case to permit defendant to take the deposition of plaintiff to enable him to prepare his defense, to which he has a right by statute, is prejudicial error.

Damages — delay in telegram — aggravating circumstances.

3. Upon the question of the damages to be allowed a son for mental anguish in being deprived of the privilege of attending his mother's deathbed, because of neglect to deliver a telegram, evidence is not admissible that he is a physician, and that treatments given by him when she had previously had similar attacks had resulted in recovery, or that she was depressed by his failure to come when expected, which had a tendency to hasten her death.

(September 30, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Rockcastle County in plaintiff's favor in an action brought to recover damages for failure

App.) 20 S. W. 834 (testimony of bystanders as to the conduct of the plaintiff's wife).

Western U. Teleg. Co. v. Manker, 145 Ala. 418, 41 So. 850 (testimony of bystander that he saw the plaintiff crying);

Missouri, K. & T. R. Co. v. Linton (Tex. Civ. App.) 109 S. W. 942 (evidence of plaintiff's daughter as to her manifestations of grief, and her declarations tending to show distress);

Western U. Teleg. Co. v. Campbell, 41 Tex. Civ. App. 204, 91 S. W. 312 (testimony as to the effect of announcement of brother's death upon plaintiff);

Western U. Teleg. Co. v. Adams, 75 Tex. 535, 6 L.R.A. 844, 16 Am. St. Rep. 920, 12 S. W. 857, and Machen v. Western U. Teleg. Co. 72 S. C. 256, 51 S. E. 697 (evidence that plaintiff felt and exhibited mental anguish);

Mentzer v. Western U. Teleg. Co. 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1 (testimony as to how plaintiff felt and what he said and did upon learning of delay in receiving a telegram announcing his mother's death);

Buchanan v. Western U. Teleg. Co. (Tex. Civ. App.) 100 S. W. 974 (plaintiff's testimony as to his own grief);

Western U. Teleg. Co. v. Burrow, 10 Tex. Civ. App. 122, 30 S. W. 378 (testimony of a wife that she suffered mental anguish because of the absence of her husband during confinement);

Doster v. Western U. Teleg. Co. 77 S. C. 56, 57 S. E. 671 (testimony of plaintiff that he was fond of his grandchildren);

Western U. Teleg. Co. v. Lydon, 82 Tex. 19 L.R.A. (N.S.)

promptly to transmit and deliver a telegram. Reversed.

The facts are stated in the opinion.

Messrs. George H. Fearons, J. W. Brown, and J. W. Alcorn, with Messrs. Richards & Ronald, for appellant:

Defendant was entitled to take plaintiff's deposition.

Re Abeles, 12 Kan. 451.

Messrs. Bethurum & Bethurum for appellee.

Clay, C., delivered the opinion of the court:

On February 1, 1906, about 9 o'clock in the evening, W. J. Sparks sent the following message from Mt. Vernon to appellant, J. M. Williams, 654 Fourth street, Louisville, Kentucky:

Lovell says you had better come. Mamma no better.

[Signed]

W. J. Sparks.

This telegram reached the Western Union office in Louisville at 10:56 P. M. It was not delivered until shortly after 8 o'clock the next morning,—too late for appellee to take the morning train for his mother's

364, 18 S. W. 701 (evidence that the plaintiff was his mother's favorite son).

So, in Western U. Teleg. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419, it was held that the natural utterances and expressions indicative of pleasure, displeasure, pain, or suffering are competent original evidence that may be received in proof of the physical or mental state they indicate, whenever that state is a pertinent inquiry.

And in Western U. Teleg. Co. v. Trice (Tex. Civ. App.) 48 S. W. 770, evidence was admitted to the effect that the plaintiff had a very strong affection for her brother.

So, in Western U. Teleg. Co. v. Heathcoat, 149 Ala. 623, 43 S. W. 117, it was held that it was competent for the plaintiff to testify that she suffered mental pain and anguish.

In Western U. Teleg. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70, evidence that plaintiff had abandoned his family was held admissible to show absence of mental anguish, in an action for negligence in transmission and delivery of a telegram.

Evidence that a dying person called for plaintiff and wanted to know of the attendants why he did not come was held, in Potter v. Western U. Teleg. Co. (Iowa) 116 N. W. 130, competent to show mental anguish; and an allegation of similar purport in a complaint was held proper in Western U. Teleg. Co. v. Evans, 1 Tex. Civ. App. 297, 21 S. W. 266, although no evidence in support of the allegation was offered. But similar evidence was held inadmissible in Western U. Teleg. Co. v. Waller, 96 Tex. 589, 94 Am. St. Rep. 936, 74 S. W. 751; and to the same

home. Had he taken this train, he would have reached Mt. Vernon at 1:24 P. M. His mother died at 3:20 P. M. Appellee instituted this action to recover damages for his mental anguish resulting from the failure of appellant to deliver the telegram to him in time to enable him to reach his mother's bedside before her death. Appellant answered, denying negligence on its part, and pleading contributory negligence on the part of appellee. According to the testimony for appellant, its night-delivery clerk made an effort to call appellee over both telephones immediately upon receiving the telegram. Being unable to reach him, a messenger boy proceeded to 654 Fourth street. After considerable search, he found appellee's office. There was no one there, and he left a note stating that the Western Union had a telegram for Dr. J. M. Williams. According to the testimony for appellee, he had a telephone connection in his sleeping apartments, which were immediately over his office, which rang whenever his office was called. He was in his apartments at the time it is alleged the boy attempted to deliver the message, and also at the time appellant claims to have called him over the phone, and he heard no call of any kind. When he received the message the next

morning a little after 8 o'clock, it was then too late for him to take the 8:10 train for the home of his mother. The jury awarded appellee damages in the sum of \$750. A new trial was refused, and the telegraph company prosecutes this appeal.

The case was assigned to the 27th day of September, 1907, for trial. On the 24th day of September the defendant tendered a motion for an order to require the plaintiff to give his deposition, as provided by subsection 8 of § 606 of the Code of Practice, and to continue the case until such time as appellant could take the deposition of plaintiff, and summon or take the deposition of witnesses to rebut such portions of his testimony as it should desire. In support of said motion, appellant filed the following affidavit, which was sworn to by its attorney, A. G. Ronald: "Affiant, A. G. Ronald, says that he is one of the attorneys for the defendant herein; that, on the 19th day of September, 1907, plaintiff, Dr. J. M. Williams, and his attorney, Mr. Herman Nettleroth, were present at the office of the clerk of the district court of the United States for the western district of Kentucky for the purpose of taking the deposition of certain witnesses on behalf of the defendant herein; that, while plaintiff and his coun-

effect was the decision in *Western U. Teleg. Co. v. Jackson*, 35 Tex. Civ. App. 419, 80 S. W. 649.

The rule in North Carolina is that a recovery may be had for mental anguish alone; and, while it is presumed in cases in which close relationship exists, nevertheless it is a matter of direct proof, and may be shown by plaintiff's own testimony or by other evidence.

Thompson v. Western U. Teleg. Co. 107 N. C. 456, 12 S. E. 427; *Cashion v. Western U. Teleg. Co.* 123 N. C. 267, 31 S. E. 493; *Bright v. Western U. Teleg. Co.* 132 N. C. 317, 43 S. E. 841; *Hunter v. Western U. Teleg. Co.* 135 N. C. 465, 47 S. E. 745; *Harrison v. Western U. Teleg. Co.* 143 N. C. 147, 55 S. E. 435, 10 A. & E. Ann. Cas. 476; *Shepard v. Western U. Teleg. Co.* 143 N. C. 244, 118 Am. St. Rep. 796, 55 S. E. 704; *Whitten v. Western U. Teleg. Co.* 141 N. C. 361, 54 S. E. 289; *Alexander v. Western U. Teleg. Co.* 141 N. C. 75, 53 S. E. 657.

In some cases it has been held that positive testimony as to mental anguish is not necessary, but may be inferred. *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L.R.A. 844, 16 Am. St. Rep. 920, 12 S. W. 867; *Western U. Teleg. Co. v. McLeod* (Tex. Civ. App.) 22 S. W. 988; *Western U. Teleg. Co. v. Porter* (Tex. Civ. App.) 26 S. W. 866; *Western U. Teleg. Co. v. Blair* (Tex. Civ. App.) 113 S. W. 164.

So, in *Western U. Teleg. Co. v. McMorris*, (Ala.) 48 So. 349, it was held that, when wounded feelings or mental pain forms an element of recoverable damages, direct proof of such suffering is not necessary, but it 19 L.R.A. (N.S.)

may be inferred by the jury from the circumstances attending the particular breach of the contract or duty.

As was suggested above, a few cases are to the contrary.

Thus, in *City Nat. Bank v. Jeffries*, 73 Ala. 183, it was held that mental anguish was a matter of inference, and not of direct proof; and consequently the plaintiff should not have been allowed to testify as to his condition of mind, etc.

So, in *Willis v. Western U. Teleg. Co.* 69 S. C. 531, 104 Am. St. Rep. 828, 48 S. E. 538, 2 A. & E. Ann. Cas. 52, it was held that a statement by the plaintiff as to what his peculiar apprehensions and conclusions were on failure to receive a telegram in reply to one sent by him inquiring as to the condition of his sick mother was inadmissible.

Testimony that a deceased son seemed nearer and dearer to plaintiff than any of her other children was held, in *Missouri, K. & T. R. Co. v. Linton* (Tex. Civ. App.) 109 S. W. 942, to be incompetent where there was no allegation of special affection.

Evidence of feelings which could be only the result of morbid sensitiveness was held inadmissible in *Western U. Teleg. Co. v. Stiles*, 89 Tex. 312, 34 S. W. 438.

Evidence as to the number of children and grandchildren of the sendee of a telegram and their location is irrelevant in an action by the father for damages for neglect to deliver to his mother-in-law a telegram announcing the serious illness of one of the grandchildren. *Western U. Teleg. Co. v. Crocker*, 135 Ala. 492, 69 L.R.A. 398, 33 So. 45.

sel were thus present, the defendant, as its attorney, called the plaintiff as a witness for the purpose of examining said plaintiff, as provided under subsection 8 of § 606 of the Kentucky Code of Practice; that the plaintiff declined and refused to testify or to answer any questions that might have been put to him by this affiant as attorney aforesaid, and, on advice of his counsel, left the room. Affiant says that he thereafter, on said day, caused a subpoena to be issued by an officer duly authorized to issue same, summoning plaintiff to appear as a witness to testify in this cause, as provided in subsection 8 of § 606 of the Kentucky Code of Practice at the office of Clarence E. Walker, Louisville Trust Building, Louisville, Kentucky, on the 21st day of September, 1907 at 3 o'clock in the afternoon, and that said subpoena was duly served upon said plaintiff and also a notice that his deposition would be taken as aforesaid; that the plaintiff and his counsel did appear at the office of said Clarence E. Walker, notary public, at the time and place named in said subpoena, but that this plaintiff declined and refused to give his deposition, and, upon the advice of his counsel, declined and refused to answer any questions which might have been put to him by affiant as attorney aforesaid. Affiant says that this action has been instituted in a court which sits more than 100 miles distant from the place where the occurrences which are made the basis of the suit transpired; that the only way to rebut any claim or statement that may be made by the plaintiff is to bring its witnesses to the place where the court is held or to take their depositions; that neither the defendant, nor affiant, nor any of its counsel, have any knowledge or information as to what statement or claims will be made by the plaintiff, and do not know the witnesses whose depositions it will be necessary to take or to have present as witnesses. Affiant says that defendant cannot properly prepare this case for trial, or cannot properly prepare its defense, without taking the deposition of plaintiff, as provided for in the section of the Code of Practice above referred to; that, under said section, it has the right to take the deposition of plaintiff in order that it may know what evidence it has to rebut, and what witnesses to call; that, after plaintiff gives his testimony on the witness stand at the trial of this cause, there will not be sufficient time for it to secure the attendance of the witnesses who would rebut same, or take their depositions. Affiant says that this motion is not made for the purpose of delay, but only that it may be placed in a position where it can properly prepare its defense; that, unless it is given an opportunity to examine plain-

tiff, and he is required to submit to said examination, this defendant will be deprived of a substantial right; that it cannot safely go to trial without the exercise of the right of examination of plaintiff, granted to it by the Code of Practice, and without the opportunity of procuring witnesses to rebut the testimony if it should so desire. Affiant says that, had said plaintiff submitted to an examination, or given his testimony upon either of the occasions upon which he was called as a witness by the defendant, it would have had sufficient time to rebut his testimony if it so desired, and would have been ready to go to trial."

The court refused to allow either the motion or the affidavit to be filed, but passed the matter to the day upon which the case was set for trial. On said day the court allowed the motion and affidavit to be filed, but overruled the motion, to which ruling the defendant excepted. The case then proceeded to trial. At the conclusion of the testimony of appellee in chief as a witness in his own behalf, appellant avowed that it was taken by surprise by the testimony of appellee to the effect that the telephone in his office was at all times connected by wire with the telephone in his sleeping apartments, and that, when the telephone in his office was rung, the telephone in his sleeping apartments was also rung for the same call; also, by the statement that the rule of the railroad company was that it would not postpone the departure of its trains except to await the coming in of a connecting train. Appellant further avowed that it could introduce testimony to rebut the statements made by appellee, but was then unable to do so because the witnesses it required for that purpose lived so far away that their presence could not be obtained or their depositions taken. Appellant thereupon moved the court to set aside the swearing of the jury, and continue the case or postpone the trial until such reasonable time as would give appellant an opportunity to take the depositions of said witnesses, all of whom it alleged resided in the city of Louisville. This motion the court overruled, and appellant excepted.

In support of its contention that the trial court erred in failing to grant it a continuance when it was made known to the court that appellee had declined to give his deposition, appellant relies upon subsection 8 of § 606 of the Civil Code of Practice. This section is as follows: "A party may be examined as if under cross-examination at the instance of the adverse party, either orally or by deposition as any other witness; but the party calling such examination shall not be concluded thereby, but may rebut it by counter testimony." It is insisted by

counsel for appellee that the only purpose of this provision is to enable one party to get the benefit of the testimony of the adverse party at the trial; that, therefore, if the adverse party whose deposition the other party sought to take actually appears at the trial and testifies, and subjects himself to cross-examination, the party seeking his deposition cannot complain because he failed to take it. While this view appears plausible, the Code itself does not place any such restriction upon the right of one taking the deposition of the adverse party. It gives to one party the absolute right to take the deposition of the adverse party as that of any other witness. It appears that appellee, whose deposition it was sought to take, lived more than 20 miles from the county seat where the trial was to take place, and, in addition to this, he was a practising physician. If, then, he were a witness other than the plaintiff in the case, appellant would have had the right to take his deposition. That being the case, it necessarily follows that, under subsection 8 of § 606, appellant had the right to take his deposition. It is earnestly insisted that the right given by subsection 8 of § 606, if interpreted according to the contention of appellant, is liable to great abuse; that it will enable the party to find out his opponent's evidence in advance of the trial. As, however, the right is given to each party, they will both be upon terms of equality; and, as it is to be presumed that neither will offer any evidence other than the exact facts and truth of the case, we do not see how either could be prejudiced. By § 537 of the Code, the right is given to a defendant to begin taking depositions immediately after filing his answer. Appellant's answer had been filed when it made the motion for a continuance on the ground that appellee had declined to give his deposition. Appellant had the right to take appellee's deposition. This right was denied to it. We therefore think the court should, under the circumstances, have continued the case, and its failure so to do was prejudicial error.

Appellant also insists that the trial court erred in permitting appellee to testify to the fact that he, in conjunction with Dr. Lovell, a physician who attended his mother at the time of her death, had treated his mother frequently before, and that she yielded to such treatment and speedily recovered; also, that the court erred in permitting Dr. Lovell to testify to the fact that appellee's mother was disappointed and depressed when she heard that her son had not arrived on the train, and that this disappointment and consequent depression had a tendency to hasten her death. Counsel for appellee insist that such evidence was ad-

missible as bearing upon appellee's mental anguish, for his grief would be all the greater because of his inability to give his mother the treatment that had previously brought about her recovery, and because of the fact that she was depressed by reason of his failure to arrive in time to see her. In our opinion, however, the effect of appellee's testimony would be to lead the jury to the conclusion that the telegraph company was in a sense responsible for the death of appellee's mother because of his failure to get there and give her the treatment that had formerly resulted in her recovery, while to admit the testimony of Dr. Lovell would, in effect, permit a recovery for the mother's anguish, instead of the son's. This is one of the few courts giving the right of recovery in cases of mental anguish. We have restricted this to cases of the nearest degree of relationship. The ground of this restriction is that there is a natural mental anguish resulting from a failure to arrive at the bedside of a dying relative or the failure to attend the funeral of such relative. The law naturally concludes that mental anguish in case of such relationship will necessarily follow. If testimony of the kind given above were admissible, there would be no reason for restricting a recovery to cases of the nearest degree of relationship, for friends could frequently prove greater mental anguish than could a parent or son. Again, if such testimony were admissible, a son might prove that the relationship between him and his mother was more tender than that which usually exists between mother and son. He might go into matters of sentiment and love which it would be impossible for the defendant in any way to rebut. We think that in cases of this kind the party suing should be confined to a statement of the mere facts of mental anguish, and should not be permitted to introduce testimony of the nature referred to for the mere purpose of harrowing the feelings of the jury, and increasing the size of the verdict. Upon the next trial the court will exclude such testimony.

For the reasons given, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,
Appt.,
v.
C. C. ROE.

(— Ky. —, 112 S. W. 683.)

Attorney — disbarment — right of state.

A proceeding to disbar an attorney for

unfitness to practise his profession because he has collected money for clients which he has refused upon demand to pay over may be instituted by the commonwealth's attorney in the name of the commonwealth, although a statute permits him to be disbarred for the cause specified upon application of the person whose money is withheld.

(October 8, 1908.)

APPEAL by the State from an order of the First Division, of the Common Pleas, Circuit Court for Jefferson County dismissing an information filed to secure the disbarment of defendant. Reversed.

The facts are stated in the opinion.

Messrs. James Breathitt, Attorney Gen-

eral, W. O. Harris, and A. Scott Bullitt, with Mr. Alexander P. Humphrey, Jr., for appellant:

The information was properly brought in the name of the commonwealth.

Wilson v. Popham, 91 Ky. 327, 15 S. W. 859; Com. v. Richie, 114 Ky. 366, 70 S. W. 1054; Richardson v. People's Life & Acci. Ins. Co. 28 Ky. L. Rep. 919, 92 S. W. 284; Nelson v. Com. 33 Ky. L. Rep. 143, 16 L.R.A. (N.S.) 272, 109 S. W. 337.

The information alleges facts sufficient to show that defendant should no longer be allowed to practise as an attorney.

Baker v. Com. 10 Bush, 592; Tudor v. Com. 27 Ky. L. Rep. 87, 84 S. W. 522.

Messrs. T. B. McGregor and J. M. Huffaker also for appellant.

Case Note. — Disbarment or suspension of attorney for withholding client's money or property.

Since honesty, probity, and good moral character are necessary qualifications of an attorney for the practice of his profession, it has been almost universally held that an attorney who, upon demand, retains money collected for his client, or fraudulently appropriates to his own use money which has come into his hands in a professional way, is not of such honesty and good character as to make him worthy of the confidence of the public and his clients; and therefore the courts have not hesitated in disbaring or striking from the rolls one guilty of such acts. Among the cases supporting the above proposition, are the following: Re Treadwell, 67 Cal. 353, 7 Pac. 724 (money collected by attorney on note, and not paid over); Re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169, reaffirmed in 78 Cal. 307, 12 Am. St. Rep. 55, 20 Pac. 674 (suspension for two years for retaining money collected on note and insurance policy, besides other unprofessional conduct); Re Moore, 72 Cal. 359, 13 Pac. 885 (suspension of five years for converting to his own use moneys received by him to be applied to particular purposes); Re Burris, 101 Cal. 624, 36 Pac. 101 (retaining money procured from administratrix under false representations that it was necessary for deposit with probate court); People ex rel. Colorado Bar Asso. v. Walkey, 26 Colo. 483, 58 Pac. 501 (aside from other unprofessional conduct, collection and appropriation to his own use of money belonging to client, and refusing to turn over the same to its owner upon proper demand); People ex rel. Colorado Bar Asso. v. Betts, 26 Colo. 521, 58 Pac. 1091 (retaining money by attorney, advanced for payment of costs in suit which in fact had been dismissed); People ex rel. Colorado Bar Asso. v. Hays, 28 Colo. 82, 62 Pac. 832 (retaining money received from client to pay costs in a suit which was never brought, and also money collected); People ex rel. Colorado Bar

Asso. v. Sindlinger, 28 Colo. 258, 64 Pac. 191 (obtaining money under false representations, and retaining money collected and also money advanced for the purpose of bringing suit); People ex rel. Colorado Bar Asso. v. Mead, 29 Colo. 344, 68 Pac. 241 (retaining money advanced by poor woman for purpose of obtaining divorce for which no action was in fact instituted); People ex rel. Colorado Bar Asso. v. Keegan, 30 Colo. 71, 69 Pac. 524 (failure to pay over money collected); People ex rel. Colorado Bar Asso. v. Webster, 31 Colo. 43, 71 Pac. 1116 (retaining money collected); People ex rel. Colorado Bar Asso. v. Kelsey, 32 Colo. 1, 75 Pac. 390 (failure to turn over money collected, and appropriating money sent for redemption of land from tax sale); People ex rel. Colorado Bar Asso. v. Essington, 32 Colo. 168, 75 Pac. 394 (misappropriation of money by the firm, of which the respondent received at least a part); People ex rel. Colorado Bar Asso. v. Nicholas, 36 Colo. 42, 84 Pac. 67 (failure, upon demand, to pay over money collected for client); Re Simpson, 9 N. D. 379, 83 N. W. 541 (concealment by attorney that he had collected claim); Re Elliott, 18 S. D. 264, 100 N. W. 431 (among other transactions, retaining money falsely represented to be necessary for costs in divorce proceedings); Baker v. State, 90 Ga. 153, 15 S. E. 788 (retaining undue portion of money collected); Re Mahoe, 3 Haw. 255 (deceit, and appropriation by attorney of money intrusted to him for costs); People ex rel. Cutter v. Ford, 54 Ill. 520 (obtaining money by false representations that it was necessary to refund taxes which had been paid by another); People v. Palmer, 61 Ill. 255 (refusal to pay over moneys collected); People v. Cole, 84 Ill. 327 (refusal upon demand to pay over money collected); People ex rel. Atty. Gen. v. Murphy, 119 Ill. 159, 6 N. E. 488 (failure to pay over money collected); People ex rel. Bulkley v. Salomon, 184 Ill. 490, 56 N. E. 815 (appropriation of money due estate, to attorney's own use); People ex rel. Deneen v. Shirley, 214 Ill. 142, 73 N. E. 303 (attorney falsely representing his serv-

Messrs. Austin E. Walsh, Coruth, Chatterson, & Blitz, and Walsh & Walsh for appellee.

Carroll, J., delivered the opinion of the court:

The purpose of this proceeding was to disbar the appellee, a practising attorney at law in the city of Louisville. The information filed against him by the commonwealth's attorney of the district, in the name of the commonwealth, was as follows: "Commonwealth of Kentucky v. C. C. Roe, Joseph M. Huffaker, commonwealth's attorney of the thirteenth judicial district of the commonwealth of Kentucky, who, in the name of and by the authority of the commonwealth of Kentucky, prosecutes in its

behalf, in his own person comes into the Jefferson circuit court, common pleas, first division, and tenders the affidavits of Charles L. Gray and Charles Peebles, and makes the same a part of this information, and informs the court that C. C. Roe of the county of Jefferson, and commonwealth of Kentucky, a member of the bar of said court, while a member of said bar and in his capacity as a practising attorney at law, within the jurisdiction of said court, committed the following acts of unprofessional misconduct, and was guilty of the following immoral and illegal practices, to wit: [Then follows in detail the charge that Roe collected for one Gray the sum of \$150, one half of which he was entitled to retain as a fee; that, although payment was fre-

ices to be necessary and thereby obtaining the payment of fees and costs); *People ex rel. Healy v. Stirlen*, 224 Ill. 636, 79 N. E. 969 (refusal to settle with client for whom attorney had collected money); *Slemmer v. Wright*, 64 Iowa, 164, 6 N. W. 181 (suspension for two years for failure to pay over money collected); *Re Wilson* (Kan.) 100 Pac. 635 (retaining of money collected on sale of real estate for client, and deceiving the latter regarding facts concerning a damage claim); *Strout v. Proctor*, 71 Me. 289 (obtaining bill of sale of household goods by false pretenses and representations, and then inducing his client to leave the state); *Boston Bar Assn. v. Casey*, 196 Mass. 100, 81 N. E. 892 (fraudulent misappropriation of money belonging to client); *Southworth v. Bearnes*, 88 Minn. 31, 92 N. W. 466 (misappropriation by attorney of the money paid to him by his clients); *Re Z—*, 89 Mo. App. 426 (suspension for six months for misappropriating funds advanced by client); *State ex rel. Benton v. Baum*, 14 Mont. 12, 35 Pac. 108 (misappropriation of money coming into his hands); *State ex rel. Hartman v. Cadwell*, 16 Mont. 119, 40 Pac. 176 (misappropriation of money coming into his hands); *Re Weed*, 26 Mont. 507, 68 Pac. 1115 (deceit in retaining money collected); *Re Thresher*, 33 Mont. 441, 114 Am. St. Rep. 834, 84 Pac. 876, 8 A. & E. Ann. Cas. 845 (retention of money deposited with clerk of court, and appropriation of money advanced for costs); *Re McDermit*, 63 N. J. L. 476, 43 Atl. 685 (retaining money advanced for various purposes connected with a bastardy proceeding); *Re Clark*, 108 App. Div. 150, 95 N. Y. Supp. 388, affirmed in 184 N. Y. 222, 77 N. E. 1 (among various other unprofessional acts, retaining for some time money collected); *Re Nekarda*, 114 App. Div. 370, 100 N. Y. Supp. 42 (collecting legacies for client, and appropriating them to his own use); *Re Stern*, 120 App. Div. 375, 105 N. Y. Supp. 190 (retention of money collected, and appropriation of money advanced for costs); *Re Cohn*, 120 App. Div. 378, 105 N. Y. Supp. 84 (appropriation of money collected for client); *Re O'Sullivan*, 122 19 L.R.A. (N.S.)

App. Div. 527, 107 N. Y. Supp. 462 (retaining money which was to be returned in case the attempt to procure a pardon for a prisoner was unsuccessful); *Re An Attorney*, 86 N. Y. 563 (besides other unprofessional conduct, retaining an undue portion of pension money collected); *Re Titus*, 50 N. Y. S. R. 636, 21 N. Y. Supp. 724 (retaining money collected, as well as other money intrusted to him for settlement); *State ex rel. McCormick v. Winton*, 11 Or. 456, 50 Am. Rep. 486, 5 Pac. 337 (securing money by false representations); *State ex rel. Kilbourne v. Hand*, 9 Ohio, 42 (retaining money collected); *Re Swadener*, 5 Ohio S. & C. P. Dec. 598 (appropriation of client's money to his own use); *Kennedy's Disbarment*, 178 Pa. 232, 35 Atl. 995 (appropriation of money advanced on mortgage, besides the retention of various other sums of money); *Ashton Disbarment*, 4 Pa. Dist. R. 425; *Re Orwig*, 31 Phila. Leg. Int. 20; *Davis v. State*, 92 Tenn. 634, 23 S. W. 59 (misappropriation of money advanced to pay judgment); *Re O—*, 73 Wis. 602, 42 N. W. 221; *Re Chandler*, 22 Beav. 253 (misappropriation of trust money); *Re —*, 10 Jur. 198 (refusal, upon direction of the master of the court, to refund sum of money); *Re Wright*, 12 C. B. N. S. 705; *Re H. An Attorney*, 31 L. T. N. S. 730; *Re Blake*, 3 El. & Bl. 34.

In *Delano's Case*, 58 N. H. 5, 42 Am. Rep. 555, an attorney at law was disbarred for appropriating to his own use money coming into his hands as collector of taxes, the court saying that his situation as collector of taxes was, in substance, the situation of an attorney recovering money for a client.

In *Re Hill*, 9 Best & S. 481, an attorney acting as a clerk to a firm of attorneys was suspended for twelve months because of the appropriation by him of money to his own use, which he had received in completing the sale of certain property. The court, in this case, although recognizing that the misconduct was not committed strictly in his professional character, yet said that it was such misconduct as would have prevented him from being admitted as an attorney,

quently demanded, he failed and refused to pay to Gray the amount to which he was entitled.] Wherefore, the said commonwealth's attorney charges that, by the commission of the acts aforesaid, the said C. C. Roe has shown himself to be a person devoid of honesty, probity, and good demeanor, and is totally unfit to be an attorney at law and a member of the bar of said court." In another paragraph, containing the same technical averments, it is charged that, as the attorney for one Mary Glover, he collected \$250, and failed to pay any part thereof until long after the same was due, although payment was frequently demanded. Upon the filing of this information, accompanied by affidavits made by the persons for whom the money was collected,

a rule was issued against Roe to show cause why his authority as an attorney to practise and be an officer of the court should not be revoked.

Upon hearing the proceeding, the court dismissed it upon the face of the papers, upon the ground that it should have been instituted and prosecuted in the name of the persons for whom it was charged Roe had collected the money, and not in the name of the commonwealth. In reaching this conclusion the lower court followed the opinion of this court in *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859. In that case there was a motion in the name of Popham against H. T. Wilson, an attorney to show cause, if any he had, why he should not pay over to him by certain day money

and they would deal with him as if he were now applying for admission.

In *Re Temple*, 33 Minn. 343, 23 N. W. 463, an attorney was suspended for six months for making arrangements with the maker of a note for boarding his partner as payment of the note, and then, without accounting to his client, who repudiated the arrangement, permitting the boarding-house keeper to stand the loss.

In *Fairfield County Bar v. Taylor*, 60 Conn. 11, 13 L.R.A. 767, 22 Atl. 441, it was held that the absolute disbarment of an attorney is justified where, upon receiving an unenforceable claim against his own client, he caused a complaint to be served in the name of another attorney, and then advised his client to settle, falsely telling him, with full knowledge of the facts, that the claim was good and could be collected out of his property.

In *Jeffries v. Laurie*, 27 Fed. 195, an attorney who disobeyed an order by the court to pay over money collected by him for his client was disbarred and committed to jail for ninety days for contempt.

In *Re Snyder*, 24 Fed. 910, a weak-minded person laboring under the hallucination that he had committed a crime fled to another state. There he was discovered by certain detectives and officers, who, with the hope of obtaining a reward, had him arrested, and committed him to jail. The officers took a lawyer into their confidence, and, on learning of his innocence, they together proceeded to ship him out of the country and to divide all the money sent to him by his relatives. In a proceeding to disbar the attorney, it was held that the conduct on the part of his attorney was sufficient to justify the court in striking his name from the roll of attorneys and disbarring him from practice.

In *People ex rel. Deneen v. Gilmore*, 214 Ill. 569, 69 L.R.A. 701, 73 N. E. 737, it was held that a license to practise law will be revoked which is secured by a fraudulent concealment of the fact that the plaintiff has recently been convicted of embezzling funds from a client in another state,—especially if, since its issuance, the plaintiff has

been guilty of professional misconduct evincing such lack of personal integrity and professional honor as to establish that he is unworthy to be allowed to hold it.

In *Re Bleakley*, 5 Paige, 311, it was held that, where a solicitor collects money for his client which he refuses to pay over, the petitioner, if necessary, may apply for a precept of commitment, or apply to remove him from his office of solicitor.

In *Re Knowles*, 16 Ont. Pr. Rep. 408, it was ordered that a solicitor should be struck off the roll unless by a named day he paid all money found to belong to his client, together with the costs of the motion to strike him off the roll.

In *Re J. B., An Attorney*, 6 Manitoba L. Rep. 19, for the retaining of money which belonged to his client, an attorney was taken off the attorneys' roll, but not off the barristers'.

In *Re Hoffecker* (Del. Ch.) 60 Atl. 981, an attorney was stricken off the roll of solicitors on chancery, which, however, had no effect on his practice before the law courts, for disposing of a trust fund invested in safe securities, and reinvesting it in industrial corporations of which he himself was the promoter, resulting in the loss and dissipation of the fund.

Insufficient defenses.

Many and various have been the excuses and defenses offered by the attorneys against whom disbarment proceedings have been instituted for fraudulent appropriation of their clients' money. Among these defenses is payment after the commencement of the proceedings. This, however, it has been universally held is not in itself sufficient to permit the dismissal of the proceedings.

Thus, in *People ex rel. Carr v. Selig*, 25 Colo. 505, 55 Pac. 722, it was held that an attorney at law who refuses to pay over money collected for a client cannot relieve himself from the consequences of the violation of professional duty by paying over the money after the commencement of disbarment proceedings, though in a proper case it may be considered in mitigation of the punishment.

Other cases holding to the same effect

he had collected as his attorney. The proceeding was instituted under § 104 of the Kentucky Statutes of 1903, reading as follows: "If any attorney at law shall collect the money of his client, and, on demand, wrongfully neglect or refuse to pay over the same, the circuit court of the county in which the money may be collected shall, after notifying the attorney to show cause against the same, suspend him from practice in any court for twelve months, and until the money shall be paid. Before any such motion shall be entertained, a demand of the money shall be made of such attorney in the county of his residence, and no such proceeding shall take place unless it is commenced within two years next after the collection of the money." Wilson moved

the court to quash the rule because the proceeding against him should have been in the name of the commonwealth in place of Popham. In answer to this objection, the court said: "This proceeding is, however, under a statute which relates to but one act of an attorney. It embraces a single act of misconduct, and that is one where there is always a person immediately and directly interested. It is true the public are incidentally interested, and, therefore, the legislature, upon the idea, likely, that otherwise it may not be properly prosecuted, has provided that the attorney for the commonwealth shall attend to the proceeding. The statute does not say in whose name it shall be carried on, and, in view of the fact that there is always a person di-

are *People ex rel. Whittemore v. Ryalls*, 8 Colo. 332, 7 Pac. 290, and *People ex rel. Colorado Bar Asso. v. Keegan*, 30 Colo. 71, 69 Pac. 524; also *Re Davies*, 93 Pa. 116, 39 Am. Rep. 729, where a settlement was effected between the client and the attorney as to the payment of a bond which the latter had collected, the client consenting to the entering of a *nolle prosequi*.

In *People ex rel. Colorado Bar Asso. v. Waldron*, 28 Colo. 249, 64 Pac. 186, it was held that, in a disbarment proceeding against an attorney for appropriating to his own use money received by him to be loaned for the benefit of his client, neither his youth and inexperience, nor the fact that since the wrong was done he had repaid the larger part of the deficit, was sufficient as a defense.

In *McMath v. Maus' Bros. Boot & Shoe Store*, 12 Ky. L. Rep. 952, 15 S. W. 879, it was held no defense to a disbarment proceeding against an attorney for retaining money collected for his client, that he is holding such money to indemnify him for the indebtedness of the collecting agency through which he received the claim for collection.

In *People ex rel. Colorado Bar Asso. v. Webster*, 31 Colo. 43, 71 Pac. 1116, it was held that the fact that the money was retained by reason of negligence and carelessness as a result of the disease of alcoholism was no defense to a disbarment proceeding.

In *People ex rel. Carr v. Selig*, supra, it was held no defense to a disbarment proceeding against an attorney for refusing to pay over money collected for his client, that the money was collected for the guardian of minor children, and that he loaned the money to prevent his client's husband from using it for his own personal benefit.

Sufficient defenses.

It has, however, often been the case that, although the conduct of the attorney in dealing with his client in regard to the latter's money was not a commendable one, yet it probably was not of such a nature as to call for such drastic measures as a disbarment proceeding.

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Thus, in *Re Veeder*, 11 N. M. 43, 66 Pac. 545, it was held that neglect on the part of the attorney to notify a client of the collection of money, or neglect immediately to pay over money collected, may, in certain circumstances, be reprehensible; but it is not, alone, sufficient ground for disbarment, if there is an absence of fraud, trickery, or deceit.

In *Guilford v. Sims*, 13 C. B. 370, it was held that the mere nonpayment of money by an attorney pursuant to an order and rule of court is not sufficient ground for striking him off the roll. To the same effect is *Re Campbell*, 32 U. C. Q. B. 444.

In *Re Duncan*, 64 S. C. 461, 42 S. E. 433, it was held that, although the conduct of an attorney in depositing his client's money in his own name and checking it out for his own use, claiming to be able to replace it at any time, is reprehensible, it does not furnish ground for disbarment.

In *Com. v. McKay*, 14 Ky. L. Rep. 407, 20 S. W. 276, it was held a good defense to a disbarment proceeding that the client was indebted to the attorney in a sum exceeding the amount collected.

It was held in *Re Thresher*, 29 Mont. 11, 73 Pac. 1109, that, although an attorney for an administratrix has no right to retain from funds collected for her an amount claimed by him as due from her decedent, yet the retention of funds for such purposes does not merit so severe a penalty as that of disbarment.

In *Re Ross*, 16 Ont. Pr. Rep. 482, it was held that, where there is some dispute as to whether or not there is a balance due the client, an order should not be granted striking the attorney from the rolls for nonpayment. To the same effect is *People ex rel. Colorado Bar Asso. v. Robinson*, 32 Colo. 241, 75 Pac. 922.

In *Re Lentz*, 65 N. J. L. 134, 50 L.R.A. 415, 46 Atl. 761, it was held that the fact that an attorney wrongfully appropriated money belonging to his client without any actual intention to defraud and with the expectation of paying it over as soon as required, coupled with the fact that since then he had conducted himself with integrity in

rectly interested in the proceeding, it seems to us it should be prosecuted in his or her name. Under the statute, this person must take the preliminary steps necessary to its institution. He only can demand payment of the money, and, as he is immediately interested, and knows whether there is ground for the proceeding, he should, in case it be unfounded, be responsible for the costs to the attorney. He is therefore the proper party to the proceeding, because, if he can, without proper ground, act in the name of the commonwealth, then there can be no judgment for costs to the attorney, and he is remediless, although another was immediately interested and directly instrumental in putting the proceeding upon foot. The motion to quash the proceeding was therefore properly overruled." The radical difference between the procedure in the Wilson Case and in this one is that there the proceeding was instituted by the individual wronged, and it was sought to punish Wilson under and by virtue of the statute, while here the proceeding is not by the injured client or under the statute, but is in the name of the commonwealth for an offense that shows the attorney unfit to practise his profession. It is true the offense committed by Wilson and Roe was the

same, but it does not follow from this that there is only one method by which the offender may be punished, and that the one adopted in the Wilson Case. The statute in question only describes one offense for which an attorney may be suspended from practising law. It does not point out the other causes for which he may be disbarred.

As further illustrating the fact that the statute in respect to the causes for which an attorney may be disbarred or the method of procedure is not exclusive, we may call attention to § 97 of the Kentucky Statutes of 1903, providing that "no person convicted of treason or felony shall be permitted to practise in any court as counsel or attorney at law." But this does not mean that only those who have been convicted of felony or treason may be disbarred. It would be doing a serious injustice to the intelligence of the lawmaking department of the state to hold that such was their intention, or to conclude that, by the enactment of this statute, they meant to declare that, however flagrant the misconduct of an attorney, if it was less than a felony, the courts were powerless to protect themselves, the profession, and the public. The statute points out two of the causes that peremptorily warrant disbarment proceed-

private and public life, was sufficient to justify the court in refusing to declare him now unworthy of the confidence of clients, and to strike his name from the roll of attorneys.

In *Goodwin v. Gosnell*, 10 Jur. 422, although a solicitor was guilty of advising a client to commit a breach of trust and profiting himself thereby, the court dismissed the proceedings, taking cognizance of his youth and inexperience, and his desire to make complete reparation, and his undertaking to restore the trust property and to pay costs and charges.

In *People ex rel. Hart v. Anderson*, 21 Colo. 271, 40 Pac. 568, it was found that the notes which were alleged to have been placed in the attorney's hands for collection, and for which the proceeds were not paid over, were in fact sold to the attorney for an adequate consideration, he not being guilty of bad faith.

Statutes.

In a few cases it appears that disbarment proceedings were hampered somewhat by special statutory provisions.

Thus, in *Turner v. Walsh*, 12 Rob. (La.) 383, although a judgment was obtained against an attorney compelling him to pay over money collected, it was held that his license as an attorney at law could not be withdrawn unless on conviction in the manner prescribed by statute. To the same effect are *Chavalon v. Schmidt*, 11 Rob. (La.) 91, and *Kane v. Haywood*, 66 N. C. 1, in the latter case it appearing that the statute 19 L.R.A. (N.S.)

provided in effect that no attorney at law should be disbarred unless he had been convicted, or in open court confessed himself guilty of some criminal offense.

Misconduct of partner.

Nor does the misconduct of a member of a firm in dealing with a client's money apply to his partner who had no knowledge of, or connection with, the misconduct complained of, so as to sustain disbarment proceedings against the latter. *Porter v. Vance*, 14 Lea, 629; *Re McCaughey*, 3 Ont. Rep. 425; *Re Ross*, 16 Ont. Pr. Rep. 482.

In *Klingensmith v. Kepler*, 41 Ind. 341, it was held that, since a statute providing for the suspension of an attorney from practice is penal in nature, and should therefore be strictly construed, an attorney cannot be suspended from practice by the acts of his partner in collecting and converting to his own use the money of a client without the former's knowledge or consent. In this case, however, a judgment was rendered for the amount of money collected, and, on return of the case to the circuit court, an amended complaint was filed in which it was asked that, since one of the attorneys was insolvent and the various amounts due the firm assigned to the other who had assumed to pay the firm indebtedness, the latter should be required to account for all sums collected on the trust; and that he be suspended from practice until he should pay off the judgment. It was held, however, by the supreme court, as reported in *Kepler v. Klingensmith*, 50 Ind. 434, that a failure to

ings, but it does not, and was not designed to, limit the right to the causes mentioned. An attorney may be guilty of many offenses, evidencing a want of honesty, probity, and good moral character, that would authorize the court to disbar him independent of the statute. When the client for whom an attorney has collected money and failed upon demand to pay it over desires to proceed against the attorney, the statute directs the method of procedure; and, as held in the *Wilson Case*, it is exclusive, and must be followed. It would seem that the purpose of this statute was to afford the client a speedy and effectual remedy for the collection of his money wrongfully withheld, and that it was intended more for the benefit of the client than to purify and elevate the profession by removing from its ranks one who had shown himself unworthy to be a member of it. But when an attorney collects the money of his client and fails upon demand to pay it over, he commits an offense greater and broader than a mere injury to his client, and may be proceeded against in the name of the commonwealth for the security of the public, the protection of the courts, and the benefit of the profession. It is certainly a breach of integrity and a manifestation of a lack of

probity in an attorney to wrongfully withhold the money of his client. For this offense, although it evinces the unfitness of the attorney to be a member of the legal profession, his client might not desire to proceed against him, and therefore, if the ruling of the lower court was correct, the attorney could not be punished at all for his delinquency. Thus we would have the anomalous state of affairs presented that a practising attorney who was guilty of conduct that brought censure and reproach upon the profession and the courts could not be punished because the particular individual whom he had wronged did not wish to institute proceedings against him. This construction is too narrow. It takes from the court the right to discipline its officers, and denies it the power to take such action as may be necessary to punish an offender who is bringing the administration of justice into disrepute. The failure to pay over money collected in a professional capacity is perhaps more frequently committed by attorneys than any other act of misconduct; yet, if the argument of counsel for appellee was sound, the court would be powerless to correct it, unless the consent of the client could be obtained. When an attorney collects the money of his client and fails to

collect and apply such debts to the payment of the judgment would not authorize the suspension of the attorney to whom the accounts had been assigned.

However, in *People ex rel. Colorado Bar Asso. v. Betts*, 26 Colo. 521, 58 Pac. 1091, where a firm of attorneys, in pursuance of their employment for that purpose, collected money for a client and failed to pay it over, but wrongfully withheld it, frequently stating to their client that they had not collected the money; and the false statements in regard thereto made in the name of the firm were well known to each member,—it was held that there was cause for disbarment of both members of the firm, although one of them had the full benefit of the money collected.

Who may institute proceedings.

The question as to who shall institute the disbarment proceedings against an attorney for the fraudulent appropriation of his client's money has not received much attention from the courts. In many of the above cases the proceedings were instituted by the local bar association or its committee, in many others by the client whose money was appropriated; but it seems that any person or persons interested may institute the proceedings.

In *People v. Palmer*, 61 Ill. 255, it was held that the statute which authorizes "any person interested" to apply for a rule upon an attorney who has failed to pay over money collected, to show cause why his name should not be stricken from the roll, 19 L.R.A. (N.S.)

should not receive the narrow construction that the person who may make the application must be a creditor: the court saying that the members of the profession, and other persons besides creditors, had a deep interest in the purity of those who sustain such important relations to the public; and that, besides, in motions of this character, there is no individual party, the information being presented in the name and in behalf of the people; and in this particular case the state's attorney initiated the proceedings.

And see *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859, cited and sufficiently set out in *COMMONWEALTH v. ROE*.

In *Boston Bar Asso. v. Casey*, 196 Mass. 100, 81 N. E. 892, it was held that the proceeding was properly brought by the bar association.

In *People ex rel. Noyes v. Allison*, 68 Ill. 151, where it did not appear but what the money had long since been paid, and that there was a dispute as to the attorney's fee, it was said that, if the party entitled was satisfied and made no complaint, the relator, who in this case was a stranger, need not concern himself about the matter.

In *Fairfield County Bar v. Taylor*, 60 Conn. 11, 13 L.R.A. 767, 22 Atl. 441, it was held that attorneys preferring charges of unprofessional conduct against another attorney, for the purpose of having him disbarred, need not show that they constitute a committee appointed by the bar association of the county for that purpose, either to establish their right to institute the proceeding, or to give the court jurisdiction.

pay it over, he may be proceeded against by the client under the statute and in the manner therein provided; and he may also be proceeded against by the commonwealth for the commission of an offense involving a lack of honesty, as well as probity and good character. The statute provides that a person who desires to obtain license to practise law in this commonwealth must first procure from the county judge of the county of his residence a certificate that he is a person of honesty, probity, and good moral character; and, to enable him to continue in the practice of his chosen profession, it is essential that he should maintain these attributes. It is not enough that he possesses them when he enters the profession. Indeed, it is more important that they be preserved throughout his professional career than that he have them in its beginning, although we would not underestimate their importance at any time. Courts independent of statutes have at all times possessed the inherent right to control and regulate the official conduct of their officers, and to inflict upon them punishment for official misconduct. Attorneys at law are officers of the court, and it has always been the rule in this state that, when the attention of the court in which they practise was called to acts of professional misconduct, it had the right to disbar them if the facts of the case justified the infliction of this punishment. Thus, in *Rice v. Com.* 18 B. Mon. 472, the court, in speaking of the right to disbar an attorney, said: "If a court have knowledge of the existence of such official misconduct on the part of any of its officers, it not only has the power, but it is its duty, to institute an appropriate proceeding against the offender, and to bring him, if guilty, to condign punishment. . . . [Attorneys at law are officers of the court.] The official misconduct of an attorney at law may be inquired into in a summary manner by the court, and, if guilty of such misconduct, his name may be stricken from the roll of attorneys admitted to the practice of law at the bar of the court." In *Baker v. Com.* 10 Bush, 592, the court said: "When an attorney commits an act, whether in the discharge of his duties as attorney or not, showing such a want of personal or professional honesty as renders him unworthy of public confidence, it is not only the province, but the duty, of the court, upon a proper and legitimate presentation of the case, to strike his name from the roll of attorneys. Nor is it necessary, as contended by appellant's counsel, that the offense should be of such a nature as would subject him to an indictment. . . . The question of the power of the court to strike the name of an attorney from the rolls in a

proceeding like this, for such a cause, has been recognized and maintained by so many adjudications that it cannot at this day be considered an open question." To the same effect is *Walker v. Com.* 8 Bush, 86; *Com. v. Richie*, 114 Ky. 366, 70 S. W. 1054; *Underwood v. Com.* 32 Ky. L. Rep. 32, 105 S. W. 151; *Nelson v. Com.* 33 Ky. L. Rep. 143, 16 L.R.A.(N.S.) 272, 109 S. W. 337. In *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, the court said: "This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practise. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession."

While this right of disbarment for proper cause is universally upheld as a legitimate exercise of power inherent in courts, it ought to be, as well expressed by Chief Justice Marshall in *Ex parte Burr*, 9 Wheat. 529, 6 L. ed. 152, exercised with great moderation and judgment. Nor do we wish to be understood as holding that it is only for professional or official misconduct in the capacity of an attorney that a licensed lawyer may be disbarred. Aside from his professional or official behavior, an attorney may be personally so disreputable a character, or be guilty of such gross misconduct outside of his professional duties and employment, as to render him unworthy of public confidence, and incapable of discharging in the proper manner his obligations as an officer of the court; or, to put it in another and perhaps better way, evince by his acts a lack of good moral character, and thus bring upon himself the punishment of disbarment. Our opinion, in harmony with all the cases both in and out of this state, is that, independent of any statute, the court may, upon the motion of the commonwealth by its attorney, after due notice to the accused, and fair opportunity for hearing, disbar an attorney who has been guilty of such personal or professional conduct as proves him to be unworthy to have his name upon the rolls. As honesty, probity, and good moral character are necessary qualifications for admission to the bar, and their existence is essential to the continuance of the relation, therefore, when an attorney ceases to possess these traits of character in whatever mode or manner the want of them is exhibited, he may be removed. We do not, of course, undertake to prescribe any rule of conduct that attorneys must follow to avoid committing acts of disbarment, or to set down the specific acts of personal or professional misconduct that

will subject them to this punishment. Want of honesty, probity, and good moral character may be manifested in various ways, and each case must be adjudged as seems right upon the facts presented in its investigation. But, with reference to the particular matter before us, we have no hesitation in saying that an attorney who intentionally and wrongfully withholds after demand money he has collected for his client is guilty of such misconduct as shows him to be unworthy to be a member of the legal profession or an officer of the court, and authorizes in a proper proceeding his disbarment.

Wherefore the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

KENTUCKY COURT OF APPEALS.

MRS. B. A. SLEET, Appt.,
v.

FARMERS' MUTUAL FIRE INSURANCE
COMPANY OF BOONE COUNTY, KEN-
TUCKY.

(— Ky. —, 113 S. W. 515.)

Insurance — lightning — liability.

Recovery for loss of a barn by being knocked down by lightning, but not burned, cannot be had under a policy in a mutual company insuring against loss by fire, although the custom has been to pay such losses and to levy assessments therefor on the policy holders, since such payments were merely misappropriations of funds by the company.

(November 13, 1908.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Boone County dismissing a petition filed to recover the

amount alleged to be due on a fire-insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. J. G. Tomlin, and J. L. Vest, for appellant:

The custom or usage of appellee in paying all similar losses may be pleaded in aid of the interpretation of the policy, and as a valid and binding by-law legally established by long use and acquiescence upon the part of those who had the power to do so.

State ex rel. Corey v. Curtis, 9 Nev. 335; Henry v. Jackson, 37 Vt. 431; Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330; 1 Morawetz, Priv. Corp. § 494; 1 May, Ins. § 179; Babcock v. Montgomery County Mut. Ins. Co. 6 Barb. 637, affirmed in 4 N. Y. 336.

Messrs. Sidney Gaines and Clore, Dickerson, & Clayton for appellee.

Barker, J., delivered the opinion of the court:

On the 5th day of February, 1906, the appellee, the Farmers' Mutual Fire Insurance Company, issued a policy of insurance to the appellant, Mrs. B. A. Sleet, the material parts of which are as follows: "By this policy of insurance, and for and in consideration of four and $\frac{2}{100}$ dollars, and a premium note of ninety-four and $\frac{40}{100}$ dollars, by said company received, do insure Mrs. B. A. Sleet, of Boone county, Kentucky, against loss or damage by fire to the amount of the insurance is then distributed as described in application and survey No. 5053, as follows, to wit: . . ." The amount of the insurance is then distributed over the dwelling house and the various barns and sheds and other buildings upon the farm, among which was a barn 60 by 40 by 18, which was insured for \$500. As this was the only building destroyed, it is not necessary to set forth the particular distribution of the remainder. The covenant of

Case Note. — Custom to pay certain class of losses as affecting liability of insurer for such a loss not covered by the policy.

An extensive search has disclosed but one other case in which this precise question was discussed, though many decisions are found in the books involving the effect of a custom or usage of trade upon the meaning of the terms used in contract of insurance. In Smith v. Mobile Nav. & Mut. Ins. Co. 30 Ala. 167, it was held that parol evidence of a custom could not be received to show that a marine policy of insurance on goods shipped from one port to another covered the overland transportation of the goods by railroad to the port of shipment. The court said that, if the policy had contained a distinct state-

ment that the insurers agreed to indemnify the owners for loss of the goods only while they were water bound, it could not be contended that it could be shown by usage or local custom that the insurer was liable for a loss of the goods on land.

Attention should, however, be called to Lattomus v. Farmers' Mut. F. Ins. Co. 3 Houst. (Del.) 254, in which the court, without rendering an opinion, sustained a demurrer to a defense upon a policy of fire insurance which was silent upon the effect of additional insurance, that there were a custom and by-law of the insurer whereby, if other insurance was carried, the insurer became liable only for such proportion of the loss as the amount of the insurance carried by it bore to the whole amount of insurance.

the company is as follows: "And the said company do promise and agree, and with the insured, to make unto her, her executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property above specified during the term of five years from the 2d day of March, 1900, at 12 o'clock (noon), unto the 2d day of March, 1911, at 12 o'clock (noon)." Prior to the institution of this action, and during the insurance-contract period, the barn in question was struck by lightning, and knocked down, but not burned. Thereupon the appellant demanded payment from the company of the sum of \$500, and, upon its refusal to pay her, she instituted this action.

The plaintiff, in her petition, sets forth the insurance contract as hereinbefore stated, the destruction of the barn by lightning, the demand of payment, and refusal, and alleges that at the time of the execution and delivery of the policy of insurance it was and had been for many years the uniform practice and custom of the defendant, the Farmers' Mutual Fire Insurance Company, to pay for all losses or damages done to buildings insured in the company when injured or destroyed by lightning, the same as though injured or destroyed by fire; that this custom was well known to the defendant at the time of the execution of the policy of insurance, and had been practised and observed by it at all times before and since the execution of the policy; that the custom on the part of the defendant insurance company entered into and formed a part of the contract of insurance herein sued on, and since the execution and delivery of the policy the defendant company had made assessments on all losses by lightning, and plaintiff has paid all assessments when called upon by the company, and contributed to the payment of all losses by lightning which were insured by the defendant company and occurred since the issue of the policy. Afterwards she amended her petition, and alleged that the defendant is a mutual company, and all of the losses and other expenses that are now or ever have been paid by it are paid from funds derived by assessments on the several policy holders insured by it according to the amounts of their respective policies. A general demurrer was interposed by the defendant to the petition as amended, and sustained by the court, and, the plaintiff declining to plead further, her petition was dismissed. The trial court was clearly right in sustaining the demurrer. The policy is filed as an exhibit, and its essential parts are copied above. The covenant of the defendant with the plaintiff was to indemnify her against

loss occasioned by fire. She was not entitled to recover for loss by lightning which did not burn, but merely knocked down, the barn, any more than she would have been entitled to recover under the policy if it had been blown down by a windstorm. If the officers of the company had paid the plaintiff, it would have been a misappropriation of the money of the corporation. The plaintiff's position is not aided by the allegation that other losses occasioned by lightning had been paid under contracts similar to that sued on. If this be true,—and the demurrer, for the purpose of testing the petition, admits it,—it would only show that the officers in charge of the corporate funds had been guilty of the payment of erroneous claims. The prior errors of the defendant company do not constitute a custom of the trade or of the community. The plaintiff's right must stand or fall by the written contract; and this clearly shows that the loss accruing to her was not occasioned by fire, and therefore not within the terms of the contract of indemnity purchased by her.

Judgment affirmed.

MAINE SUPREME JUDICIAL COURT.

OPINION OF JUSTICES.

LEGISLATIVE PROHIBITION OF TREE CUTTING.

(— Me. —, 69 Atl. 627.)

Trees—cutting—prohibition—Federal Constitution.

1. Regulation by the state of the cutting or destruction of trees growing on wild and uncultivated land, or prohibition of the wanton cutting of small trees on such lands which are of equal or greater value standing than cut, for the purpose of protecting the water supply of the state, is not a taking of property for which com-

Case Note.—Constitutionality of legislation restricting or regulating the right to cut timber on private land.

In view of the present widespread discussion of the subject of the conservation of the natural resources of the country, the foregoing opinion is of especial interest. A search has failed to disclose any other case involving the constitutionality of legislation regulating or restricting the right to cut timber upon private land; but in a few cases the courts have upheld statutes of a very similar character, and in language sufficiently broad to indicate that they would uphold legislation of the character of that discussed in the foregoing opinion. Thus, in *Com. v. Tewksbury*, 11 Met.

pensation must be made under the 14th Amendment of the Federal Constitution, since that amendment was not intended to interfere with the police power of the state.

Same — discrimination — classification.

2. Regulating or prohibiting the cutting of trees on wild or uncultivated lands for the purpose of protecting the water supply of the state is not a denial of the equal protection of the laws, since the classification is based on real differences in the nature, situation, and condition of things.

Trees — protection — property rights — compensation.

3. Private property is not taken, so as to require compensation, by regulating the cutting of trees on wild and uncultivated land to protect the public water supply, and, for the same purpose, prohibiting the cutting of small trees on such property, the value of which standing is equal to or greater than when cut, and regulating the cutting of small trees on such land to enhance the value of such land and the trees thereon, and promote the interests of the owners and the common welfare of the public.

(March 10, 1908.)

SUBMISSION by the Senate for the Opinion of the Justices of the Supreme Judicial Court of questions relating to the power of the legislature to regulate or prohibit the cutting or destruction of trees on wild or uncultivated land. Legislation sanctioned.

In Senate, March 27, 1907.

Ordered:—

The justices of the supreme judicial court are hereby requested to give to the senate, according to the provisions of the Constitution in this behalf, their opinion on the following questions, to wit:

55, which is cited in **OPINION OF JUSTICES**, the court said: "All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community, under the maxim of the common law, *Sic utere tuo ut alienum non laedas*. When the injury is plain and palpable, it may be a nuisance at the common law, to be restrained and punished by indictment. . . . But there are many cases where the things done in particular places, or under a particular state of facts, would be injurious, when, under a change of circumstances, the same would be quite harmless. . . . In such cases, we think, it is competent for the legislature to interpose, and, by positive enactment, to prohibit a use of property which would be injurious to the public, under particular circumstances, leaving the use of similar property unlimited, where the obvious con-

In order to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving, and maintaining the natural water supply of the springs, streams, ponds, and lakes, and of the land, and by preventing or diminishing injurious erosion of the land and the filling up of the rivers, ponds, and lakes, and as an efficient means necessary to this end, has the legislature power, under the Constitution:

(1) By public general law to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof, without compensation therefor to such owner?

(2) To prohibit, restrict, or regulate the wanton, wasteful, or unnecessary cutting or destruction of small trees growing on any wild or uncultivated land by the owner thereof, without compensation therefor to such owner, in case such small trees are of equal or greater actual value standing and remaining for their future growth than for immediate cutting, and such trees are not intended or sought to be cut for the purpose of clearing and improving such land for use or occupation in agriculture, mining, quarrying, manufacturing, or business, or for pleasure purposes, or for a building site; or

(3) In such manner to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated lands by the owners thereof as to preserve or enhance the value of such lands and trees thereon and protect and promote the interests of such owners and the common welfare of the people?

(4) Is such regulation of the control, management, or use of private property a

siderations of public good do not require the restraint. This is undoubtedly a high power, and is to be exercised with the strictest circumspection, and with the most sacred regard to the right of private property, and only in cases amounting to an obvious public exigency. Still, we think the power exists, and has been long exercised in cases more or less analogous."

So, in *Hodges v. Perrine*, 24 Hun. 516, it was held that a court of equity would not interfere to obstruct the due execution of a penal statute forbidding the removal of sand which formed a natural barrier between the sea and a public highway, for, assuming that the plaintiff had an absolute title to the beach, yet the power of the legislature to prevent the removal of the sand rested upon the familiar maxim that every owner of land must so use his property as not to injure the public interests.

taking thereof for public uses for which compensation must be made?

In Senate Chamber, March 27, 1907.

Read and passed.

F. G. Farrington, Secretary.

To the Honorable Senate of the Seventy-Third Legislature:

The undersigned justices, in obedience to the requirement of the Constitution, severally give the following as their advisory opinion upon the questions of law submitted to the justices of the supreme judicial court by the senate order of March 27, 1907:

We find that the legislature has, by the Constitution, "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this Constitution nor to that of the United States." Me. Const. art. 4, pt. 3, § 1. It is for the legislature to determine from time to time the occasion, and what laws and regulations are necessary or expedient for the defense and benefit of the people; and, however inconvenienced, restricted, or even damaged, particular persons and corporations may be, such general laws and regulations are to be held valid, unless there can be pointed out some provision in the state or United States Constitution which clearly prohibits them. These we understand to be universally accepted principles of constitutional law.

As to the proposed laws and regulations named in the senate order, the only provision of the United States Constitution having any possible application to such legislation by a state would seem to be that in the 14th Amendment. As to that provision, we think it sufficient to quote the language of the United States Supreme Court in *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, where, speaking of the 14th Amendment, the court said: "But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." It may be added that the proposed laws and regulations would not discriminate between persons or corporations, but only between things and situations, with a classification not merely arbitrary, but based on real differences in the nature, situation, and condition of things.

We think the only provisions in the state Constitution that could be reasonably invoked against the proposed laws and regulations are the guaranteed right of "acquiring, 19 L.R.A. (N.S.)

possessing, and defending property," and the provision that "private property shall not be taken for public uses without just compensation." Declaration of Rights, §§ 1, 21. If, however, the proposed legislation would not conflict with the latter provision, it evidently would not with the former. Hence only the latter one need be considered.

The question of what constitutes a "taking" of private property in the constitutional sense of the term has been much considered and variously decided. In the earlier cases and in the older states the provision has been construed strictly. In some estates in later cases it has been construed more widely to include legislation formerly not considered within the provision. Still more recently, however, the tendency seems to be back to the principles enunciated in the earlier cases. In Massachusetts, one of the earliest states to adopt the constitutional provision, and in Maine, adopting the same provision in succession, the courts have uniformly considered that it was to be construed strictly as against the police power of the legislature.

Com. v. Tewksbury, 11 Met. 55, decided in 1846, was a case where the legislature prohibited the owners from removing "any stones, gravel, or sand" from their beaches in Chelsea as necessary for the protection of Boston harbor. The court held that the statute did not operate to "take" property within the meaning of the Constitution, but was "a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with or injurious to the rights of the public." *Com. v. Alger*, 7 Cush. 53, decided in 1851, was a case where the defendant was prohibited by statute from erecting and maintaining a wharf on his own land (flats) beyond certain fixed lines. The court held that the defendant's title to the land (flats) was a fee simple, and that but for the statute he would have had full right to erect and maintain wharves upon any part of it where they would not obstruct navigation. It was not claimed that the proposed wharf would obstruct navigation, but rather admitted that it would not. The court further held, however, that the statute was within the legislative power, and not forbidden by any clause in the Constitution. The question was considered at length in an opinion by Chief Justice Shaw, and the principle stated as follows, viz. (page 84): "We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious

to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary for the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain," etc.

In the case *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188, decided in 1835, only fifteen years after the adoption of our Constitution, there was upon the plaintiff's land a wooden building. A city ordinance was passed by legislative authority prohibiting the erection of wooden buildings within certain limits, which included the plaintiff's building. After the passage of the ordinance, the plaintiff moved his building to another place within the same inhibited limits. The defendant as city marshal, acting under the ordinance, entered upon the plaintiff's land, and took the building down. The court held the ordinance valid and the defendant protected, and declared as follows (page 405 of 12 Me.): "Police regulations may forbid such a use and such modifications of private property as would prove injurious to the citizens generally. This is one of the benefits which men derive from associating in communities. It may sometimes occasion an inconvenience to an individual, but he has a compensation in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power without impairing any constitutional provision. It does not appropriate private property to public uses, but merely regulates its enjoyment." In *Cushman v. Smith*, 34 Me. 247, decided fifteen years later, in an elaborate opinion by Chief Justice Shepley, the court said of the constitutional provision in question (page 258): "The design appears to have been simply to declare that private property shall not be changed to public property, nor transferred from the owner to others for public use without compensation." In *Jordan v. Woodward*, 40 Me. 317, it was said by the court at page 324: "Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated 19 L.R.A. (N.S.)

that the public have certain and well-defined rights to that use secured, as the right to use the public highway, the turnpike, the public ferry, the railroad, and the like." The same doctrine was recognized in *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *State v. Gurney*, 37 Me. 156, 58 Am. Dec. 782; *Boston & M. R. Co. v. York County*, 79 Me. 386, 10 Atl. 113, and as late as 1905 in *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 A. & E. Ann. Cas. 275.

There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land: (1) Such property is not the result of productive labor, but is derived solely from the state itself, the original owner; (2) the amount of land being incapable of increase, if the owners of large tracts can waste them at will without state restriction, the state and its people may be helplessly impoverished and one great purpose of government defeated.

Regarding the question submitted, in the light of the doctrine above stated (being that of Maine and Massachusetts at least), we do not think the proposed legislation would operate to "take" private property within the inhibition of the Constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase untouched and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay, but not deprivation. While the use might be restricted, it would not be appropriated or "taken."

In the following cases restrictive statutes for the protection of property and other material interests of the people were held to be within the police power, and not a taking of private property, *viz.*: (Limiting the height of buildings though the owner owns *usque ad cælum*) *Welch v. Swasey*, 193 Mass. 364, 118 Am. St. Rep. 523, 79 N. E. 745; (prohibiting the erection of wooden buildings within specified limits) *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; (even when the owner had begun to erect the building before the statute was enacted) *Salem v. Maynes*, 123 Mass. 372; (authorizing the destruction of buildings without compensation to prevent the spread of conflagration) *American Print Works v. Lawrence*, 23 N. J. L. 9; (prohibiting the further use of buildings and appliances for brewing purposes although they had been erected and fitted for that purpose when brewing was a lawful business) *Mugler v.*

Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; (prohibiting the erection of fences on one's own land to gratify spite against others) *Karasek v. Peier*, 22 Wash. 419, 50 L.R.A. 345, 61 Pac. 33; *Smith v. Morse*, 148 Mass. 407, 19 N. E. 393; (prohibiting the wasteful burning of natural gas by the owner) *Townsend v. State*, 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; (prohibiting the use of artificial means by the owners of gas wells to increase the natural flow of the gas from them) *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 467, 50 L.R.A. 768, 57 N. E. 912; (authorizing dams for the purpose of reclaiming swamp lands where the effect was to oblige land-owners to construct and maintain dikes to protect their lands from the water raised) *Manigault v. Springs*, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; (prohibiting one from allowing weeds to grow on his own land) *St. Louis v. Galt*, 179 Mo. 8, 63 L.R.A. 778, 77 S. W. 876; (limiting the quantity of land any person or family may cultivate within city limits) *Summerville v. Pressley*, 33 S. C. 56, 8 L.R.A. 854, 26 Am. St. Rep. 659, 11 S. E. 545; (prohibiting the flow of water from a private artesian well except for certain specified beneficial purposes, as irrigation or domestic use) *Ex parte Elam*, 6 Cal. App. 233, 91 Pac. 811. In *Windsor v. State*, 103 Md. 611, 12 L.R.A. (N.S.) 869, 64 Atl. 288, a statute restricted owners of private oyster beds in taking oysters from them. It was held constitutional, and not a taking of private property. The court, quoting from Judge Story, said: "Property of every kind is held subject to those regulations which are necessary for the common good and general welfare. And the legislature has the power to define the mode and manner in which everyone may use his property."

The foregoing considerations lead us to the opinion at present that the proposed legislation for the purposes and with the limitations named in the senate order would be within the legislative power, and would not operate as a taking of private property for which compensation must be made.

Respectfully submitted.

Lucillius A. Emery.
Wm. P. Whitehouse.
Sewall C. Strout.
Henry C. Peabody.
Albert M. Spear.
Leslie C. Cornish.

Mr. Justice Woodward, one of the justices of the court when the senate order was passed, died before the foregoing opinion could be prepared. His successor, Mr. Jus-

tice King, was not appointed for several months after the passage of the senate order, and holds that, therefore, the senate has not required any opinion from him.

Lucillius A. Emery.

To the Honorable Senate of the Seventy-Third Legislature:

By an order of the senate passed March 27, 1907, the justices of the supreme judicial court were requested to give to the senate their opinion on certain questions, involving the power of the legislature, under the Constitution, to prohibit, regulate, or restrict the cutting or destruction of trees growing on wild or uncultivated land, by the owner thereof, without compensation therefor to the owner, in order, as an efficient means necessary to the end, to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving, and maintaining the natural water supply of the springs, streams, ponds, and lakes, and of the land, and by preventing or diminishing injurious erosion of the land, and the filling up of the rivers, ponds, and lakes. The seventy-first legislature adjourned finally on the following day, March 28, 1907, and the order was received by me April 6, 1907, nine days after the adjournment of the legislature. I now respectfully make the following answer to the order:

The Constitution provides (art. 6, § 3) that the justices "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate, or house of representatives." By this constitutional provision, of course, the justices are not obliged to give their opinion unless the inquiries relate to "important questions of law," nor unless they are made upon "solemn occasions." And, as I shall undertake briefly to show hereinafter, if the justices are not obliged to answer the questions, if they do not relate to important questions of law, or if the occasions are not solemn, it would be improper and inexpedient for them to give their opinion. And, if this be so, they have no right to give an opinion, and may properly decline and should decline to do so.

So that I must first inquire whether the constitutional exigency has arisen, which requires or, in other words, which makes it proper for me to give my opinion on the questions presented. And this involves the further inquiry: Who is to decide? Is the order of the senate conclusive upon the justices; or have the justices, each for himself, an independent right, equal with that of the senate, to determine the question? These alternatives were very carefully considered

by all the justices in their opinions in answer to an order of the house of representatives, found in 95 Me. 564, 51 Atl. 224. And a majority of those then in commission were firmly of the opinion that the justices, each for himself, must determine whether the condition exists which requires the giving of an opinion. Among the justices who were then of that opinion were the late Chief Justice Wiswell and Justice Fogler, both since deceased, and Justice Powers, since resigned. The conclusions thus expressed by the majority of the justices were based, not only upon a careful analysis of the constitutional provision itself and the relations existing between the legislative and judicial departments of the government, but also upon the unanimous opinion of the justices who composed the court in 1891 (85 Me. 546, 27 Atl. 454), as well as upon the opinions of the courts in Massachusetts and New Hampshire, under similar constitutional provisions (122 Mass. 600; 126 Mass. 557; 148 Mass. 623, 21 N. E. 439; 56 N. H. 574; 67 N. H. 600, 43 Atl. 1074).

But, since I have been advised that I alone of the present justices hesitate to answer the questions submitted by the senate, I have carefully reviewed the constitutional questions involved, and it is with sincere regret, after reconsideration and much reflection, that I feel compelled to say that the opinion of the majority of the justices in 95 Me. 564, 51 Atl. 224, and the reasons given therefor, which I then subscribed, but which I need not repeat, seem to me to be sound and compelling, and that I cannot do otherwise than adhere to them. When under the Constitution I am asked, as a member of that court which the Constitution makes both independent and co-ordinate with the other branches of the government, and of that court whose interpretation of the Constitution is binding upon all the branches of the government, to give my opinion to either of those branches, I think I am bound to interpret what the Constitution means by "important questions of law," and by "solemn occasions," and by that interpretation to determine whether the question is important and the occasion solemn.

There can be no doubt that the order under consideration presents important questions of constitutional law. The only question is: Is the occasion solemn? I make no question but that when either branch of the legislature asks the opinion of the justices touching pending legislation, or it may be even upon matters concerning which that branch may be expected to act, and can act, it is a solemn occasion within the meaning of the Constitution. On the other hand, it is my conviction that, when there is no pending legislation touching which the opin-

ion of the justices is asked, or when it is demonstrably clear that the body asking the opinion neither expects nor intends to act upon it, and therefore has no occasion to be advised, it is not a solemn occasion.

I cannot conceive it to have been the intention of the framers of the Constitution, or of the people who adopted it, that the justices should be required by a branch of the legislature to give their opinion on questions of law merely for the information of the public, or for the possible use of future legislatures. Each legislature will judge for itself what advice it needs, and what subjects it will legislate upon.

I hold that it is not a solemn occasion, within the meaning of the Constitution, unless the body asking the questions is in a position to act later in the light of such opinions as may be given. The Constitution implies, I think, that the opinion may be of some use to the body requiring it in the performance of its constitutional functions. If not, there is no occasion, solemn or otherwise, for the opinion.

As already stated, the order now being considered was passed March 27th. The legislature adjourned March 28th. The legislative history of these two days, which is now a part of the recorded history of the state, shows that the legislature was on the eve of adjournment when the order was passed. It had so far completed its work, and the hour of expected final adjournment was so near that by no possibility could the opinion of the justices have been obtained before such adjournment. And apparently there was not then, nor has there been since, any reason to expect the legislature to be reconvened. I am therefore, I think, compelled to conclude that the senate requested the opinion of the justices not for use in any expected action, to be taken by itself, but for the future use of the public, or of future legislatures. If so, I think the occasion was not a solemn one. And, in this connection, I refer again to the opinion of the majority of the justices in 95 Me. 564, 51 Atl. 224, and to the reasons given and to the authorities cited therein. And I may add that, even if it was a solemn occasion when the order was passed, it had ceased to be such nine days before the order came to me.

To my mind it is manifestly improper for the justices to express their opinions on questions of law concerning the right of citizens, except in the performance of their judicial functions, unless it be in the case of a constitutional solemn occasion, as I have conceived it to be defined. I think that this provision of the Constitution should be read and construed in the light of that fundamental provision of law that the citizen shall not be deprived of his life, liberty, property,

or privileges, except by the "law of the land," that law "which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

Any answers to the questions before me will vitally affect the interests of many hundreds of property owners, and a vast amount of property. To lay down a rule which deprives a man of his property or restricts him in the use of it is, in effect, to deprive him of his property. But the justices are asked to determine whether such rule may be laid down. They are asked to do this under circumstances which preclude argument. The persons to be affected are virtually to lose the protection of the law of the land. They are not suitors. They are not to be heard before they are condemned. There is to be no inquiry, and judgment is to be rendered before, and not after trial.

The answer usually given to this proposition is that the justices are not bound by their opinions thus given, that they are opinions simply, and not law, and that when actual cases arise, and suitors are in court and are heard, the justices as a court are at perfect liberty to lay down such doctrine and render such judgment as may then seem to them meet. It may be so. Nevertheless it is my belief that, while human and judicial nature remain as we know them to be, the opinion of the justices will quite likely be the judgment of the court. And, in any event, it must be said that the right of the citizen is likely to be prejudiced, if not prejudged.

These considerations, of course, should not and do not prevent full force being given that provision of the Constitution which is under consideration. Either branch of the legislature may require the opinion of the justices upon solemn occasions, and in such case the citizen must be content to be prejudiced, and practically prejudged. And no doubt, when such opinions are asked upon such solemn occasions, as I understand the Constitution to mean, they may so serve the public good that individual interests ought to yield the rightful advantage of being heard.

But the considerations I have named do demonstrate, I think, the expediency and necessity of limiting the giving of these extrajudicial opinions to such occasions as fall fairly within the spirit as well as the language of the Constitution. And they emphasize what seems to me to be the impropriety of giving such opinions, unless when required by the Constitution, as well as when requested by another branch of the government.

With great deference to your honorable body, the undersigned, a justice of the supreme judicial court, for the reasons stated, 19 L.R.A. (N.S.)

feels compelled most respectfully to decline to give an opinion upon the questions submitted.
Albert R. Savage.

MAINE SUPREME JUDICIAL COURT.

MARTIN FLYNN

v.

AMERICAN BANKING & TRUST COMPANY et al.

(— Me. —, 69 Atl. 771.)

Corporation — acceptance of amendment — presumption.

1. Permitting a corporation to continue in business and exercise powers conferred by an amendment to its charter imposing an additional liability on stockholders is sufficient to establish their acceptance of the amendment after contracts have been made for the performance of which their liability is sought to be enforced.

Stockholders' liability — limitation of action.

2. The statute of limitations begins to run against the statutory liability of stockholders for debts of the corporation when the creditors' remedies against the corporation, and its assets have been exhausted.

Creditors' bill — exhaustion of corporate assets — establishment of.

3. A decree declaring the assets of a corporation to be exhausted leaving debts un-

Case Note. — Does statutory liability of stockholders for debts of corporation include interest thereon?

It is not intended to include in this note cases involving the liability of a stockholder of an insolvent corporation for unpaid stock subscriptions.

Cases bearing upon the question under consideration may fairly be classified as follows: (1) Right to interest in actions by creditors against stockholders to enforce their statutory liability for the debts of the corporation; (2) right to interest as against the insolvent estate; (3) right to interest in addition to statutory liability. Cases will be considered herein according to the foregoing classification.

Actions by creditors against.

Where the statutory liability of the stockholders of a corporation is for its contracts, debts, and engagements to a certain limit, a creditor has, as against a stockholder, the same right to recover interest which, according to the nature of the contract or debt, would exist against the corporation itself, as it would were the action against the corporation; not, however, in excess of the stockholder's maximum liability as fixed by the statute.

One of the leading cases wherein the foregoing doctrine was enunciated is *Richmond*

paid is not necessary to justify a creditors' suit to enforce the statutory liability of stockholders, if the report of the commissioner on claims and that of the receiver have been allowed, which show that fact.

Corporation — stockholders' liability — interest.

4. The statutory liability of stockholders for debts of the corporation extends to interest on claims beyond the time the affairs of the corporation are placed in the hands of a receiver, although the commissioner appointed to determine the claims in the receivership proceedings was instructed to allow interest to the date of the receivership.

Same — payment of principal.

5. The fact that the principal of the debt of a corporation has been paid by its receiver out of its assets does not prevent the maintenance of an action against the stock-

holders for unpaid interest, under a statute making them individually liable for the debts of the corporation, where the payments by the receiver were not accepted in full payment of the corporate debts, but merely as dividends thereon.

Same — delay of administration.

6. A creditor of a corporation cannot be deprived of the right to enforce interest on his claim, against stockholders under their statutory liability for the corporate debts, for the period covering the time the affairs of the corporation are being wound up by the receiver, on the ground that it would be a hardship on them to hold them liable for interest during the delays of administration of the estate.

Same — receiver's misconduct.

7. The shareholders of a corporation, and not its creditors, must bear the loss occa-

v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788. In this case the court was considering the liability of the stockholders of an insolvent bank under the national banking laws, which make the shareholders individually liable for the contracts, debts, and engagements of a bank, to the extent of the amount of stock standing in the name of each shareholder. It was held that, up to the maximum amount of a shareholder's liability, interest should be computed on claims of creditors after suspension to the same extent as it would if the action was against the bank itself, in ascertaining the amount such shareholder would have to pay.

To the same effect, also, is *Chemical Nat. Bank v. Armstrong*, 28 L.R.A. 231, 8 C. C. A. 155, 16 U. S. App. 465, 59 Fed. 372, wherein it was also specifically held that, as against its stockholders, claims continued to bear interest after suspension.

So, in *Re Warren*, 52 Mich. 557, 18 N. W. 356, an action to enforce the statutory liability of stockholders in a bank, under a very similar statute, it was held that the liability of the shareholders was commensurate with that of the corporation itself, and extended to costs and interest on the judgment against the bank, which it was being sought to enforce against the shareholders.

So, where stockholders, by statute, were made responsible for the debts, contracts, and engagements of a bank, it was said in *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565, that if, from the nature of the contract or debt, interest was allowable against the bank, it would constitute a part of its indebtedness for which the stockholders were made liable, provided it was within the maximum liability as fixed by statute.

Under a statute imposing upon each stockholder an individual liability for his equal proportion of all contracts, debts, and engagements of the corporation to the extent of the amount of his stock at the par value thereof, interest upon these contracts, debts, and engagements runs until their total amount is ascertained and liquidated and a ratable apportionment thereupon made. This in-
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terest is included in ascertaining the total sum to be apportioned, and the stockholder's liability is for his share of the total sum, to the extent of the amount of his stock at its par value. *Mahoney v. Bernhard*, 45 App. Div. 499, 63 N. Y. Supp. 642, affirmed on opinion of lower court in 169 N. Y. 589, 62 N. E. 1097.

To the same effect are *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, and *Western Nat. Bank v. Faber*, 29 Misc. 467, 62 N. Y. Supp. 82 (liability of a director of a corporation for its debts for failing to file an annual report).

If the claim of a creditor of a corporation consists of both principal and interest, he is just as much entitled to the latter as to the former; and the statutory liability of stockholders of insolvent corporations to pay the debts of the corporations within certain limits must necessarily include the accrued interest on the debts up to the statutory limit. *Wheeler v. Millar*, 90 N. Y. 353.

This doctrine was also stated in *Haslett v. Wotherspoon*, 1 Strobh. Eq. 209, in an action for unpaid stock subscriptions.

And in *Cumberland Lumber Co. v. Clinton Hill Lumber Co.* 64 N. J. Eq. 521, 54 Atl. 452, on an application of the receiver to assess stockholders of an insolvent corporation for an amount sufficient to cover the debts of the corporation, for the payment of which such stockholders were liable by statute, it was held that the claims of creditors, with interest on them, were to be included in the amount to be assessed. It was said that, "as against a stockholder, interest is to be allowed to the same extent as if the action were against the corporation itself, not exceeding, however, the maximum liability of the stockholder for unpaid stock."

So, in an action to enforce the statutory liability of the stockholders of an insurance company, who, by statute, were rendered individually liable for the debts of the company for an amount equal to their stock, it was held, in *Grund v. Tucker*, 5 Kan. 70, that it was proper to compute interest on the claim.

Wells, F. & Co. v. Enright, 127 Cal. 669, 49 L.R.A. 647, 60 Pac. 459, also holds that

sioned by loss of assets due to the misconduct of the receiver.

Same — guaranty — demand.

8. Voluntary stopping of payment by a corporation which has sold mortgages with a guaranty of principal and interest and the sequestration of its assets deprives it of the right to insist on a demand upon it for payment of defaulted mortgages to charge it with interest on the demand; and therefore stockholders cannot avoid liability for such interest in actions to enforce their statutory liability for the corporate debts because no demand was made upon the corporation for payment.

Corporation — guaranty — primary liability.

9. A corporation which sells mortgages under a guaranty of principal and interest cannot insist that a purchaser shall proceed

in the first instance against a defaulting mortgagor where there is no such provision in the contract.

Stockholders' liability — administration of fund — objection.

10. Stockholders of a corporation which, having guaranteed payment of principal and interest on mortgages sold by it, became insolvent, after which defaulted mortgages were returned to and collected by the receiver, cannot object to his placing the proceeds in the general funds of the corporation, rather than applying them to the individual claims of the purchasers of the mortgages, for the first time after the money has been paid out and the proceeding closed.

Bank deposits — interest.

11. Demand for payment of deposits from a bank which stops payment and the assets of which are sequestered by the court is not

stockholders are liable for interest on the debts of the corporation up to the maximum limit of liability assumed by each stockholder for his proportion of the debts of the corporation; and it is said that interest is as much a part of the debt as is the principal. To the same effect is *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

To the same effect, as to a statute making stockholders of a corporation liable for its debts to an amount equal to the par value of their stock, are *Whitman v. Citizens' Bank*, 49 C. C. A. 122, 110 Fed. 503, and *Taylor v. West Liberty Wheel Co.* 6 Ohio Dec. Reprint, 947.

Apparent exceptions to this doctrine are the cases of *Crease v. Babcock*, 10 Met. 525, and *Grew v. Breed*, 10 Met. 569. The statute considered in these cases, however, differed from the statute in the foregoing cases in that it rendered the shareholders in a bank liable in their individual capacities for the payment and redemption of all bills which may have been issued by said bank, and which shall remain unpaid, in proportion to the stock they may respectively hold at the dissolution of the charter. Under this statute the court said in the *Crease* Case that the liability of the shareholders depended upon a new and peculiar statutory provision intended better to secure the payment of bills at par, but which did not provide for the payment with interest; that the proportion which each was to pay could be ascertained only by the result of a suit in equity, and that, if that difficulty could have been surmounted, a still greater one lay in the way, that whatever was due from any stockholder was due in various proportions to all the holders of bills. It was impossible, therefore, to pay or tender payment prior to the time of that decision; and therefore the shareholders were not in default, and interest should not be computed on the unpaid bills in ascertaining the amount of their liability.

The same result was also reached under a similar statute in *Lane v. Morris*, 10 Ga. 102. These cases are not inconsistent with the doctrine that interest should be computed upon debts of a corporation, as against

the shareholder's statutory liability for its debts, up to the maximum limit thereof, as the liability assumed by the shareholder under such a statute is to pay the debts of the corporation in which he has stock, up to a maximum limit. Such an assumption of liability fairly covers interest as part of the debt of the corporation. In the latter cases, however, where the liability assumed by the shareholders was to pay all unpaid bank bills issued by the bank in which the stock was held, interest could not fairly be said to be a part of the liability assumed, and the shareholders ought, therefore, not to be charged therewith, at least until default was made.

—right to interest as against the insolvent estate.

It is a general rule that interest does not run in favor of one creditor at the expense of another while the law, acting for all, is administering the assets of the insolvent. This rule is applied to the claims of creditors as against the assets of the estate where the assets are insufficient to pay the original claims in full, or sufficient only for that purpose; and in such case interest will be computed only up to the date of the insolvency or suspension of the business of the corporation, or the appointment of a receiver; in other words, in such cases interest ceases the day the court practically takes possession of the assets for the purpose of distribution among its creditors. *People v. American Loan & T. Co.* 172 N. Y. 371, 65 N. E. 200; *People v. Merchants' Trust Co.* 187 N. Y. 293, 79 N. E. 1004. *Bank Comrs. v. New Hampshire Trust Co.* 69 N. H. 621, 44 Atl. 130; *Bank Comrs. v. Security Trust Co.* 70 N. H. 536, 49 Atl. 113; *Chemical Nat. Bank v. Armstrong*, 28 L.R.A. 231, 8 C. C. A. 155, 16 U. S. App. 465, 59 Fed. 372; *Solomons v. American Bldg. & L. Asso.* 116 Fed. 676, affirmed in 56 C. C. A. 620, 120 Fed. 1018; *White v. Knox* (United States ex rel. *White v. Knox*) 111 U. S. 784, 28 L. ed. 603, 4 Sup. Ct. Rep. 686.

As said by Vann, J., in *People v. American Loan & T. Co.* supra: "Interest should not run in favor of one creditor at the ex-

necessary to entitle them to bear interest from the time of such stoppage.

Stockholders' liability — pledges.

12. The statutory liability of stockholders of a corporation rests upon persons holding the stock as collateral security for loans to the real owners, where they appear upon the stock books as owners.

Same — trustee.

13. One cannot avoid his statutory liability for the debts of the corporation by adding the word "trustee" to his name as it stands upon the stock books.

Same — origin of debt.

14. The statutory liability of a stockholder for the debts of a corporation is not affected by whether he purchased his stock before or after the incurring of the debt.

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pense of another while the law, acting for all, is administering the assets. If the assets are sufficient to pay all, including interest, it must be paid, for, as against the corporation itself, interest should be allowed before the return of any surplus to the stockholders." To the same effect is *People v. Merchants' Trust Co.* supra.

The doctrine is also applied in *Sickles v. Herold*, 149 N. Y. 332, 43 N. E. 852, where a stockholder was allowed to offset, in an action against him to enforce his statutory liability, a claim he had against the corporation, together with interest thereon from the maturity of the claim.

In *Chemical Nat. Bank v. Armstrong*, supra, it was said that, as against an insolvent bank, a debt continues to bear interest, but that, as against the assets of such bank in the hands of a receiver, interest should be calculated only to the date of suspension and the vesting of title to the assets in the receiver. Where, however, the assets are more than sufficient to pay the principal of the debts, interest will be computed thereon in favor of the creditors before a dividend is paid to the stockholders.

The same doctrine was enunciated and applied in *New York Secur. & T. Co. v. Lombard Invest. Co.* 73 Fed. 537, wherein the rule fixed for the distribution of the assets of the estate was that interest on claims should be calculated up to the date of the appointment of the receiver; and it was said that interest did not run as against the estate after the assignment or declared insolvency, unless there were funds sufficient on hand to pay all of the demands and accrued interest.

In *Ex parte Stockman*, 70 S. C. 31, 106 Am. St. Rep. 741, 48 S. E. 736, depositors were held entitled to interest as against the bank from the date of suspension, the suspension being treated as a waiver of demand. It does not appear in this case whether or not the assets were sufficient to pay the creditors in full. The question arose on an appeal by the receiver from an order requiring him to pay interest on deposits from the date of suspension. A somewhat similar case, in which the same conclusion is reached, 19 L.R.A. (N.S.)

EXCEPTIONS by defendants to rulings of the Supreme Judicial Court for Androscoggin County in a suit to enforce defendants' liability as stockholders for debts of the American Banking & Trust Company, which confirmed the report of the master sustaining such liability. Overruled.

The facts are stated in the opinion.

Mr. Ruel W. Smith, for defendant Redman:

Where the delay is the act of the law, and not of the party himself, interest should not be charged.

Kelsey v. Murphy, 30 Pa. 340; *Potter v. Gardner*, 5 Pet. 718, 8 L. ed. 285; *People v. American Loan & T. Co.* 172 N. Y. 371, 65 N. E. 200; *Bowman v. Wilson*, 2 McCrary, 394, 12 Fed. 864; *Crease v. Babcock*, 10 Met.

is *Baker v. Williams Bkg. Co.* 42 Or. 213, 70 Pac. 711. In this case the receiver had sufficient assets to pay the principal, leaving a balance to be applied on the interest.

The English cases shed but little light on this question, as the act relating to stockholders' or shareholders' liability for the debts of the corporation controls the question of interest. *Re Welsh Flannel & Tweed Co. L. R. 20 Eq. 360*; *Re Overend, G. & Co. L. R. 3 Ch. 784*.

In *Warrant Finance Co's Case*, L. R. 4 Ch. 643, it was said, however, that dividends ought to be paid on the debts as they stand at the date of the winding up; and, where the estate is solvent, as soon as it is ascertained that there is a surplus, the creditor whose debt carries interest is remitted to his rights under his contract. To the same effect is *Re Joint Stock Discount Co. L. R. 5 Ch. 86*.

—right to interest in addition to statutory liability.

It is well settled that the maximum limit of the stockholder's liability for the debts of a corporation cannot be increased by interest charges until, at least, he is in default in paying such liability. The weight of authority and reason, however, are to the effect that, where the amount of the liability of a stockholder is ascertained, and the persons to whom the same is payable are known, such a liability will from that date bear interest. This is especially true if the stockholder denies and contests the question of his liability. As applied to stockholders in national banks, whose liability is fixed by an order of the Comptroller of the Currency, it is held that, the amount to be paid being liquidated and due and payable when the Comptroller's order is made, the amount will bear interest from that date. *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. ed. 176; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Davis v. Watkins*, 56 Neb. 288, 76 N. W. 575.

When the claims against a corporation, existing at the time of its dissolution, are judicially ascertained, a stockholder is in a

eral exceptions were taken by different defendants to his rulings of law, and the case is before the law court upon those exceptions only. The various exceptions have been exhaustively argued, with numerous citations of cases, by the several counsel for the defendants and by the counsel for the plaintiff. Of course, all the briefs and the cases cited, numerous as they are, have been studied, but to answer every argument and comment on every case cited would consume so much space, and make this opinion so very long, the parties and counsel must be content with our conclusions and briefly stated reasons therefor.

The exceptions to the rulings of the single justice.

1. Some of the defendants contend that there is not sufficient evidence that the amendment creating that liability of the shareholders was ever accepted by them. The fact that, after the enactment of the amendment, the shareholders allowed their corporation to continue in business and exercise the new powers provided in the amendment, and to make contracts, debts, and engagements therein authorized, is sufficient evidence of their acceptance of the liability imposed upon them. No shareholder appears to have objected at the time. It is too late to object now, after the contracts, etc., have been made. *Stanley v. Stanley*, 26 Me. 191.

2. The corporation stopped payment December 22, 1896. Its assets were sequestered by decree of the court December 31, 1896. This bill was not filed until September 17, 1904. The defendants contend that this suit is therefore barred by the general six-year statute of limitations.

Upon the question when the statute of limitations begins to run against a creditor seeking to enforce the statutory liability of shareholders for his debt against the corporation, there have been numerous, various, and even conflicting decisions in other jurisdictions; but our duty is to construe our own statute in harmony with our own decisions and with what we think the better reason, even though we come to conclusions different from those of other courts.

Of course, the statute of limitations does not begin to run against the creditor and in favor of the shareholder when the debt or other obligation is incurred by the corporation, but only when the shareholder becomes subject to a suit to enforce his liability. When does the shareholder become subject to such suit? is therefore the determining question. One view is that it is when the corporation fails to pay, or, at least, when its assets are sequestered so it cannot pay. The other view is that it is when the creditor's remedies against the corporation and 19 L.R.A. (N.S.)

the assets of the corporation have been exhausted. Under the former view the creditor, immediately upon default of the corporation, can ignore the corporation and its assets, can pursue the shareholders alone, collect of them his debt against corporation, and leave them to bring their own suits against the corporation for recoupment, though it might in the end appear that the corporate assets were ample to pay all the corporate debts, and hence that the suits against the shareholders were unnecessary and vexatious. Individuals and corporations often default for want of ready cash to meet obligations when due, though they have ample assets to eventually pay all their obligations in full. Under the latter view, the creditor cannot ignore the corporation, his direct and principal debtor, upon its default, and cannot burden the shareholders with suits until the necessity therefor is shown by an exhaustion of the corporate assets. Evidently the liability of the shareholder is heavier and more severe under the former than under the latter view.

We think the latter view is the correct one to take of the statute imposing the liability in this case. The statute imposes a new liability before nonexistent, and hence, if susceptible of more than one construction, it should receive that imposing the lightest burden. The shareholder is not made liable "on" the contracts, debts, and engagements of the corporation, but only "for" them. He cannot be joined in any suit against the corporation on such contracts, etc., because he is not a party to them; nor can the corporation or its receivers sue him, since his liability is not to them or for them, but only "for" the creditors. It is no part of the corporate assets. It is a liability apart and distinct in origin and character from that of the corporation. The creditor's claim is primarily against the corporation, and only secondarily against the shareholder. The creditor's remedy against him, to use a military metaphor, is a reserve force, to be brought into action only when necessary, only when it becomes apparent that the remedy against the corporation has failed.

We hold, therefore, that, under the statute in this case, the shareholder is not to be vexed with suits, and hence the statute of limitations does not begin to run until the assets of the debtor corporation are fully exhausted, nor until it has been judicially ascertained in proceedings against the corporation that a resort to the statutory liability of the shareholders is necessary. In so holding we hold nothing new, but are following the reasoning in the cases in this state. *Longley v. Little*, 26 Me. 162; *Hewett v. Adams*, 50 Me. 271; *Morris v. Porter*,

87 Me. 510, 33 Atl. 15; Gillin v. Sawyer, 93 Me. 151, 44 Atl. 677; Childs v. Cleaves, 95 Me. 498, 50 Atl. 714; Pulsifer v. Greene, 96 Me. 438, 52 Atl. 921; Hale v. Cushman, 96 Me. 148, 51 Atl. 874; Abbott v. Goodall, 100 Me. 231, 60 Atl. 1030. The same view was incidentally expressed by the court in Maine Trust & Bkg. Co. v. Southern Loan & T. Co. 92 Me. 444, 452, 43 Atl. 24, where the court said: "So must the assets of the corporation be exhausted before this liability be incurred."

It is urged in argument that by such a holding the burdens of the shareholders are increased; that they are disabled from discharging themselves from liability; that the creditors can delay almost indefinitely their proceedings against the corporation, and thus prolong the liability of the shareholders against their will. The shareholders, however, are not helpless. They can so conduct the affairs of their corporation that there shall be no default in its obligations. They can themselves apply the corporate assets to the payment of the corporate debts. That their assets are sequestered and receivers appointed is rather the fault of the shareholders than of the creditors; but even then the shareholders can compel the receivers to proceed with reasonable vigor and speed to a full administration.

In the proceedings against the corporation in this case it was not judicially ascertained until May, 1904, at least, that the corporate assets were exhausted and that a resort to the shareholders was necessary. This bill was filed September 17, 1904, and hence is not barred by the six-year statute of limitations.

3. But some of the defendants contend that, if the right of action against them did not accrue until it was judicially ascertained that the corporate assets were exhausted, then this bill was prematurely filed. The final account of the receiver was filed May 7, 1904, and showed a full disbursement of all his receipts. On September 13, 1904, this final account was settled, and the court entered a decree that the account, being final and "showing a complete disposition of the assets of the corporation and no balance remaining in his hands, is hereby accepted, approved, and allowed." The report of the commissioners on claims had previously been filed and accepted, showing the amount of the debts of the corporation. The receiver's accounts allowed showed how much of the indebtedness had been paid and when. These two amounts had thus been judicially ascertained and declared. It had also been adjudicated that the assets had been fully administered and exhausted. The deficiency of assets, if any, and the amount of the deficiency, then appeared of record. There was no need of a further decree of the court to 19 L.R.A. (N.S.)

establish a mere mathematical truth. We agree with the single justice that to require such a decree would be final in the extreme. This bill, not having been filed until after the decree of September 13, 1904, was not prematurely filed.

4. Upon the appointment of a receiver for the corporation, commissioners were also appointed by the court to determine the claims against the corporation, and were instructed to allow such interest as would accrue up to the date of the receivership, January 1, 1897. They executed their commission according to those instructions, and made their report, showing the amounts due at that date. Upon these claims, thus allowed, payments were made from time to time by the receiver as he realized from the assets; the last payment being made November 12, 1903. The sum of these various payments only equals the amount of the debts allowed to be due January 1, 1897. The interest accrued since that date remains unpaid.

The defendants now contend that the shareholder's liability does not extend to such interest. As supporting this contention many cases are cited, but nearly all of them are cases of proceedings against the corporation, and can be eliminated by conceding, *arguendo*, that, as between the creditor and the corporation and its sequestered assets in the hands of its receivers, interest beyond the date of the receivership cannot be recovered, unless there are surplus assets after paying the indebtedness of that date; that, when the corporate assets are exhausted, the remedy against the corporation is exhausted. Moreover, in all these cases it is held that, where there is a surplus of assets, it shall be applied to the payment of such interest before any distribution is made among shareholders. When, however, the corporate assets are exhausted, and the corporation by a court decree, in pursuance of the statute, is enjoined from transacting any further business, the corporation has become *civili-ter mortuus*. It has then no legal rights nor liabilities, except to formal dissolution. The liabilities of its receivers or other representatives are fully discharged when they have administered its assets. If nothing remains for the payment of subsequent accrued interest, creditors have no remedy against the corporation, its assets, or receivers for such interest.

But, though the corporation and its receivers may thus be freed from actions by creditors to recover claims for interest or other claims, it does not follow that the contracts, debts, and engagements of the corporation have been fulfilled. If the contract, debt, or engagement is such that interest accrues for delay in fulfilment, it is not fulfilled until that interest also is paid. Whoever is

made liable by contract or by statute for those contracts, debts, and engagements is made liable for the interest accrued and accruing on them. The liability of the shareholders for them and for the interest on them is not discharged when the corporation is dissolved. It continues until they are fulfilled, interest as well as principal. It was imposed to insure that fulfilment in case the corporation should become defunct before itself fulfilled them. The creditor then acquired the same right against the shareholders to recover principal and interest (of course, not in excess of their maximum liability fixed by the statute) that he would have had against the corporation, had it continued solvent and possessed of its assets. *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788. The cases of *Crease v. Babcock*, 10 Met. 525, and *Grew v. Breed*, 10 Met. 569, were suits by bill holders against shareholders in banks of issue, and were decided upon the ground that the then Massachusetts statute did not provide for interest on bank bills.

The defendants cite, from the Maine statute relative to claims against insolvent banks, the last clause of § 66 of chapter 47 of the Revised Statutes of 1883 (in force when the proceedings against the bank in this case were begun), as follows: "All claims allowed shall bear interest from the time that they are filed, provided that the assets in the hands of the receivers are more than sufficient to pay the principal of all the claims allowed and outstanding when the final dividend is declared." The original of this clause is found in Laws 1872, chap. 86, p. 54, § 3, which enacts that § 71 of chapter 47 of the Revised Statutes of 1871 "shall not be construed to require the payment of interest on claims against the bank unless the assets," etc. The argument is that that statutory limitation upon the payment of interest is to be read into every contract and obligation of the bank, and hence that its shareholders are entitled to the benefit of that limitation. That statute, however, was designed for banks of issue, where the liability of the shareholders was different in many respects from that imposed by the statute in this case, and was enforceable only by the receivers. But even that statute does not declare the bank's contracts and obligations to be fulfilled by the failure of the bank and the appointment of the receivers. It simply limited the powers of the receivers of such banks, and thereby limited the liability of those shareholders. In this case the creditors, and they only, have the right to enforce the liability imposed by its charter upon the shareholders of this corporation. That liability is for all the contracts, etc., of the corporation. There is no excep-

tion nor condition, except that it shall not exceed the par value of their shares.

5. The defendants claim, however, that an action cannot be maintained for interest alone, and hence this proceeding cannot be maintained for interest. It is true that one action cannot be maintained for the principal of a debt and a separate action for the interest. It is also true that, when a creditor has accepted payment of the principal in full for his claim or debt, he cannot afterward maintain an action for the interest. The interest is incident to the principal debt, and not a separate debt, unless so stipulated in the contract. In this case, however, there has been no action to recover the principal, and there has been no acceptance, nor even offer of payment, of the principal in full for the debt. The proceedings against the corporation were for the sequestration and division of its assets. The sums received by the creditors from those assets were received as dividends, not as payments. They were, of course, applicable to the debts as they were received; but their reception and application entailed upon the creditors no forfeiture of the accruing and accumulating interest.

It is urged that to hold the shareholders responsible for interest accruing during the delays of administration is a hardship upon them. It would be an equal hardship upon the creditors to hold that they must lose the interest through no fault of theirs. The responsibility for the failure of the corporation, for the necessity for the sequestration and administration of its assets, and for the delay and expense entailed, is more upon the shareholders than upon the creditors. It is not, however, a question of hardship, but of legal right. The enforcement of even unquestioned legal rights sometimes inflicts great hardship, but the court cannot for that reason stay its hand.

6. Through the misconduct of the first receiver appointed, some \$6,500 of the assets of the corporation were irretrievably lost. Who must bear the loss, the creditors or the shareholders? We think the loss fell upon the shareholders, and that there is must remain. Though the assets were in the custody of the court through a receiver by it appointed and controlled, they were still the property of the corporation and its shareholders until administered. The loss was their loss, even if from causes beyond their control. The risk of that loss they assumed when they so managed the affairs of the corporation that a receivership became necessary.

7. A demurrer to the bill was filed, but the bill, with the amendments allowed by the single justice, read in the light of the foregoing, will show sufficient grounds for its maintenance. The objections to the bill are

practically disposed of by the propositions above laid down.

Exceptions to the report of the master.

The bill having been sustained, the case was referred to a master to ascertain the amount and nature of the claims of the creditors within the statutory liability of the shareholders; also the names of the shareholders, the number of shares owned by each, and the ratable amount of the liability of each share. Upon the coming in of the report of the master, various exceptions to it were filed, which were all overruled by the single justice, and the report accepted. Exceptions were taken from that ruling.

Some of the exceptions to the master's report are disposed of by propositions already laid down upon the questions above considered. We have, therefore, only to consider the other exceptions not thus disposed of.

1. Some of the claims were against the corporation as guarantor of certain notes and mortgages sold and assigned by it to purchasers. The guaranty was as follows: "For value received, the within-named American Banking & Trust Company hereby guarantees the payment of the within note and interest coupons thereto attached, when due and payable, without notice of any neglect on the part of the payors thereof. The mortgage securing their payment to be re-assigned in due form." The promisors having failed to pay at maturity, the holders of these guaranteed notes and mortgages presented their claims therefore to the commissioners, which claims were allowed. It is contended by the defendants that for want of a demand made upon the bank for payment of these notes and mortgages no interest runs against it. We think the vote of the directors to stop payment and the immediately following sequestration of its assets deprived the bank of all right to insist upon a demand. The evident inability and the declared resolution not to pay, if demanded, made a demand useless, and therefore unnecessary. All claims due upon demand, including those under the guaranty in question, then became due and payable, and, unless otherwise stipulated in the contract of guaranty, interest began to accrue against the guarantor.

2. It is also contended by some of the defendants that the holders of these guaranteed notes and mortgages should first have proceeded against the promisors. But there was no such stipulation. The guaranty was unconditional, dispensing even with notice of the default of the promisor. The holder could proceed at once against either. *Cooper v. Page*, 24 Me. 73, 41 Am. Dec. 371.

3. After the appointment of the receiver the holders of these guaranteed notes and 19 L.R.A. (N.S.)

mortgages proved against the corporation their claims under its guaranties, and assigned the notes and mortgages to the receiver as they had stipulated to do to the corporation. The receiver collected more or less of them from the makers. Had he paid the proceeds over to the respective holders, they would have been paid in full and thus eliminated from the case. Instead of doing this, the receiver turned all the proceeds into the general fund, all of which was administered and distributed *pro rata* among all the creditors. The result was that the holders of the guaranteed notes and mortgages only received a partial payment *pro rata* with the general creditors. Can they be reckoned in this proceeding as creditors for the balance remaining unpaid? This question, so far as appears, is academic, rather than practical. If the proceeds had all been paid to the holders, the dividends to the other creditors would have been so much less, and the balance of indebtedness to them to be paid by the shareholders so much more. The burden upon the shareholders would have been nearly the same in either event. We do not think, however, the holders of the guaranteed notes and mortgages are to be excluded from consideration because of the action of the receiver. He was the bank's representative, performing its duties so far as its assets would permit. The money or other property received upon these notes and mortgages was passed to the general fund, as the bank would have done. The court ordered them paid out in dividends to all the creditors. The shareholders made no objection at the time, and it is too late now; the decree having been made, the money paid out, and those proceedings closed.

4. When the bank or corporation voted to stop payment and its assets were sequestered, all its deposits became immediately due and payable, without formal demand, except such as were on some specified time, which had not then elapsed. Whatever interest the bank had agreed to pay upon these deposits, it became liable for the legal rate of 6 per cent from and after its default, unless otherwise stipulated, which does not appear to have been done as to any deposit in this case. *Eaton v. Boissonnault*, 67 Me. 540, 24 Am. Rep. 52. It has been held in some cases that a demand for payment of bank-currency bills is necessary, even after failure of the bank, if the bill holder wishes to recover interest. We do not think those cases applicable to deposits under our statute.

5. In some cases the persons appearing on the stock ledger as owners of shares really only hold them as security for loans made to the real owners. This fact, however, did not appear upon the books of the bank, nor

upon the share certificates. So far as there appeared, the persons named as owners were the actual owners. As to the corporation and its creditors, they were the owners, and as such were within the statutory liability of shareholders. *Crease v. Babcock*, 10 Met. 525.

6. Upon the stock ledger of the corporation the word "trustee" appeared after the name of one shareholder. That shareholder contends in his answer and argument that he invested the entire trust fund in those shares, and that, as there is nothing left of that fund, he should not be held personally liable. Even if such facts would exempt him from the liability, no evidence of them was reported to the law court. So far as appeared, he purchased the shares, became the legal owner, and entitled himself to the dividends on them, as well as to represent them in corporation meetings. He thereby assumed the statutory liability attached to them. The addition of the word "trustee" was only *descriptio personæ*. Even if the statute (Rev. Stat. chap. 47, § 84) applies to a case like this, it was not enacted till 1897, after the liability in this case had become fixed.

7. The shareholders purchased their shares at different times, some before and some after particular contracts, debts, and engagements upon which the corporation defaulted were entered into. This fact does not make any difference in their liability under the statute in question, whatever might be the effect under other statutes. No distinction is made by the statute, and none can be made by the court. Those who were shareholders at the time of the default have the entire liability cast upon them,—those who purchased at the eleventh hour, as well as earlier purchasers. The purchaser of shares took the risk of the financial condition of the corporation, good or bad, as it was at the time of his purchase, as well as the future risks. He took over the liabilities as well as the advantages attaching to the shares. *Curtis v. Harlow*, 12 Met. 3; *Maine Trust & Bkg. Co. v. Southern Loan & T. Co.* 92 Me. 444, 452, 43 Atl. 24.

Though numerous exceptions were taken by different defendants, it is not expedient to recite and discuss every one seriatim, since all the questions of law raised by any of them are decided in the foregoing opinion. The rulings of the master and the single justice were in accord with what we above hold to be the law, and hence the exceptions must be overruled, and the degrees of the single justice be affirmed, and with costs.

So ordered.
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MAINE SUPREME JUDICIAL COURT.

ELIZA A. MCCLERRY

v.

WOODARD LEWIS.

(— Me. —, 70 Atl. 540.)

Record—proof of deed.

1. The record of a deed is not admissible to prove its existence, on behalf of the grantee claiming under it.

Deed—delivery—record—possession.

2. The existence of the record of a deed for more than fifty years, together with the occupation of the land by the grantee for a time subsequently to the date of the record, without anything to show that he claimed under the deed, is not sufficient to raise a presumption of the existence of a duly executed and delivered original.

(February 28, 1908.)

Case Note.—Admissibility of record, or copy of record, of deed, to prove deed under which party offering it claims.

This note is confined to the question of the admissibility in evidence of the record, or a copy of the record, of a deed to prove the existence, due execution, and delivery (but not the contents) of a deed under which a party to an action claims; and includes only cases where the record or copy thereof purports to be of a duly executed deed which is entitled to be entered of record, and does not include the question of admissibility of the record of a defectively executed deed.

In absence of statutory regulations.

Official copies of deeds from the records thereof are *prima facie* evidence of everything necessary to the validity of the instruments. *Cole v. O'Neill*, 3 Md. Ch. 174; *Warner v. Hardy*, 6 Md. 525.

And this is true although the original deed vested the title to land in the plaintiff in ejectment. *Warner v. Hardy*, *supra*.

In *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40, where the party to an action apparently claimed title under a sheriff's deed, a certified copy of the record thereof was held to be sufficient evidence of its execution.

One seeking the registration of a land title under the Massachusetts torrens registry act may use, in lieu of the original deed, a certified copy of an ancient official record, which will be good evidence of the execution of the deed as of the date it was recorded. *Phillips v. Watuppa Reservoir Co.* 184 Mass. 404, 68 N. E. 848.

It was said in *Bentley v. McCall*, 119 Ga. 530, 46 S. E. 645, to be the general rule that the execution and genuineness of a lost or destroyed deed may be proven by a certified copy of the record.

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Franklin County made during the trial of an action brought to recover possession of certain real estate, which resulted in a verdict in plaintiff's favor. Sustained.

Plaintiff claimed title under a supposed deed dated October 27, 1855, and duly recorded in the Franklin county registry, purporting to convey to plaintiff's mother a life estate in the premises with remainder to plaintiff and others. The life tenant having died, this action was brought.

Rev. Stat. chap. 84, § 125, is as follows: "In all actions touching the realty, or in which the title to real estate is material to

the issue, and where original deeds would be admissible, attested copies of such deeds from the registry may be used in evidence, without proof of their execution, when the party offering such copy is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs." Plaintiff, being unable to prove the existence of the deed, produced an attested copy of the record from the registry, which, after objection, was admitted in evidence.

Further facts appear in the opinion.

Mr. Frank W. Butler, for defendant:

The office copy of the deed was not admissible.

But the effect of such copy as evidence is destroyed when the opposite party files an affidavit alleging that the original deed under which the person producing the copy claims, was a forgery; and this is true, notwithstanding that it appears from the certified copy that the original deed has been of record for more than thirty years. Ibid.

An enrolment of a deed of bargain and sale under which the defendant in ejectment claims is as competent evidence of his title as the original itself would have been, where, by law, such a deed is required to be enrolled. *Hurn v. Soper*, 6 Harr. & J. 276. To the same effect, see *Dick v. Balch*, 8 Pet. 30, 8 L. ed. 856.

So, in a proceeding by a slave to obtain his freedom, an office copy of a deed of manumission was admitted by the trial court without the production of the original, which was acknowledged and recorded according to law. *Thomas v. Magruder*, 4 Cranch, C. C. 446, Fed. Cas. No. 13,904.

As it is to be presumed that a grantee has possession of the deed under which he claims, at an early day it was declared in Maine, by rule of court, that office copies from the registry of deeds, when pertaining to an issue pending in any court, might be read in evidence without proof of the execution where the party offering the copy was not a party to the deed, or did not claim thereunder as heir, nor justify as servant of the grantee or his heirs. *Knox v. Silloway*, 10 Me. 216; *Woodman v. Colbroth*, 7 Me. 181.

So, an heir claiming under his ancestor's deed cannot prove the genuineness of such deed by the production of an office copy, although the persons purporting by the copy to have been the parties to the deed, as well as the subscribing witnesses and the registrar, are dead. *White v. Dwinel*, 33 Me. 320.

But an office copy of a deed to the demandant in a writ of entry is admissible in evidence where it is shown by the official registrar that when the deed was recorded he must have had the original before him, and that the subscribing witness thereto had removed from the state; and other witnesses were produced, who had examined the deed shortly after its date, and were familiar

with the grantor's handwriting, who had no doubt as to the genuineness of his signature; and demandant made affidavit that diligent search had failed to discover the original, which he believed to have been lost, as he had never seen it since it was left with the registrar for recordation. *Hewes v. Wiswell*, 8 Me. 94.

This rule does not apply to trustees under a will so as to prevent them, in an action of trespass *quare clausum fregit*, from giving in evidence an office copy of the deed to their testator to prove their title, as they do not fall within the class barred by such rule. *Baring v. Harmon*, 13 Me. 361.

The rule recognized in New Hampshire is that a certified copy of the record of a deed is not admissible, where the party to an action claims under it, without first establishing the proof of its execution and delivery. *Forsaith v. Clark*, 21 N. H. 421.

So, one claiming under a deed cannot use a certified copy of the record thereof as proof of its existence, execution, and delivery, merely by proving that search for the original has been unavailing, as it is necessary that the original be proven by the subscribing witness, if to be found, or by the grantor or grantee, and, if the latter cannot be found, by the officer who recorded it, or any person who has seen the original and can testify as to the handwriting of the witness and grantor. *Wells v. Jackson, Iron Mfg. Co.* 48 N. H. 401. The court said it did not mean to decide that a showing such as made would not warrant the admission of the certified copy if it appeared that no other evidence existed and was in reach of the party by making a reasonable search and inquiry therefor.

But one claiming as devisee, after proving his title as such, may give in evidence an office copy of his testator's deed, without accounting for the absence of the original, which will be regarded as *prima facie* evidence of the execution and acknowledgment of the original. *Fellows v. Fellows*, 37 N. H. 75.

So, one claiming title to land as devisee or heir may give in evidence a copy of the record of his testator's or ancestor's deed upon showing the loss of the original or

Elwell v. Cunningham, 74 Me. 127; Woodman v. Coolbroth, 7 Me. 181; Bird v. Bird, 40 Me. 392; White v. Dwinel, 33 Me. 320; Webber v. Stratton, 89 Me. 379, 36 Atl. 614; Egan v. Horrigan, 96 Me. 46, 51 Atl. 246.

Mr. Joseph C. Holman, for plaintiff: Possession of premises, accompanied with the record of the deed made fifty-two years ago, makes the copy admissible.

3 Wigmore, Ev. § 2143; Donelson v. Taylor, 8 Pick. 390; Page v. Page, 15 Pick. 368.

Emery, Ch. J., delivered the opinion of the court:

This was a real action. The plaintiff claimed, and sought to prove, title only under a deed of conveyance, which she claimed was executed and delivered to her mother

his inability to produce it, as such copy furnishes evidence of the execution and existence of the original as a genuine instrument. Kelsey v. Hanmer, 18 Conn. 311; Hathaway v. Spooner, 9 Pick. 23; Ward v. Fuller, 15 Pick. 185.

And such copy is prima facie evidence of the authenticity of the original deed. Ward v. Fuller, supra.

But it was held in Cunningham v. Tracy, 1 Conn. 252, that heirs claiming under their ancestor's deed must produce the original and prove its execution, which cannot be done by a certified copy of the record thereof without accounting for the absence of the original, as the heirs are presumed to have possession of their ancestor's deed. The court said that, where this presumption did not apply, upon accounting for the absence of the original deed the production of a certified copy dispensed with proof of the execution of the original.

It was said in Bowser v. Warren, 4 Blackf. 527, that one who relies upon a deed which, from its character, is presumed to be in his possession, cannot resort to a certified copy to prove it, as the original, if not lost or destroyed, must be produced and its execution proven.

In an action by church trustees to recover a penalty for cutting trees upon church property, a certified transcript of the deed conveying the property to the trustees is admissible in evidence where the original deed is more than twenty years old and is of record in the proper office as of the day of its date, as, from the lapse of time, it will be presumed that the original deed was lawfully proved or acknowledged, and properly certified, and that the subscribing witnesses are dead. Allison v. Little, 85 Ala. 512, 5 So. 221.

And, where the original trustees named in such deed are dead, there is no presumption that their successors have possession of the original; and therefore they need not account for its nonproduction. Ibid.

A certified copy of the record of a deed under which a party to an action claims is admissible in evidence, without proof of the execution of the original, where the absence of the latter is satisfactorily accounted for.

in 1855, and conveying a life estate to her mother, with remainder to herself. The mother was deceased.

The essential proposition of fact to be proved by the plaintiff was that such a deed had been, in fact, executed and delivered. She was not able to produce any witness that ever saw such a deed, or ever heard such an one read. She did, however, produce an office copy of what purported to be the record of such a deed in the proper registry of deeds, and offered it as admissible evidence that an original deed corresponding to the record had been executed and delivered prior to the date of the record.

We are constrained to hold that, by the settled law of this state, neither the copy

Stone v. Fitts, 38 S. C. 393, 17 S. E. 136. To same effect, see Smith v. Wilson, 18 N. C. (1 Dev. & B. L.) 40; Park v. Cochran, 2 N. C. (1 Hayw.) 410; Anderson v. Walker, Mart. & Y. 200.

So, an assignee for creditors cannot prove the title of the assignor to real estate by a copy of the record of the latter's deed, without showing the loss or destruction of the original, or that it is out of his power to produce it, as the assignee stands in his grantor's shoes, and, to make title in himself, must produce the original deed. Talcott v. Goodwin, 3 Day, 264.

Where a lost deed, under which a party in ejectment claims, conveying lands in two counties, is of record in one county only, a copy from the record thereof is not admissible in evidence in the other county without proof of the execution of the original. Kennedy v. Harden, 92 Ga. 230, 18 S. E. 542, S. C. on subsequent appeal 94 Ga. 651, 20 S. E. 105. Contra, see McKen v. Delancy, infra.

When regulated by statute.

Chief Justice Marshall held in M'Keen v. Delancy, 5 Cranch, 22, 3 L. ed. 25, that, in an action of ejectment, a certified copy of the record of the deed of the defendant's lessor is competent evidence as proof of the execution thereof, even though it conveys lands in two counties and is recorded in the county other than that in which it is offered, where the statute provides that copies of records of deeds shall be allowed in all courts where produced, and they are declared to be as good evidence, and as valid and effectual in law, as the original deeds.

Under a statute providing that a certified copy of the record of a deed is sufficient evidence of the execution of the original, a copy of a deed to an ancestor of a defendant in ejectment, under which he claims, is prima facie evidence of its execution, notwithstanding it is disputed. Love v. Harbin, 87 N. C. 252.

The record of a deed under which a party to an action claims is competent to show the execution, if not delivery, thereof, under a statute providing that a copy or record may be received in evidence, as the delivery

of the record, nor the record itself, is admissible evidence to prove the existence of an original; the plaintiff being a grantee in the supposed deed. The statute (Rev. Stat. chap. 84, § 125) authorizing the use of records, and copies of records, of deeds as evidence of the existence, execution, and delivery of originals only applies to deeds prior to that in which the party is the grantee or heir of a grantee. It does not include the deed produced by the plaintiff. *Elwell v. Cunningham*, 74 Me. 127; *Webber v. Stratton*, 89 Me. 379, 36 Atl. 614.

The plaintiff urges that the age of the record, an age of more than half a century, together with the fact that her mother occupied the land for a time after the date

of the record, creates a presumption that there was, in fact, an original of the record duly executed and delivered. It is true that, when a document, apparently an original deed, and shown to be thirty years old or more, is produced, it may be received in evidence without other proof of execution. But this presumption of due execution applies only to originals, not to copies. Further, the mere fact that the mother occupied the land, there being no evidence that her occupation was under any claim of title, creates no legal presumption that her occupation was under any particular deed. If neither the copy, nor the occupation, creates any presumption, both together cannot. Zero plus zero is still zero. In *Elwell v.*

of a deed may be inferred from its execution and acknowledgment. *Series v. Series*, 35 Or. 289, 59 Pac. 634.

So, such a copy is admissible as proof of the genuineness of the grantor's signature, under a statute providing that such copy shall be received to all intents and purposes as the original, and which shall be prima facie evidence of the deed, and the genuineness thereof. *Chrast v. O'Connor*, 41 Wash. 360, 83 Pac. 238.

One resting his title upon a deed may use an exemplified copy thereof, as showing the execution and acknowledgment of the original, even when such facts are in dispute, where, by statute, such copy may be read in evidence as presumptive evidence of the fact of the conveyance of the title. *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532.

A certified copy of the record of a deed under which a party to an action claims is admissible in evidence under a statutory provision that such copy shall be received as prima facie evidence of the existence of the original. *Burnet v. Brush*, 6 Ohio, 32.

So, after notice to the plaintiff to produce his ancestor's deed, the opposite party may give in evidence a certified copy of the record thereof as proof of the execution of the original, as, under the Ohio statute, such copy is prima facie evidence, subject to be rebutted only as to the fact of the delivery of the original. *Buckley v. Carlton*, 6 McLean, 125, Fed. Cas. No. 2,093.

So, a certified copy of the record of a commissioner's deed is admissible in evidence, without proof of the judgment authorizing it, where the copy shows that the original was examined and approved by the court, under a statute providing that certified copies of instruments regularly recorded shall be prima facie evidence in all courts and tribunals. *Helton v. Belcher*, 114 Ky. 172, 70 S. W. 295.

In Michigan, by statute, a transcript of the record of a deed is sufficient proof of its execution and delivery. See *Webb v. Holt*, 113 Mich. 338, 71 N. W. 637; *Mee v. Benedict*, 98 Mich. 260, 22 L.R.A. 641, 39 Am. St. Rep. 543, 57 N. W. 175.

A certified copy of the record of a deed under which one claims is not admissible in 19 L.R.A. (N.S.)

evidence without accounting for the absence of the original, under a statute providing that such copy shall be deemed good evidence of a title at law where the original has been lost by accident, until better evidence appears. *Purvis v. Robinson*, 1 Bay, 495.

One claiming under a sheriff's deed may introduce in evidence a certified copy of the record thereof without accounting for the absence of the original, where, by statute, such copy is made primary evidence without further proof of execution. *Hammond v. Johnston*, 93 Mo. 198, 6 S. W. 83; *Hammond v. Gordon*, 93 Mo. 223, 6 S. W. 93.

So, a record of a deed to a party to an action is admissible in evidence under a statute declaring it to be full and sufficient evidence of such deed, even though he is entitled to the possession of the original, and does not account for its absence. *Ratliff v. Ratliff*, 131 N. C. 425, 63 L.R.A. 963, 42 S. E. 887.

But the effect thereof is destroyed where the opposite party files an affidavit alleging that the original deed is a forgery. *Ibid.*

In Maine, as shown in *McCLERRY v. LEWIS* by statute, in order to lay a foundation for the introduction of an office copy of a deed under which an heir of the grantee claims, the execution and genuineness of the lost deed must be shown, as well as the fact that all means of producing the original have been exhausted. *Elwell v. Cunningham*, 74 Me. 129; *Egan v. Horrigan*, 96 Me. 46, 51 Atl. 246.

Nor is such a copy admissible as secondary evidence without proof that all apparent means of producing the original have been exhausted. *Egan v. Horrigan*, supra.

By a provision of the Florida Constitution, a certified copy of the record of a deed, recorded according to law, is prima facie evidence of its due execution with like effect as the original duly proved, if it is made to appear that the original is not within the custody or control of the party relying upon the copy (*Bell v. Kendrick*, 25 Fla. 778, 6 So. 868); although a prior statute permitted a copy to be received in evidence in the same manner and with like force and effect as the original only upon

Cunningham, *supra*, the record was nearly seventy-five years old, yet the court held it was not evidence of the execution and delivery of an original.

The plaintiff's counsel cites several cases, to the effect that an office copy of a deed is admissible in evidence upon proof that the original is destroyed or lost, or is in the possession of the opposite party, who will not produce it. In those cases there was evidence *aliunde* that an original had been executed and delivered. In this case there

is no such evidence. This circumstance shows the inapplicability of the cases cited.

As the law is to-day in this state, grantees in deeds, and their heirs, cannot depend upon the record of deeds direct to them. If unable to produce the original deed, they must produce evidence *aliunde* the record that there was in fact such a deed executed and delivered. The *pro forma* ruling admitting the copy in this case must be reversed.

Exceptions sustained.

proof of the execution and acknowledgment thereof (*Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1).

A certified copy of the registry of a deed to a party to an action will be competent evidence of the execution and delivery of the original, under a statute providing that such a copy may be read in evidence with like effect as the original, upon showing that the latter is not in the possession, or under the control, of the party producing or claiming under it. *American Mortg. Co. v. Mouse River Live Stock Co.* 10 N. D. 290, 86 N. W. 965.

And a certified copy of the record of a deed under which a party claims is competent evidence under a statute providing that such copies shall be *prima facie* evidence in all cases on accounting for the absence of the original. *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. 759; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153. However this rule was modified in *Manhattan Malting Co. v. Sweteland*, 14 Mont. 269, 36 Pac. 84, to the extent of requiring that there shall be preliminary proof that the original is lost or not in the possession or control of the person desiring to use the same.

In an action to recover possession of lands, the record of a deed to the plaintiff is, by statute, admissible, where it is proved that the original is not in his possession or under his control. *Grant v. Oliver*, 91 Cal. 158, 27 Pac. 596, 861.

Upon showing the identity of the grantor in a deed, without calling the subscribing witnesses thereto, one claiming under the deed may give in evidence a certified copy of the record thereof, upon showing that the original is not in his possession and cannot be found by diligent search, and he believes it to have been destroyed, under a statute providing that, under such circumstances, the copy shall be received in evidence upon like proof as is required in case of the original, and which shall have the same effect as the production of the original. *Moss v. Anderson*, 7 Mo. 337.

The Texas statute permits the use in evidence of a certified copy of the record of a deed as proof of the execution, where a copy thereof is filed three days before trial, and is accompanied by an affidavit showing that the original is lost or cannot be produced, together with notice to the opposite party of the intention to use such copy in evidence.
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So, under such statute, a certified copy of the record of the deed of a party's ancestor is admissible, even where the party claims thereunder, without proof of the execution of the deed, upon showing the loss thereof. *Logan v. Logan*, 31 Tex. Civ. App. 295, 72 S. W. 416.

So, a certified copy of the record of a deed upon which a party's title depends is sufficient proof of the original without accounting for the absence thereof, or giving such notice, where the opposite party fails to object to its admission in evidence for that reason. *Moody v. Ogden*, 31 Tex. Civ. App. 395, 72 S. W. 253.

So, upon proof of the loss of his ancestor's deed, under which one claims, a certified copy of the record thereof, which is over thirty years of age, is admissible. *Galveston, H. & S. A. R. Co. v. Stealey*, 66 Tex. 468, 1 S. W. 186. The court said that the original was attested by two witnesses and proved before a notary, and "this authentication and the registry of the instrument in 1853 are almost conclusive evidence of the antiquity of the paper; and the same circumstances have a bearing upon the issue as to its genuineness."

But, where the plaintiff in an action to try title to land gives notice, under such statute, that he will offer in evidence a certified copy of the deed under which he claims, in which the defendant appears to be the grantor, and the latter files an affidavit that his signature thereto is a forgery, the plaintiff must prove the due execution of the deed by the defendant according to the rules of the common law. *Thompson v. Johnson*, 24 Tex. Civ. App. 246, 58 S. W. 1030.

Where a certified copy of the record of a deed to a party to an action is not solely relied upon as evidence of the execution of the original, which cannot be produced, it is admissible as a fact or circumstance tending to show that such a deed has been executed. *Burleson v. Collins* (Tex. Civ. App.) 29 S. W. 688.

A certified copy of a deed under which one claims is not admissible upon a showing that the original is in his possession, and that he is absent from the state, and has the deed with him, although, by statute, such copy is competent evidence when it appears that the original is lost, or does not belong to such party, or is not within his control. *West v. Cameron*, 39 Kan. 736, 18 Pac. 894.

MICHIGAN SUPREME COURT.

PEOPLE OF THE STATE OF MICHIGAN

v.

MELVIN C. RANNEY, Plff. in Err.

(153 Mich. 293, 116 N. W. 999.)

Confession — corroboration — false pretenses.

1. The confession of one charged with obtaining money by false pretenses by means of a worthless check, that the check was, and was known by him to be, worthless, upon which a conviction cannot be had without corroboration, is sufficiently corroborated by evidence that the check was forwarded through the regular channels for collection, and was returned unpaid.

Evidence — corroboration — confession.

Evidence corroborating facts stated in a confession, which is necessary to uphold a conviction on the confession, is that

Case Note. — *Corpus delicti* in false pretenses.

As to what constitutes the *corpus delicti*, and how it may be proven, are questions which have been the subject of much discussion, even as connected with homicide, arson, and larceny, crimes which are generally cited as clearly showing that the *corpus delicti* is separate and distinct from the question as to who committed the offense. Where, however, the crime is of such a nature that the body of the offense is intimately connected with the question as to whether or not the accused was guilty, as in forgery and false pretenses, the difficulties are multiplied manifold, and it is probably due to this reason that, so far as a diligent search discloses at least, very few courts have attempted in unequivocal terms to define just what is meant by the phrase *corpus delicti*, or how far it must be proved in order to render admissible a confession, as connected with the prosecution of one accused of false pretenses; the majority of cases found being simply content with holding that in the particular case the *corpus delicti* was either corroborated, or, because of the lack of some element, not corroborated, thus rendering the confession of the accused admissible or not admissible, whatever the case may be.

In *Johnson v. State*, 142 Ala. 1, 37 So. 937, it was held that, in a prosecution for obtaining money under false pretenses, proof of the falsity of the representations is necessary to the establishing of the *corpus delicti*; and, in the absence of independent evidence of such falsity, the defendant's confession is inadmissible.

In *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440, it was held that, where one is accused of obtaining property under false pretenses, the falsity of the repre-

which not merely tends to produce confidence in the truth of the confession, but which refers to facts which concern the *corpus delicti*.

Appeal — argument to jury — inaccurate statements.

3. A conviction for obtaining money by false pretenses will not be reversed because the prosecuting attorney, in his argument to the jury, stated that the defendant was committing adultery every day, where he was living with a woman not his wife, and the gist of the argument was not that his relations were such as the word used defines, but that they were immoral and affected the credibility of the accused.

(June 27, 1908.)

ERROR to the Superior Court of Grand Rapids to review a judgment convicting defendant of obtaining money by false pretenses. Affirmed.

The facts are stated in the opinion.

sentations made as to the ownership of land is a material and essential element and portion of the *corpus delicti*, and his admissions alone cannot be relied upon to establish as sufficient a fact which is a necessary ingredient to form the body of the crime; and therefore where, laying aside the evidence of the defendant's admissions, there is nothing whatever in the record even pointing toward the commission of the crime, thus furnishing a sure and conclusive test that the falsity of the representations is a necessary element of the *corpus delicti*, the evidence is insufficient to support a conviction.

A similar case, but seemingly carrying the doctrine of proof of the *corpus delicti* a little farther, is *People v. Ward*, 145 Cal. 736, 79 Pac. 448, where the court said: "The charge was obtaining money by false pretenses. The elements of this crime necessary to the establishment of the *corpus delicti* are false statements adapted to the fraudulent purpose, and money parted with upon the faith of such statements. As in other cases, the *corpus delicti* must be proved by evidence independent of the extrajudicial confessions or admissions of the defendant." For the above statement in regard to the proof of the *corpus delicti*, the court cited as authority *People v. Simonsen*, supra. This, it would seem, was somewhat unwarranted on the part of the court, for the *Simonsen* Case does not hold that the *corpus delicti* must be proved "independent" of the confession, but merely holds that it cannot be established by the confession alone.

For cases dealing with the question of *corpus delicti* in arson, see case note to *Spears v. State*, 16 L.R.A.(N.S.) 285.

The general question of *corpus delicti* as connected with all criminal cases is discussed in a subject note to *Bines v. State*, 68 L.R.A. 33.

Mr. William B. Brown for plaintiff in error.

Messrs. John E. Bird, Attorney General, and John W. Powers for the People.

Ostrander, J., delivered the opinion of the court:

Respondent is charged, in the information, with obtaining money by false pretenses. The pretenses alleged are that he was owner of a certain check and order for the payment of money, that the check was of the value of \$50, and that there was, on deposit at the place of payment designated in the check \$50 with which to pay it when presented, and that said sum would be paid to the complainant, or bearer, upon presentation of the check, and that there was, at the place of payment, a book No. 583, and would be when the check was presented, and that said book showed a balance on deposit of \$478. A copy of the check is set out, as follows:

New York, April 4, 1907.

\$50.00.

Union Dime Savings Institution, Broadway, 32d St. & 6th Ave.: Pay on Book No. 583 fifty dollars, to myself or bearer, and this shall be your receipt.

[Signature] L. J. Cameron.

Individually or as trustee, as the book reads. Present address: Grand Rapids, Mich. Previous balance: \$478.00.

Indorsed on back: "M. C. Ranney, J. E. Rice."

The record discloses that respondent procured the check to be cashed at a hotel where he was stopping, paid his bill out of the proceeds, and retained the balance. The hotel keeper indorsed the check, and negotiated it with a merchant, who deposited it in a local bank for collection. It was sent by the local bank to New York city, and returned unpaid. There is no other testimony tending to prove that the check was ever presented at the designated place of payment. Beyond the fact that the check was so forwarded and so returned unpaid, there is nothing tending to prove the check was worthless, except an alleged confession of respondent, testified to by officers who had him in charge.

It is contended, and it is the principal question presented, that there was no sufficient proof of the commission of the offense. The proposition advanced is that the commission of a felony cannot be proved by the extrajudicial confession of the accused. Applied to this case, this means that guilt of the respondent may not be determined by his confession that the check

was, and was by him known to be, worthless; that the people were bound to show presentation of the check to the Union Dime Savings Institution in New York, if such an institution existed; that it was not drawn against funds; that payment was refused. It is the general rule that the *corpus delicti* may not be proved by the naked extrajudicial confession of the accused. 12 Cyc. Law & Proc. p. 483; 6 Am. & Eng. Enc. Law, p. 582; Wharton, Crim. Ev. 8th ed. §§ 632, 633; People v. Lane, 49 Mich. 340, 13 N. W. 622. The question presented leads to the inquiry: What is the *corpus delicti* in a case like this one? In 3 Wigmore on Evidence, § 2072, it is said that an analysis of every crime, with reference to this element of it, reveals three component parts: First, the occurrence of the specific kind of injury or loss (as, in homicide, a person deceased; in arson, a house burnt; in larceny, property missing); secondly, somebody's criminality as the source of the loss,—these two together involving the commission of a crime by somebody;—and, thirdly, the accused's identity as the doer of this crime; that the term *corpus delicti* seems, in its orthodox and its logical sense, to signify merely the first of these elements, namely, the fact of the specific loss or injury sustained, although some judges (Chief Justice Shaw in Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711, and Chief Justice Church in People v. Bennett, 49 N. Y. 137, among others) have held that it also includes the second element. I do not find any general rule laid down by the decisions of this court. Language is employed in People v. Hall, 48 Mich. 482, 485, 42 Am. Rep. 477, 12 N. W. 665, which indicates that in cases of homicide the *corpus delicti* involves the death and, also, its character, whether probably caused by some one other than the deceased. See also People v. Aikin, 66 Mich. 460, 472-474, 11 Am. St. Rep. 512, 33 N. W. 821; People v. Parmelee, 112 Mich. 291, 74, 295, 70 N. W. 577. The rule that the *corpus delicti* must be proved by some evidence other than the confession of the accused—that the confession must be corroborated—is recognized in People v. Lambert, 5 Mich. 349, 366, 72 Am. Dec. 49; People v. Isham, 109 Mich. 72, 67 N. W. 819; People v. Hawksley, 82 Mich. 71, 73, 74, 45 N. W. 1123, People v. Kemp, 76 Mich. 410, 416, 43 N. W. 439, and People v. Heas, 85 Mich. 128, 132, 48 N. W. 181, but without determining in either case, except perhaps inferentially, what constituted the *corpus delicti*. In some cases the idea has been expressed that the nature of the offense charged was such that no proof of the *corpus delicti* could be made as of a sepa-

rate element of the offense. Such are the cases of *People v. Swetland*, 77 Mich. 53, 63, 43 N. W. 779, and *People v. McGarry*, 136 Mich. 316, 324, 99 N. W. 147. In *People v. Swetland* it was said: "There are some cases where the *corpus delicti*—generally in homicide—is clearly separated and distinct from the question as to who committed the offense, if any is found to have been committed. In such cases the evidence to establish the *corpus delicti* must first be given, before acts or admissions of the accused can be put in evidence. But the present case is one where the body of the offense—the uttering of a forged instrument, knowing it to be false—is so intimately connected with the question whether or not the respondent is guilty of the crime that there can be no such separation. The *corpus delicti* in this case depends entirely for its existence upon the acts and intent of the respondent, so that her acts and admissions, if admissible at all, were admissible at any stage of the proceedings upon the trial."

For the purposes of the present case, it may be conceded that it was necessary that the confession of respondent should be corroborated as to the *corpus delicti*. Whether we consider only the first or the first and second elements, as stated, as constituting the *corpus delicti*, there is, in this case, evidence corroborating the facts stated by respondent in his confession. I use the term "corroborate" as meaning, not merely tending, to produce confidence in the truth of the confession, but as referring to facts which concern the *corpus delicti*. This is the legally correct meaning. 3 Wigmore, Ev. § 2071. There is evidence undisputed—indeed corroborated by respondent—that he applied to Mr. Rice, the keeper of the hotel, to cash the check, that the check was cashed, and respondent received the money. The check was forwarded, in the usual course of business, to New York, and was returned unpaid. It has not been paid, and Mr. Rice has never received his money. Before the check was cashed, and as an inducement, respondent, who was at the hotel with a woman not his wife, and owed the proprietor for entertainment, stated that they were going to Muskegon for three or four days, and would then return to the hotel, and that meantime Mr. Rice could find out whether or not the check was good; that he would leave a big trunk and a typewriter in it. He left the trunk, but no typewriter. He did not return to the hotel, but was arrested in May, at Wheaton, Illinois, where he was known as H. H. Straub. He told Mr. Rice that he had been with a certain firm or institution in New York for ten years, had worked from a window

washer up, and that the house always sent such checks to their traveling men. He said that Cameron, the drawer of the check, was a member of the firm. A portion of his confession, according to the testimony, was that a man named Cameron drew the check, respondent was to get it cashed, and they were to "split" the money, and did divide it; that Cameron was more to blame than he (respondent) was; that Cameron "told me that he knew a way to get a little easy money;" that he used an assumed name at Wheaton because afraid he might be arrested, and intended to straighten up this matter when he got to work. There was more to the confession than is here stated, some of it favorable to respondent. But it cannot be said that such portions of it as relate to the *corpus delicti* are not corroborated by other evidence.

During the trial the prosecuting attorney, over objection, obtained leave of the court to indorse upon the information the name of a witness, who was thereupon called, sworn, and examined. The testimony of this witness, or that of some other person connected with the bank which forwarded the check for collection, was necessary if the fact was to be proved. On a motion, made previous to the trial, to discharge the respondent, the subject was adverted to in such a manner that it is apparent the prosecuting attorney must have known he would probably need the witness at the trial. Counsel for respondent, before learning the nature of the testimony, to be elicited from the new witness, stated that he would need time to send to New York to find out in regard to the check. Upon learning that it was proposed to prove only that the check went through the bank, was sent on for collection, and returned unpaid, he said his position was that the testimony would be incompetent, irrelevant, and immaterial. It is stated in the brief for respondent that a continuance of the case was asked for and was denied. The record, which is referred to, does not support this statement. The right to further time was asserted, as has been stated, but no motion for time was made, and the necessary inference from the record is that the trial judge did not suppose that a continuance was desired.

Error is assigned upon a statement made in argument by the prosecuting attorney, to the effect that respondent was committing adultery every day. The remark was excepted to. The point made seems to be that there was no proof that either the respondent or the woman he was traveling with was married. But they were registered as man and wife, and respondent testified they were not married. The gist of the

argument was, not that the relations were such as the word used defines, but that they were immoral, affecting the credibility of respondent. We should not reverse the conviction upon this ground.

A number of errors are assigned upon the charge as given, and upon refusal to charge as requested. They have been examined, and the charge as given has been carefully read, without our being able to say that any reversible error was committed.

Judgment is affirmed.

MONTANA SUPREME COURT.

MARIE NEARY et al., Appts.,

v.

NORTHERN PACIFIC RAILWAY COMPANY et al., Resp'ts.

(37 Mont. 461, 97 Pac. 944.)

Negligence — freight conductor — walking on track.

1. An experienced freight conductor is negligent in walking along a track in a yard on which is momentarily expected a passenger train, to check the cars of his train, which he can do as conveniently after the passenger train arrives, with his back to the expected train, and without paying any attention to its approach, at a time when switch engines are at work, the noise of which will obscure, more or

less, the signals and noise of the passenger train.

Same — last clear chance — question for jury.

2. Whether or not the negligence of a railroad conductor, who, in his work, negligently placed himself in the way of an expected passenger train, will preclude his holding the railroad company liable for injuries received from the train, is for the jury, where the evidence tends to show that the train was running at an extraordinary and illegal rate of speed, not under full control as required by the company's rule, and might have been stopped before striking him after the engineer discovered that he was so absorbed in his work that he was not conscious of his peril; since these facts, if found to exist, would justify an inference of reckless and wanton negligence, justifying a recovery notwithstanding the negligence of the plaintiff.

Evidence — materiality — custom.

3. Exclusion, in an action for death of a freight conductor by being run over by train while walking along a track to check his train, of evidence that his act was according to custom in railroad yards generally, is not error where he was negligent in becoming so absorbed in his duties as to fail to observe his surroundings.

Servant — negligence — master's acquiescence.

4. A freight conductor cannot justify or excuse his negligence in walking along a track on which a train is momentarily ex-

Note. — This case illustrates the narrowness, from a practical point of view, of the distinction between the doctrine of last clear chance and the rule that contributory negligence will not bar a recovery for a wanton or wilful injury. It will be noticed that in one part of the opinion the court suggests that the evidence was sufficient to justify an inference of "reckless and wanton negligence," but the reversal apparently rests upon the ground that it was not within the province of the trial court to determine, as a matter of law, whether the defendant, by the exercise of "reasonable care," could have stopped the train and saved the decedent's life. If the holding of the court that the decedent was, as a matter of law, guilty of "contributory negligence" in walking on the track were to be construed literally and technically, it would preclude the doctrine of last clear chance. For, as pointed out in a note on this subject in 55 L.R.A. 418, and in case notes in this series, that doctrine does not, even when applicable, permit a recovery in spite of contributory negligence, but operates by stripping the plaintiff's or decedent's antecedent negligence of the character of contributory negligence which it would otherwise bear. (See further, on this point, case note to *Dyerson v. Union P. R. Co.* 7 19 L.R.A. (N.S.)

L.R.A. (N.S.) 132.) If, however, the conduct of the defendant transcends negligence, and amounts to a wanton or wilful injury, the contributory negligence of the plaintiff, conceding it to be such, does not prevent a recovery. Practically, however, even the courts which intend to apply the doctrine of last clear chance frequently state it as though it operated to permit a recovery in spite of contributory negligence. As the evidence in the foregoing case clearly warranted a finding that the engineer saw the decedent and realized his peril, and could, by the exercise of reasonable care, have prevented the accident, the fact that the decedent's negligence apparently continued up to the very moment of the accident would not, perhaps, have prevented a recovery under the "humanitarian" doctrine, so-called, even if the defendant's conduct had been regarded as nothing more than negligence. According to the better view, however, it would have been fatal to the application of the doctrine of last clear chance if the negligence on the part of the engineer had consisted of the mere failure to discover the decedent's peril, even assuming that there was a duty on his part to discover it. (See *Muse v. Seaboard A. L. R. Co.* *post*, 453, and earlier notes in the present series on this aspect of the question.)

pected, to check his train, by showing that the company passively acquiesced in the use of tracks for that purpose.

Evidence — particular fact — general custom.

5. The fact that the space between a main and repair track of a railroad company is at times obstructed so that it cannot be used by conductors in checking their trains is not admissible to show that it was obstructed at the time a particular conductor was injured while attempting to use the main track for that purpose.

(October 24, 1908.)

A PPEAL by plaintiffs from a judgment of the District Court for Yellowstone County in defendants' favor in an action brought to recover damages for the alleged negligent killing of plaintiffs' husband and father. Reversed.

The facts are stated in the opinion.

Messrs. E. E. Enterline and Walsh & Nolan, for appellants:

Contributory negligence is no defense to a suit for a death occasioned by gross and wanton carelessness.

1 Thomp. Neg. §§ 238, 239; 2 Thomp. Neg. §§ 596, 1734-1736, 1738; Riley v. Northern P. R. Co. 36 Mont. 545, 93 Pac. 954; Louisville & N. R. Co. v. Morlay, 30 C. C. A. 6, 58 U. S. App. 526, 86 Fed. 240; Bouwmeester v. Grand Rapids & I. R. Co. 63 Mich. 557, 30 N. W. 337; Kelley v. Chicago, B. & Q. R. Co. 118 Iowa, 387, 92 N. W. 45; Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 9 So. 870; Watts v. Richmond & D. R. Co. 89 Ga. 277, 15 S. E. 365; Kansas & A. Valley R. Co. v. Fitzhugh, 61 Ark. 341, 54 Am. St. Rep. 211, 33 S. W. 960; St. Louis Southwestern R. Co. v. Bishop, 14 Tex. Civ. App. 504, 37 S. W. 764; Erickson v. St. Paul & D. R. Co. 41 Minn. 500, 5 L.R.A. 786, 43 N. W. 332; Esrey v. Southern P. Co. 103 Cal. 541, 37 Pac. 500; Green v. Southern R. Co. 102 Va. 791, 47 S. E. 819; Teakle v. San Pedro, L. A. & S. L. R. Co. 32 Utah, 276, 10 L.R.A.(N.S.) 486, 90 Pac. 402; Lake Shore & M. S. R. Co. v. Bodemer, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692; Snyder v. Cleveland, C. C. & St. L. R. Co. 60 Ohio St. 487, 54 N. E. 475; Schlereth v. Missouri P. R. Co. (Mo.) 19 S. W. 1134; Haden v. Sioux City & P. R. Co. 92 Iowa, 226, 60 N. W. 537.

Deceased was where his duty called him, and in the discharge of his duty, and, under undisputed testimony, rightfully on and occupying the track.

McMarshall v. Chicago, R. I. & P. R. Co. 80 Iowa, 757, 20 Am. St. Rep. 445, 45 N. W. 1067; Jordan v. Chicago, St. P. M. & O. R. Co. 58 Minn. 8, 49 Am. St. Rep. 485, 59 N. W. 633; Snyder v. Cleveland, C. C. & 19 L.R.A.(N.S.)

St. L. R. Co. supra; Pittsburgh, C. C. & St. L. R. Co. v. Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133; Erickson v. St. Paul & D. R. Co. 41 Minn. 500, 5 L.R.A. 786, 43 N. W. 332; 1 Labatt, Mast. & S. § 355; Nelson v. New Orleans & N. E. R. Co. 40 C. C. A. 673, 100 Fed. 731; Schultz v. Chicago & N. W. R. Co. 44 Wis. 638; Hutchinson v. Missouri P. R. Co. 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852; Nord v. Boston & M. Consol. Copper & S. Min. Co. 30 Mont. 48, 75 Pac. 681.

It was entirely proper to show how the work was usually done by railroad operatives generally.

Prosser v. Montana C. R. Co. 17 Mont. 372, 30 L.R.A. 814, 43 Pac. 81; Northern P. R. Co. v. Wendel, 84 C. C. A. 232, 156 Fed. 336; 1 Labatt, Mast. & S. 353; Black, Law & Pr. in Acci. Cases, 36; 1 Thomp. Neg. 31.

Messrs. Wallace & Donnelly, John G. Brown, and R. F. Gaines, for respondents:

The decedent was guilty of contributory negligence in failing to look and listen.

Hunter v. Montana C. R. Co. 22 Mont. 531, 57 Pac. 140; Kenna v. Central P. R. Co. 101 Cal. 26, 35 Pac. 332; Keefe v. Chicago & N. W. R. Co. 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503; Cahill v. Chicago & A. R. Co. 205 Mo. 393, 103 S. W. 532; St. Jean v. Boston & M. R. Co. 170 Mass. 213, 48 N. E. 1088; Wilber v. Wisconsin C. R. Co. 86 Wis. 535, 57 N. W. 356; Labatt, Mast. & S. pp. 834, 835, 837; Collins v. Burlington, C. R. & N. R. Co. 83 Iowa, 346, 49 N. W. 848; Magee v. Chicago & N. W. R. Co. 82 Iowa, 249, 48 N. W. 92; Fisk v. Chicago, M. & St. P. R. Co. 111 Iowa, 392, 82 N. W. 931; Haden v. Sioux City & P. R. Co. 99 Iowa, 735, 48 N. W. 733; Carlson v. Cincinnati, S. & M. R. Co. 120 Mich. 481, 79 N. W. 689; Chicago, B. & Q. R. Co. v. Yost, 56 Neb. 439, 76 N. W. 901; Redmond v. Rome, W. & O. R. Co. 31 N. Y. S. R. 366, 10 N. Y. Supp. 330; Clark v. New York, L. E. & W. R. Co. 80 Hun. 320, 30 N. Y. Supp. 126; Brady v. New York, N. H. & H. R. Co. 20 R. I. 338, 39 Atl. 186; Harrison v. Texas & P. R. Co. (Tex. Civ. App.) 31 S. W. 242; Buckmaster v. Chicago & N. W. R. Co. 108 Wis. 353, 84 N. W. 845; Sours v. Great Northern R. Co. 84 Minn. 230, 87 N. W. 766; Rutherford v. Chicago, M. & St. P. R. Co. 57 Minn. 237, 59 N. W. 302; Sharp v. Missouri P. R. Co. 161 Mo. 214, 61 S. W. 829; Cincinnati, I. & St. L. R. Co. v. Long, 112 Ind. 166, 13 N. E. 659; Dyerson v. Union P. R. Co. 74 Kan. 528, 7 L.R.A.(N.S.) 132, 87 Pac. 680, 11 A. & E. Ann. Cas. 207; Flemming v. Western P. R. Co. 49 Cal. 253; Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615.

29 L. ed. 224, 5 Sup. Ct. Rep. 1125; Elliott v. Chicago, M. & St. P. R. Co. 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85.

It is but the natural presumption that, when a man can exercise ordinary care by making an ordinary use of his senses, he will do so to avoid an imminent danger to himself.

Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; *Beach, Contrib. Neg.* 394; *Florida C. & P. R. Co. v. Williams*, 37 Fla. 406, 20 So. 558; *Pittsburgh, C. C. & St. L. R. Co. v. Judd*, 10 Ind. App. 213, 37 N. E. 777; 2 *Shearm. & Redf. Neg.* p. 852; *Labatt, Mast. & S.* § 333; *St. Louis Bolt & Iron Co. v. Brennan*, 20 Ill. App. 555; *Cunningham v. Chicago, M. & St. P. R. Co.* 5 *McCrary*, 465, 17 Fed. 882; *Holland v. Chicago, M. & St. P. R. Co.* 18 Fed. 243; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Kresanowski v. Northern P. R. Co.* 5 *McCrary*, 528, 18 Fed. 229; *Behrens v. Kansas P. R. Co.* 5 Colo. 400; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616; *Simmons v. Chicago & T. R. Co.* 110 Ill. 340; *Rumpel v. Oregon Short Line R. Co.* 4 Idaho, 13, 22 L.R.A. 725, 35 Pac. 700; *Tobin v. Omnibus Cable Co. (Cal.)* 34 Pac. 124; *International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. 223; *Louisville & N. R. Co. v. Webb*, 90 Ala. 185, 11 L.R.A. 674, 8 So. 518; *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L.R.A. 287, 19 S. E. 863, 923; *Schofield v. Chicago, M. & St. P. R. Co.* supra; *Drown v. Northern Ohio Traction Co.* 76 Ohio St. 234, 10 L.R.A.(N.S.) 421, 118 Am. St. Rep. 844, 81 N. E. 326; *Dyer-son v. Union P. R. Co.* supra.

Unless it is clearly shown that the injury complained of was the direct, proximate result of the unlawful speed of the train, without any contributory negligence on the part of the plaintiff, it is foreign to the case, and gives him no right of recovery.

Reidel v. Philadelphia, W. & B. R. Co. 87 Md. 153, 67 Am. St. Rep. 328, 39 Atl. 507; *Baltimore & O. R. Co. v. State*, 69 Md. 551, 16 Atl. 212; *Neal v. Carolina C. R. Co.* 126 N. C. 634, 49 L.R.A. 684, 36 S. E. 117; 21 Am. & Eng. Enc. Law, p. 478; *State use of Dyrenfurth v. Baltimore & O. R. Co.* 73 Md. 374, 11 L.R.A. 442, 21 Atl. 62; *Denman v. St. Paul & D. R. Co.* 26 Minn. 357, 4 N. W. 605; *Raines v. Chesapeake & O. R. Co.* 39 W. Va. 50, 24 L.R.A. 226, 19 S. E. 665; *Richmond & D. R. Co. v. Yeamans*, 86 Va. 860, 12 S. E. 946.

Brantly, Ch. J., delivered the opinion of the court:

This appeal presents for review a judgment upon a verdict directed for the de-

fendants at the close of the evidence submitted by the plaintiff. The action was brought by the plaintiff Marie Neary in her own right as the widow and heir at law of James S. Neary, deceased, and as the guardian of her minor children, to recover damages for the death of the husband and father, which, it is charged, was caused by the negligence of the defendant railway company and its engineer.

The defendant company owns extensive yards at Billings, Montana. At this point the line of its railroad extends east and west, with a slightly downward grade toward the east. There are, including the main line, nine parallel tracks. To the left, going east on the main line, is track No. 1, about 14 inches lower than the main line. Measured from rail to rail, the distance between the main line and this track is variously stated by witnesses at from 5 to 8 feet. To the north of this are two other tracks, designated as the "scale lead" and the "house" tracks. Immediately to the right is a repair track, at a distance of 10 feet from the main track, so called because used to hold cars undergoing repairs. At the time of the accident there were cars on this track. The other tracks are further toward the south. The defendant company and the Chicago, Burlington, & Quincy Railway Company make joint use of these yards and tracks, the trains of the latter leaving its line, which ends at Huntley, 12 miles to the east, and running upon the main line of the defendant company, thence into the yards. Under this arrangement, Billings becomes the western terminus of the Chicago, Burlington, & Quincy line. Its west-bound trains are either broken up at this point, or are transferred to the defendant company, and its east-bound trains, except the passenger trains, which are transferred to it at this point by the defendant company, are made up there. The employees of both companies frequently go upon all of these tracks in the performance of their duties. The deceased was in the employ of the Chicago, Burlington & Quincy company as a freight conductor, and had brought his train into Billings at least fifty times during the previous eight months. The yards extend through the central portion of the city, and for most of the distance—several thousand feet—lie within the city limits. On the morning of April 29, 1905, the train of the deceased, having been made up for an outgoing run to Sheridan, Wyoming, was standing on track No. 1, headed toward the east, awaiting the coming in of passenger train No. 6 from the west on the line of the defendant company. The engine was attached and steam was up. It was to follow train No.

6 to Huntley, where the latter also left the main line of the defendant company and became No. 42 on the Chicago, Burlington, & Quincy road. Train No. 6 was due at 9:10 o'clock. While it was a few minutes late, its arrival was momentarily expected; in fact, it arrived nearly on time. The passenger depot is near the east end of the yards. The engine of the outgoing freight train stood at a point about 800 feet west from this depot. The train was about 1,300 feet in length, thus putting the caboose attached to its rear end about 2,100 feet from the depot. There is a street crossing about 300 feet west of the depot. Witness Gintz, who was a brakeman on the train of the deceased, testified that about 9:10 o'clock he came to the caboose to change his shoes and to get the train ready to leave; that, as he went in, he met the deceased going out to check the train,—that is, to take the numbers, lettering, etc., on the cars constituting it, and write them into his designation book,—that this was one of his duties; that he did not again see him alive; that it was customary for one checking trains to walk along on the right-hand side toward the engine parallel to the train, about 6 feet distant, in order to obtain an easy view of the numbers and lettering; that when in the yards, as in this instance, the conductor in checking his train walks between the rails of the track immediately to the right, because the numbers are on the right, if the track is clear; that this was the customary way of checking trains in the Billings yards; that a distance of 6 feet from the train as it stood that morning would put the deceased between the rails of the main track; that the main track to the west for $3\frac{1}{2}$ miles is straight and the view unobstructed; that a few minutes after entering the caboose he heard the noise of train No. 6, about half a mile away, and saw it through the rear door; that it passed the caboose, being then within the city limits, at the rate of 25 to 30 miles per hour; and that, as it did so, the whistle was blown, giving a rolling sound. From statements of a witness who was at the passenger depot waiting for the incoming train, and another who was standing in the yards between the main line and track No. 1, about 200 yards away, and witnessed the accident from that point, it appeared that the deceased was at that time engaged in checking his train, walking eastward between the rails of the main line. The latter of these states that he heard a whistle, and, upon turning to look, saw the train within "a rail and a half" of the deceased, and that immediately afterwards it struck him, throwing him in the air half as high as a box car and to the right. The deceased seemed to be writing,

standing with his back toward the incoming train. When the train was stopped, immediately after the collision, the body of the deceased was found lying opposite one of the Pullman cars attached to train No. 6, close to the repair track, and about 600 feet from the caboose. It was picked up, and taken on the train to the depot. The other witness stated that he was standing at the passenger depot observing the train as it came in; that he did not hear the whistle; that he saw no emission of steam; and that he did not hear the bell ring. This train consisted of 9 cars, and was about 600 feet in length. By the application of the air brake, such a train could be stopped within 250 or 300 feet when going at the rate of 20 or 30 miles per hour. If going at the rate of 6 miles per hour, it could be stopped within a distance of 6 feet. Application of the air brake in emergencies—that is, with full braking power—would cause passengers in the Pullman to experience a jar. None was felt by the stopping of the train at this time. Several switch engines were at work in the yards, making more or less noise. Train No. 6 was due to leave at 9:30. The employees of the Chicago, Burlington, & Quincy company had time cards showing the hour of its departure from Billings, but none of the hour of arrival. The atmosphere was clear, and the sight and hearing of the deceased were good. There was an ordinance of the city of Billings in force at the time declaring it unlawful to move trains within the city limits at a rate of speed exceeding 6 miles per hour. A rule of the defendant company, introduced in evidence, is as follows: "(a) All trains must approach terminals, the ends of double tracks, junctions, railroad crossings at grade, and drawbridges prepared to stop, and must not proceed until switches or signals are seen to be right, or the track seen to be clear. Where required by law, all trains must stop. (e) All trains must approach and pass through yards under full control." The words "under full control," as used in this rule, are understood by railroad men to mean "ready to stop at any moment; there is danger ahead."

The complaint alleges that the deceased was upon the track in the performance of his duties; that his presence there was well known to the defendant Frost, who was driving the engine of the passenger train; that he, through gross and wanton negligence, failed to give any signal of the train's approach; that, through his gross and wanton negligence, he was running at an unlawful and dangerous rate of speed; that, because of these gross and wanton acts of negligence, he failed to stop the train,

and thus prevent the accident; and hence that the death of the deceased was due to the gross and wanton negligence of the defendants. The defendants allege that the death of the deceased was due to his own negligence. The trial of the issues resulted as above stated. The principal questions presented for decision are two: (1) Was the deceased as a matter of law guilty of contributory negligence? (2) Is contributory negligence a bar to recovery in this case?

1. The first of these questions must, we think, be answered in the affirmative. But one legitimate inference can be drawn from the facts stated. The deceased was a man of experience,—so much so that he had been put in charge of a train. He had been in and out of these yards many times during the preceding eight months, and must be presumed to have been acquainted not only with the hazardous character of his employment generally, but also with the special dangers to be encountered there, for, he had performed the same duties there at least fifty times during these months. Several switch engines were at work and the noise from them tended necessarily, as he knew, to obscure more or less the signals and noise of the east-bound train, which he momentarily expected to arrive. So far as the proof shows, he could have checked his train as well after the arrival of train 6. With this experience and knowledge, he left the caboose of his train at a time when there was no pressing necessity or emergency calling him, got upon the track upon which the train was expected, the most perilous position he could have assumed, and proceeded in the opposite direction to check his train, allowing himself to become so absorbed in his task as to be apparently entirely oblivious of his surroundings. The track was clear behind him for a long distance. He did not turn to look, nor did he notice the sound of the whistle as the train approached, a fact which emphasizes his inattention. He had ample time to step off the track no matter what the rate of speed was at which the train approached, or whether it was running in violation of the rule or the ordinance, or not. The slightest attention would have prevented the collision. Assuming that he would ordinarily have had a right to proceed between the rails as he did, instead of upon the vacant space between the tracks, this did not excuse him from the exercise of at least ordinary care and diligence to preserve his own safety. A railway track, known to be constantly in use, is itself a warning of danger. It is the duty of one attempting to cross it to look and listen. Failure to use this precaution is such contributory

negligence as to preclude recovery for an injury inflicted by a passing train. *Hunter v. Montana C. R. Co.* 22 Mont. 525, 57 Pac. 140; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85. With greater reason does the principle apply to one who goes upon the track and travels laterally along it (*Kenna v. Central P. R. Co.* 101 Cal. 26, 35 Pac. 332), especially if he knows that a train is momentarily expected. While the rule stated by these cases may not be applied strictly to the employees of a railway company who, in the discharge of their duties, are expected or required to be upon or near the track, yet to say that it has no application would be equivalent to an unqualified statement of a rule that would in all cases absolve the employees from using ordinary care for their own safety. They have a right to rely to some extent upon the persons in charge of moving trains to give the proper signals and to take proper precautions to prevent accidents, but they have no right to rely wholly upon them, but must use due care to avoid danger. And that this rule is applied with more or less strictness, in view of the circumstances of the particular case, is shown by the decisions of the courts generally. *Keefe v. Chicago & N. W. R. Co.* 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503; *Cahill v. Chicago & A. R. Co.* 205 Mo. 393, 103 S. W. 532; *St. Jean v. Boston & M. R. Co.* 170 Mass. 213, 48 N. E. 1088; *Wilber v. Wisconsin C. R. Co.* 86 Wis. 535, 57 N. W. 356; *Collins v. Burlington, C. R. & N. R. Co.* 83 Iowa, 346, 49 N. W. 848; *Carlson v. Cincinnati, S. & M. R. Co.* 120 Mich. 481, 79 N. W. 688; *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb. 439, 76 N. W. 901; *Brady v. New York, N. H. & H. R. Co.* 20 R. I. 338, 39 Atl. 186; *Harrison v. Texas & P. R. Co.* (Tex. Civ. App.) 31 S. W. 242; *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Dyer v. Union P. R. Co.* 74 Kan. 528, 7 L.R.A.(N.S.) 132, 87 Pac. 680, 11 A. & E. Ann. Cas. 207; *Buckmaster v. Chicago & N. W. R. Co.* 108 Wis. 353, 84 N. W. 845; *Sours v. Great Northern R. Co.* 84 Minn. 230, 87 N. W. 766; *Sharp v. Missouri P. R. Co.* 161 Mo. 214, 61 S. W. 829. The rule is a just one, and is necessary to the successful operation of railways. Otherwise the employee would be excused entirely from the use of his faculties, and the necessity cast upon the employer to provide for his safety would make him practically an insurer.

2. But it is not an invariable rule that,

where one, through his own negligence, puts himself in a place of danger, he is for this reason alone, as a matter of law, denied recovery for injuries inflicted by another. The general rule that one's own negligence in such case precludes recovery is subject to the qualification that, where the defendant has discovered, or should have discovered, the peril of the plaintiff's or deceased's position, and it is apparent that he cannot escape therefrom or for any reason does not make an effort to do so, the duty becomes imperative for the defendant to use all reasonable care to avoid the injury; and, if this is not done, he becomes liable, notwithstanding the negligence of the injured party. And this is true, not only as to technical trespassers upon a railway track in the way of passing trains, but also as to employees who may become so absorbed in the performance of their duties that they do not observe signals. In no case may the railway company, after the peril becomes apparent to those in charge of a train, and especially so after it is obvious that the danger is not appreciated by the person in the perilous situation, omit any reasonable effort to stop the train and prevent injury. On this subject it is said by Mr. Thompson in his work on Negligence: "It must be kept in mind that this obligation of care and effort does not necessarily commence at the time when the men who are driving the train see the trespasser on the track, for he may be a mile away, and in no immediate danger. It arises at the moment when he is seen to be in a perilous situation. Then, but not until then, the effort to stop the train must commence. In fact, the language of most of the decisions which speak upon this question speak of the obligation of care and effort in favor of the trespasser as arising at the point of time when his perilous situation is discovered or is known. They must have become aware both of his presence and his peril. When this condition arises, their obligation of care and effort to avert injuring him is exactly the same as though he were lawfully upon the track. Where those who are driving the train fail in the discharge of this duty after discovering the perilous situation of the trespasser, his contributory negligence in getting himself into the dangerous situation is eliminated from the case. . . . This duty is stronger and clearer in regard to employees working upon the track; because they are rightfully there, and their presence is always to be anticipated by the engineer, and he is consequently bound, in the exercise of reasonable care, to give them signals of the approach of his train. Their position, on the other hand, is that of men absorbed in their work, entitled to presume

that the signals will be given. Moreover, if, by reason of being absorbed in their work, they fail to heed the signals, the law will extend some indulgence to their negligence, and will not exonerate the company if the engineer, seeing that they did not heed the signals and attempt to leave the track, fails to make any effort to stop his train, if there is time to do so, so as to avoid injuring them." 2 Thomp. Neg. § 1735. And, as pointed out by this author, it is frequently a question of fact as to whether the railway company has observed all the required precautions.

There are many cases in the books where it has been held upon conditions very similar to those shown in this case that the negligence of the employee as a matter of law precludes a recovery; but we are of the opinion that the facts stated here made a case for the jury. The train was running at an extraordinary and illegal rate of speed, and does not appear to have been under full control as required by the rule. Even so, it could have been stopped within 300 feet. The deceased was apparently busy checking his train, and so completely absorbed in his task that he was unconscious of his peril. The engineer evidently saw him, for the evidence tends to show that he sounded the whistle. If this was done while the train was near the caboose, he had more than twice the distance necessary to stop the train. If it was not done until he was within a rail and a half of the deceased, and while going at the rate of 30 miles an hour, this precaution would seem to have been entirely ineffectual and useless, for the deceased was still so absorbed in his work that he did not notice it, and, if he had done so, had then less than three seconds to get out of the way; whereas, if the engineer had been obeying the ordinance and had his train under full control, it could have been brought to a standstill within 6 feet. Prima facie the facts give room for an inference of reckless and wanton negligence, justifying a recovery in the absence of countervailing evidence. Such is the variety of incident entering into each case that it is difficult to find any two alike, and each must be determined by its own facts and circumstances. The following, however, are more or less in point, to the effect that a trial court may not, under such circumstances, conclude, as a matter of law, that the defendant had discharged itself from liability by observing all the precautions which the emergency required: *Riley v. Northern P. R. Co.* 36 Mont. 545, 93 Pac. 948; *Louisville & N. R. Co. v. Morlay*, 30 C. C. A. 6, 58 U. S. App. 526, 86 Fed. 240; *Bouwmeester v. Grand Rapids & I. R. Co.* 63 Mich. 557, 30 N. W. 337; *Kelley v. Chi-*

or 8 feet south of the siding, waiting for an engine backing down the siding to reach that point, for the purpose of talking to the engineer. The engine was backing to a train of freight cars down the siding. While he was standing in this position, some part of the train caught the end of a plank lying on the east side of a skid, at an angle of about 30 degrees, violently throwing it against plaintiff, inflicting serious injury. Plaintiff did not notice any lumber lying at the place liable to come in contact with the car. "Railroad street" was on defendant's right of way. The injury sustained, as described, constitutes plaintiff's first cause of action. After he was struck by the scantling, the train moved again, and, while he was down, he was again struck by a plank and injured, and this constitutes his second cause of action. The defendant denied that it was guilty of negligence, and pleaded contributory negligence on the part of plaintiff. The usual issues raised by the pleadings were submitted to the jury, who found, upon the first cause of action, that defendant was guilty of negligence, and that plaintiff was guilty of contributory negligence. Upon the second cause of action they found for the plaintiff upon both issues, and assessed his damages at \$3,800, for which judgment was signed. Plaintiff noted numerous exceptions to his Honor's ruling upon the issue of contributory negligence, and from a refusal to grant a new trial upon that issue appealed.

Messrs. J. G. McCormick, Cox & Dunn, and McLean & McLean, for appellant:

It was not incumbent on plaintiff to be on the lookout for a danger which he had no reasonable grounds to apprehend existed.

Hammill v. Pennsylvania R. Co. 56 N. J. L. 370, 24 L.R.A. 531, 29 Atl. 151; Stanley v. Durham & N. R. Co. 120 N. C. 514, 27 S. E. 27; Baltimore & O. R. Co. v. State, 33 Md. 542.

Messrs. Gibson & Russell, John D. Shaw, and Burwell & Cansler, for appellee:

The plaintiff having no business with the defendant, which entitled him to go upon its premises, his presence there made him a trespasser.

West Virginia C. & P. R. Co. v. State, 96 Md. 652, 61 L.R.A. 574, 54 Atl. 669; Woolwine v. Chesapeake & O. R. Co. (Manning v. Chesapeake & O. R. Co.) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81; Poling v. Ohio River R. Co. 38 W. Va. 645, 24 L.R.A. 215, 18 S. E. 782.

Assuming plaintiff was a permissive licensee, still defendant owed him no duty 19 L.R.A. (N.S.)

except not wilfully or wantonly to injure him.

Peterson v. South & Western R. Co. 143 N. C. 265, 8 L.R.A. (N.S.) 1240, 118 Am. St. Rep. 799, 55 S. E. 618; Glenn v. Norfolk & W. R. Co. 128 N. C. 188, 38 S. E. 812; Holland v. Sparks, 92 Ga. 753, 18 S. E. 990; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Quantz v. Southern R. Co. 137 N. C. 139, 49 S. E. 79; Carr v. Missouri P. R. Co. 195 Mo. 214, 92 S. W. 874; Redigan v. Boston & M. R. Co. 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; Carolina C. R. Co. v. McCaskill, 94 N. C. 746; Purifoy v. Richmond & D. R. Co. 108 N. C. 100, 12 S. E. 741; Seaboard Air Line R. Co. v. Olive, 142 N. C. 272, 55 S. E. 263.

Connor, J., delivered the opinion of the court:

Plaintiff concedes that "the only exceptions which require notice cluster around the question of contributory negligence." While it is conceded that the strip of land upon which plaintiff was standing when he was injured has been used by the public for many years, it is a part of defendant's right of way, and by permitting the use of it, as described, it lost none of its rights to use it for "railroad purposes." A railroad company owns its right of way as a necessary means of discharging its duty, as a common carrier, to the public, and cannot dispose of it, or, by permissive user as a pass way, confer any rights upon the public inconsistent with the purpose for which it has been acquired, by any of the methods known to the law or named in the charter. The right of way is dedicated to a public use. It is for this reason protected against loss by adverse or permissive possession of its right of way. Revisal 1905, § 388. Carolina C. R. Co. v. McCaskill, 94 N. C. 746; Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263. The fact, therefore, that the defendant permitted the public to use a portion of the right of way, and that it was called "Railroad street," upon which plaintiff was standing when injured, does not affect the defendant's right to place the lumber on the right of way. The defendant had a right to place such structures or obstructions on it as were necessary or convenient for the conduct of its business as a common carrier. It also had a right to pile lumber or other material on it, either for its own or the use of its patrons, and the officers and agents are the sole judges of such necessity or convenience, subject, of course, to the police power of the town, as any other property owner. Seaboard Air Line R. Co. v. Olive, supra. When, therefore, the plaintiff went

upon the right of way, as described by him self, he was at best but a permissive licensee, and the duty of the defendant to avoid injuring him, and his own duty to avoid being injured, is measured by the well-settled rules of law in regard to persons occupying that relation. He was not on the right of way for the purpose of transacting any business with the defendant, or its employees within the scope of their employment. We have uniformly applied the principle fixing the relative rights and duties of the company and persons going upon its right of way to cases coming before us. The last case was *Bailey v. North Carolina R. Co.* (N. C.) 62 S. E. 912. As illustrative of its application in this case, our attention is called, in defendant's brief, to a number of decisions of other courts.

In *West Virginia C. & P. R. Co. v. State*, 96 Md. 652, 61 L.R.A. 574, 54 Atl. 669, the plaintiff's intestate, a boy, who, it was alleged, was standing in a yard adjoining the right of way of the defendant railway company, was killed as a result of a box car being negligently thrown from the railway track by reason of a collision between two trains. The court held that, if the boy was standing off the right of way, he might be entitled to recover, but that, if he was standing on the right of way, he was a trespasser, to whom the company owed no duty except not to wilfully or wantonly injure him, and he would not be entitled to recover.

In *Woolwine v. Chesapeake & O. R. Co.* (*Manning v. Chesapeake & O. R. Co.*) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81, the plaintiff's intestate, without express invitation, visited the telegraph office of the defendant for the purpose of paying a friendly call to the operator; the office being located on the right of way. While in the office one of the defendant's trains was derailed, on account of the negligence of its servant in leaving a switch open, and ran into the telegraph office and killed the plaintiff's intestate. The court denied the right of the plaintiff to recover, on the ground that his intestate was a mere trespasser, and the defendant owed him no duty other than not to wilfully injure him.

In *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L.R.A. 215, 18 S. E. 782, plaintiff's intestate was standing on the defendant's right of way, within two steps of a public highway, and 15 feet of a mail crane, for the purpose of watching the postal clerk catch the mail bag that had been suspended from the crane, while the train was in motion. In some way, as the postal clerk undertook to make the catch, a sliver from the mail crane broke off, and was hurled

against the plaintiff's intestate, killing him. In denying the right of the plaintiff to recover, the court held that his intestate was a mere trespasser, or, at most, a permissive licensee, and the defendant, therefore, owed him no duty other than not to wilfully or wantonly injure him, and was consequently not legally responsible for his death; the court saying: "He was there simply as a looker-on to see the mail train go by and a mail agent make the flying catch of the mail pouch. Therefore he was a mere trespasser, or, at best, a voluntary licensee. The company made no change to endanger him after he came. It owed him no duty that was violated. . . . It was a case in which the unexpected happened, and its liability to happen could not be foreseen, and is only proved by the actual happening."

In *Holland v. Sparks*, 92 Ga. 753, 18 S. E. 990, plaintiff's intestate was walking along near the defendant's track, upon its right of way, when a freight train was derailed as a result of being negligently run too rapidly, and one of the cars struck plaintiff's intestate and killed him. In holding the plaintiff was not entitled to recover, the court said: "In the present case it was insisted that the servants in charge of the defendant's freight train were running it at a high and dangerous rate of speed, and that this conduct on their part amounted to negligence. Most probably it was a violation of the duty which these servants owed to the company, and to those whose property was being transported by the train, and in this sense their conduct may have been negligent. But we do not think their failure to observe due care and diligence in running the train was negligence, as against one in no way connected therewith, and whose injury, by its rapid running and derailment, was a consequence so remote as to require almost the gift of prophecy to anticipate it."

So, in the leading case of *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, cited with approval in *Quartz v. Southern R. Co.* 137 N. C. 139, 49 S. E. 79, the court said: "So a licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure."

In *Carr v. Missouri P. R. Co.* 195 Mo. 214, 92 S. W. 874, plaintiff, while walking along one of the defendant's railway tracks,

which was habitually used by pedestrians, was injured by being struck by a brake shoe, which was thrown from a train running in the opposite direction on a parallel track, on account of the alleged negligence of the defendant in permitting the defective shoe to be upon its train. In holding that the plaintiff in no view of the law was entitled to recover, the court said: "The plaintiff was on the defendant's right of way, enjoying the privilege merely of a licensee in walking thereon, and the company owed him no other or greater duty than not to negligently or wantonly injure him. The evidence in no way shows that the injury was the result of negligence on the part of the company. . . . 'If there is no evidence of a wilful, reckless, or wanton disregard to human life on the part of the operatives of the train, there is nothing for a jury to pass upon, and the court should sustain a demurrer to the evidence. . . .' The courts make a distinction between a person who comes upon railroad's premises at the invitation of the railroad company, or for some purpose connected with its business, and a person who goes upon such premises for his own convenience or pleasure. In the one case there is a duty to protect the person thus going upon the property of another from injury while on his premises, while as to the other there is no such duty." *Peterson v. South & Western R. Co.* 143 N. C. 265, 8 L.R.A.(N.S.) 1240, 118 Am. St. Rep. 799, 55 S. E. 618. In *Ray v. Aberdeen & R. F. R. Co.* 141 N. C. 84, 53 S. E. 622, the plaintiff was a passenger, and was injured by a backing train. The question of contributory negligence was submitted to the jury.

Upon the second issue his Honor instructed the jury that, "if they found by the greater weight of the evidence that the plaintiff, by the exercise of that care which an ordinarily prudent man would have exercised under similar circumstances, could have discovered that the said piece of scantling was lying so dangerously near the defendant's side track as to make it probable that it would be struck by the passing train and injure the plaintiff in the way he was injured, in time to have avoided being so injured, then the court charges you that the plaintiff was guilty of contributory negligence of the defendant in bringing about his injury, and you will answer the second issue 'Yes.'" While it is by no means clear that, in the light of the plaintiff's evidence, he may not have told the jury to answer the first issue in the negative, that question is not presented, and we do not decide it. Certainly, however, when his Honor placed upon the plaintiff the same standard to avoid being injured

as he imposed upon the defendant to avoid injuring him, the plaintiff cannot complain. The defendant was using, in a lawful way, and for a lawful purpose, its right of way, while plaintiff, in the most favorable view for him, was a voluntary or permissive licensee. He had the same, if not better, opportunity of seeing the physical conditions by which he was surrounded as the defendant's employees. There was no concealed danger. The pile of lumber and the position of the plank or scantling were obvious. It is true that he did not see or observe that the plank was in a position to be struck by the backing train, and it is also true that defendant's employees did not see or observe it. Conceding that it was the duty of one to do so, why was it not equally the duty of the other? Why, as contended by plaintiff, was defendant guilty of negligence in not seeing the position of the plank, and he relieved of all obligation to see it, standing within 2 or 3 feet of the pile while defendant's employees were discharging their duty on the moving train? The jury found that both should have done so, and by the exercise of reasonable care could have prevented the accident. The negligence of both continued up to the last moment, leaving no element of the last clear chance in the case. In this condition of the record it is manifest that the plaintiff cannot recover. The jury having found, under his Honor's instructions, that the plaintiff, in the exercise of the care of an ordinarily prudent man, under similar circumstances, could have discovered that the piece of scantling was lying so dangerously near the track as to make it probable that it would be struck by a passing train, and injure him in the way he was injured, in time to have avoided being so injured, no other conclusion could be reached than that his failure to get out of the danger from the train, which he knew was backing, and for which he was waiting, was the proximate cause of the injury. Both parties are held to correlative duties, not necessarily or always the same, but regulated by the relation which they occupy in respect to the transaction or occurrence, by reason of which the injury is caused. The owner of premises in their lawful use owes to a trespasser or permissive licensee a duty, the standard of which is fixed by law. The trespasser or licensee owes to himself, while on the premises, a duty also fixed by law. If, by reason of the failure of both to act up to the standard, the trespasser or licensee is injured, and such failure is concurrent with and continues up to the moment of the impact, the law attributes the injury to his failure, and not to that of the defendant, and does not permit a recovery. This is the basis

upon which the doctrine of contributory negligence, which bars a recovery, is founded. This was the sole question involved in this case upon the second issue. His Honor properly defined the plaintiff's duty, and the jury found that he failed to act up to the standard. Many of the numerous requests for instructions were calculated to confuse the real question and mislead the jury. We do not mean that they were so intended. In every case involving liability for alleged negligent conduct, either of commission or omission of duty, the decision may be simplified, and much confusing language eliminated, by keeping in mind the elemental truth that the real inquiry is whether there has, in the concrete case, been a breach of duty by either or both parties.

This being answered, the sole remaining inquiry is whether the proximate cause of the conditions produced by such breach of duty is located. Usually the questions combine both law and fact, and the latter must be decided by the jury. In some exceptional cases, upon well-settled principles, the question is one of law, to be decided by the court by instructions to the jury, or upon demurrer to the evidence. His Honor put the real question upon the second issue in its simplest form, and at the same time comprehended every essential element involved. Many of the exceptions have no relation to the question of contributory negligence, and were properly refused. It is well settled that, when the charge given presents every phase of the controversy, with correct instructions as to the law, a new trial will not be awarded for failure to give the instructions asked, although they may involve correct propositions of law. The instructions given bring the case within this rule. We do not find any merit in the exceptions to the admission and rejection of testimony. His Honor properly exercised his discretion in denying the motion to set aside the verdict on account of the alleged misconduct of the jury. The wisdom of the well-settled rule excluding evidence from the jurors tending to impeach their verdict is illustrated in this case. Upon the whole evidence the deplorable injury sustained by the plaintiff appears to have been one of those accidents which overtake men in life for which it is impossible to account, or to affix any moral or legal accountability. While the jury may well have found this to be so, they have reached the same result by fixing blame on both parties. This is one of the tendencies of the human mind, the other and more charitable being to attribute to unforeseen and uncontrollable causes many of the incidents of human life. The plaintiff recovered substantial damages on his second cause of action, and it would

seem that the jury, within the latitude necessarily, and perhaps wisely, given them, have done substantial justice. At least there is no error entitling either party to further prolong the litigation.

The judgment must be affirmed.

NEW YORK COURT OF APPEALS.

NICHOLAS C. FRIES, Appt.,

v.

LEWIS F. OSBORN et al., Respts.

(190 N. Y. 35, 82 N. E. 716.)

Evidence — will — intent.

The mere fact that a will, making no reference to real estate, gives legacies in excess of testator's personalty, will not admit evidence that testator meant by the legacies to repay money loaned him for the purchase of the realty, and therefore intended them to be a charge upon it.

(November 19, 1907.)

Case Note. — Admissibility of extrinsic evidence for the purpose of charging property with payment of legacies or debts where the will is silent on that point.

The scope of this note is limited strictly to cases where there is no language in the will susceptible of interpretation on the point, extrinsic evidence being relied upon to read into it a provision on the subject.

The doctrine of the case reported finds support in the very nearly parallel case of *Heslop v. Gatton*, 71 Ill. 528, where a testatrix died testate as to her personal property only, the will containing no devise of real estate whatever. The personal property not specifically disposed of was insufficient to pay the principal legacy, but no intention of the testatrix to charge her real estate with the payment of this legacy was expressly declared by the will, nor was there anything in the language of the will from which such intention could be fairly and satisfactorily inferred. It was argued that it was the intention of the testatrix that the legacy should be paid out of the proceeds of the real estate, and that she knew that unless it was so paid it must fail; and a bill filed for the construction of the will set out, as affording evidence of such intention, the state of the property of the testatrix, which consisted for the most part of real estate; that her income was derived from an interest in a life estate, determinable on her death, and was absorbed by her annual expenses; and that it was her intention to convert her real estate into money, and that she had given for that purpose a power of attorney to sell it. The court said: "Without adverting to the force of such circumstances as evidence to show the intention to charge the real estate with the payment of the legacy, in

APPPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming an interlocutory judgment of a Special Term for Livingston County upon the report of a referee in defendants' favor in a proceeding to partition certain real estate in which defendants sought to charge legacies in the will of Michael J. Fries, deceased, upon the property. Reversed.

The facts are stated in the opinion.

Mr. Edwin A. Nash, with Mr. Newton B. Gorham, for appellant:

The real estate of a decedent cannot be charged with the payment of legacies, unless there is a devise either expressly charging the real estate, or from which it can be inferred that there was an intention on the part of the testator so to charge his real estate.

Lupton v. Lupton, 2 Johns. Ch. 623; McCorn, v. McCorn, 100 N. Y. 513, 3 N. E. 480; Reynolds v. Reynolds, 16 N. Y. 259.

case they were admissible for such purpose, we are clearly of opinion that such extrinsic evidence cannot be resorted to, to show what the testatrix intended, under the rules of evidence applicable to the construction of wills. Generally, a will is not to be construed by anything *dehors*, where there is no latent ambiguity, and parol evidence is not admissible to show the intention of the testator against the construction on the face of the will, and the state of his property cannot be resorted to, to explain the intention."

A similar decision was made in *Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777, where a testator who, neither at the time of making the will nor at the time of his death, owned or possessed more than an inconsiderable amount of personal property, his estate consisting almost wholly of real property, gave legacies to a considerable amount, his will upon its face neither expressly nor impliedly making such legacies a lien or charge upon his real estate. The court said: "It is insisted that the will should be read in the light of extrinsic facts and circumstances which existed when it was made and when it took effect, and which were well known to the testator; and that, when so read and considered, the implication arises that the testator intended to charge these legacies upon his real estate. It is, however, well settled that the intention of the testator must be determined by the will itself, and not from evidence *aliunde*. There is no latent ambiguity in the will requiring parol evidence to explain, and, where the intention to make the legacies a charge upon the real estate is not expressed in the will, or cannot be implied from the language used, we know of no rule of law which would authorize us to go outside of the will to look for proof of such intention."

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Messrs. Clyde E. Shults and Charles W. Stevens, for respondents:

The law seeks only to discover and carry out the purpose of the testator.

Reynolds v. Reynolds, 16 N. Y. 262; McManus v. McManus, 179 N. Y. 342, 72 N. E. 235; Taylor v. Dodd, 58 N. Y. 348.

Where the personality at the time of death is inadequate, resort is always had to the extrinsic circumstances at the date of the will to ascertain testator's intention.

Kalbfleisch v. Kalbfleisch, 67 N. Y. 363; Bevan v. Cooper, 72 N. Y. 322; LeFevre v. Toole, 84 N. Y. 102; Hoyt v. Hoyt, 85 N. Y. 147; Scott v. Stebbins, 91 N. Y. 614; McCorn v. McCorn, 100 N. Y. 511, 3 N. E. 480; Re Rochester, 110 N. Y. 168, 17 N. E. 740; Brill v. Wright, 112 N. Y. 135, 8 Am. St. Rep. 717, 19 N. E. 628; Briggs v. Carroll, 117 N. Y. 291, 22 N. E. 1054; Morris v. Sickly, 133 N. Y. 456, 31 N. E. 332; Hogan v. Kavanaugh, 138 N. Y. 417, 34 N. E. 292; McManus v. McManus, 179 N. Y.

In *McGough v. Hughes*, 18 R. I. 768, 30 Atl. 851, it was held that parol evidence was not admissible to prove that the testator had no personal estate out of which legacies could be paid, for the purpose of creating an inference that, as the will was made only a few days before the testator's death, he must have known that the legacies could be paid only out of his real estate, and hence, that he must have intended to charge the payment of them thereon, where the will contained no express charge on the real estate, nor any language from which the charge could be implied, and made no mention of, or reference to, the real estate, nor even contained a gift of the residue of the estate under which real estate might pass.

The Pennsylvania courts also recognize the doctrine that there must be something on the face of a will from which an intention of the testator to create a charge on real estate can be inferred. *Okeson's Appeal*, 59 Pa. 99; *Duval's Estate*, 146 Pa. 176, 23 Atl. 231.

In *Bishop v. Howarth*, 59 Conn. 455, 22 Atl. 432, it was held that oral evidence was inadmissible to show the actual intention of the testator in regard to the payment of a mortgage debt on property devised.

In *Golder v. Chandler*, 87 Me. 63, 32 Atl. 784, where a will made no mention of life insurance, and no expression in it afforded any evidence that the testator intended to change the direction which the law gives to such insurance money; but it appeared that the personal estate was insufficient to pay the debts and bequests in the will,—it was held that parol evidence was not admissible, upon the ground of latent ambiguity in the will, to show an alleged intention on the part of the testator that such life insurance should be considered as part of his personal estate.

338, 72 N. E. 235; *Gilmer v. Stone*, 120 U. S. 586, 30 L. ed. 734, 7 Sup. Ct. Rep. 689.

Hiscock, J., delivered the opinion of the court:

This is an action of partition. The appellant and various defendants are the relatives and heirs at law of one Michael J. Fries, who died leaving no descendants. The respondents are relatives of his deceased wife and legatees under his will. The dispute between them is summarized in the question submitted to us, whether certain legacies to the latter are a charge upon real estate of the testator which descended to the former. In the answer which we are about to give to this question we feel constrained to differ with the decisions of the learned courts below, which have held that such legacies were such a charge.

The will which presents the question, outside of clauses respectively directing the payment of debts and funeral expenses and

appointing an executor, contains simply and solely the following provision: "Second. I give and bequeath to my brother-in-law, Lewis F. Osborn, the sum of five hundred dollars (\$500.00), and to my sisters-in-law, namely, Ella Harding, Mary Kilbury, Jennie Southgate, the sum of three hundred dollars (\$300.00) each, and my sister-in-law, Dora F. Osborn, the sum of five hundred dollars (\$500.00), and my niece Gladis Kilbury and my nephew Lewis S. Osborn, the sum of five hundred dollars (\$500.00) each." From evidence, much of which was received over sufficient objections and exceptions, the court has found, amongst other things, that the testator left sufficient personal property to pay only a small portion of the legacies after satisfaction of debts; that at the time of making the will he knew the value of his personal property and the amount of his debts; that the father of the decedent's wife had advanced \$1,000 on the purchase price of a

The doctrine of the case reported is also supported by the statement of the rule in 19 Am. & Eng. Enc. Law, 2d ed. p. 1351, that the intention of a testator to charge legacies upon his real property cannot be inferred from circumstances altogether extrinsic to the will, and that evidence *aliunde* is not admissible to show a testator's intention, unless there is a latent ambiguity in the will.

There seem, however, to be considerable differences of opinion as to when a will is susceptible of interpretation, and, while it is not purposed to go into the general question, some reference to certain decisions where the provisions of the will appeared to afford a very slender basis for admission of extrinsic evidence may properly be made in this connection.

In *Leigh v. Savidge*, 14 N. J. Eq. 124, it was said that, while the authorities are by no means agreed as to whether parol evidence is admissible as to the amount and nature of the testator's estate, or other extrinsic circumstances, in order to ascertain the testator's intention to charge the legacies upon real estate or to exonerate the personality; and although the decided weight of the English authorities would seem to be against it,—it is well settled in New Jersey that such evidence is admissible; and it was accordingly held, where a testator gave numerous pecuniary legacies and devised his house and lot to his widow for life, directing that on her death it should be sold and the money equally divided between certain persons, no disposition whatever being made of the balance of his real estate, concluding with the appointment of executors, "investing them with all power necessary to execute that ample trust," that evidence was admissible that, at the date of the will, the testator's personal property was entirely

inadequate to satisfy the legacies given by the will, and so continued up to the testator's death, but that the amount of the legacies given by the testator, making a reasonable allowance for the costs and expenses of settling his estate, was equal to the combined value of his personal and real estate not specifically devised.

But even if the New Jersey doctrine be regarded as at variance with the foregoing cases, the substantial result is the same, as it is held that, although the insufficiency of the personal estate to pay legacies, when so made to appear, creates a strong impression in favor of an intention to charge them, yet, standing alone, it is not enough, as against heirs, to effect such a charge. *Leigh v. Savidge*, supra; *Johnson v. Poulson*, 32 N. J. Eq. 390; *Turner v. Gibb*, 48 N. J. Eq. 526, 22 Atl. 580.

In *Stuart v. Robinson*, 80 Miss. 200, 92 Am. St. Rep. 603, 31 So. 903, where a testatrix on her deathbed, knowing that she had neither money nor personalty sufficient to satisfy pecuniary bequests, made a will making various dispositions of her property, specifically devising her real estate, it was held that her situation and surroundings might be considered in determining whether the pecuniary legacies should be charged upon the lands.

In *Theobald v. Fugman*, 64 Ohio St. 473, 60 N. E. 606, it was held that legacies not specifically charged upon real estate will nevertheless be held to be charged upon such real estate, and be a lien thereon, where it appears that the testator, at the time the will was made and at his decease, had no moneys or personal estate of any kind out of which such legacies could be paid, unless a contrary intention is manifest from the whole will.

farm deceded to testator and owned by him at the time of his death; that the latter had intended that his wife's relatives should be repaid by will, or otherwise the sum so advanced with interest for many years; that the will was drawn by a person ignorant of the law relating to wills; and, finally, "that the said testator . . . intended to and did charge the real estate with the payment of the legacies mentioned in his will." Obviously the will under consideration does not expressly charge the legacies upon the testator's real estate. But the rule is invoked that extrinsic evidence may be resorted to for the purpose of showing an intention to so charge such legacies which will be binding in the construction of the will, although express provision to that effect is wanting.

It will therefore be well to place before us the rule upon this subject as it has been stated at various times and as unquestionably it now runs. In *Lupton v. Lupton*, 2 Johns. Ch. 614, 623, it is said: "The real estate is not, as of course, charged with the payment of legacies. It is never charged unless the testator intended it should be, and that intention must be either expressly declared, or fairly and satisfactorily inferred, from the language and disposition of the will." In *Bevan v. Cooper*, 72 N. Y. 317, 322, it is said: "There are some rules which are well settled as to the payment or charging of general legacies. One is that the primary fund for the payment of them is the personal estate. It is one which is to be observed, unless express direction otherwise is found in the will, or there be a clear intent to the contrary to be gathered from the provisions of the will, which may be assisted by the extraneous circumstances of the case." It is further written in this case: "It is said that the mere fact of giving legacies by the testator furnishes a strong probability that he intended that they should be paid if his estate, in any of its parts, was sufficient therefor. It is hardly to be supposed that a man of sense, engaged in the solemn and deliberate matter of making a final disposition of his worldly estate, would trifle with the subject, by making bequests which he did not expect or intend should be satisfied; and, if so, then at first view it seems plausible to say that he must have meant that they should be satisfied from any portion of his estate—from the real, if the personal does not suffice. But yet this idea only imputes to the testator a general purpose that legacies given shall be paid. It does not satisfactorily show that, when giving them, it entered into his mind and formed a part of his intent that they should be so charged upon his real estate as that it should be subject

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to them as to a lien." In *McCorn v. McCorn*, 100 N. Y. 511, 513, 3 N. E. 480, it is said: "Whether a legacy is charged upon the real estate of the decedent is always a question of the testator's intention. The language of the will is the basis of the inquiry; but extrinsic circumstances which aid in the interpretation of that language, and help to disclose the actual intention, may also be considered."

These decisions simply make application to a specific subject of the general rule that extrinsic evidence may be resorted to within certain limits and qualifications for the purpose of ascertaining the intention of the testator, and thereby of making clearer and interpreting clauses in his will which otherwise are obscure and of uncertain meaning. But this general rule, wherever laid down, and the rule applicable to the solution of the particular question before us as stated in the citations which we have made, seem to make it sufficiently clear that extrinsic evidence may be utilized only for the purpose of interpreting something which is actually written in the will, that there must be some provision in the will which will serve as a subject for interpretation, and that, under the guise of interpretation, extrinsic evidence cannot be utilized for the purpose of adding to the will provisions which otherwise are not found there at all. Many cases have been cited by the learned counsel for the respondent, and many more might have been added, in which extrinsic evidence has been allowed to aid the court in interpreting provisions of wills which gave legacies and disposed of real estate, and whereby the conclusion was aided that the devise of the real estate was made subject to the payment of the legacies. But no case has been cited, or, as we believe, can be found, in which it has been decided that evidence extrinsic to the will may be made the basis of construing into the will provisions charging real estate with the payment of legacies where the will as actually written by the testator contained not one word even indirectly relating to this subject, and was absolutely silent upon the subject of the testator's real estate, not taking notice or disposing of it in any way whatever. It seems almost axiomatic that a will cannot create a charge or lien upon real estate when it contains no provision whatever which disposes of or deals with such real estate. The idea of charging real estate with the payment of money by will necessarily seems to imply that the instrument shall take jurisdiction of the former and contain some provision with reference to it, and that it shall not be absolutely silent and barren of any word relating to it.

Until some method is adopted of reforming wills after the death of the testator, we fail to see how parol extrinsic testimony can be made to control the testamentary disposition of property as to which the testator has died absolutely intestate.

As we read it, that is this case. The testator has died intestate as to his real estate. His will does not touch it at all. There are no clauses relating to it which may be made the basis of interpretation and construction. We do not see how we are any more entitled upon the record presented to say that the will requires that the legacies be charged upon the unmentioned real estate than we would be entitled to read into the will a provision giving it in whole or part to the legatees named. Perhaps it may be assumed from the evidence and findings that this conclusion defeats what was really the expectation and intention of the testator. If that is so, of course, it is to be regretted. But it will be only another illustration of the experience that no statute or rule, however wise and conducive to public welfare and safety in its general observance and application, can be so framed that it may not be made by ignorance and carelessness an occasional source of hardship in the individual case.

The question certified to us must be answered in the negative, and the judgment appealed from reversed, and a new trial granted, with costs to abide event.

Cullen, Ch. J., and Edward T. Bartlett, Haight, O'Brien, Vann, and Chase, JJ., concur.

NEW YORK COURT OF APPEALS.

MARY SMITH et al., Appts.,

v.

MICHAEL RYAN et al., Respts.

(191 N. Y. 452, 84 N. E. 402.)

Incompetent person — deed — avoidance — action at law.

A deed by an incompetent person may be avoided in an action at law to recover possession of the granted premises, since, being incapable of giving assent, no valid contract has been effected.

(March 31, 1908.)

APPEAL by plaintiffs from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part 8, for New York County in defendants' favor in an action brought to recover possession of certain real estate. Reversed.

The facts are stated in the opinion.
19 L.R.A. (N.S.)

Messrs. Henry B. Twombly and Louis H. Hall, for appellants:

The plaintiffs had the right to sue in ejectment, and, when the deed was set up to defeat their claim, to meet the defense by showing the incompetency of the grantor.

Phillips v. Gorham, 17 N. Y. 270; New York Ice Co. v. North Western Ins. Co. 23 N. Y. 360; Mandeville v. Reynolds, 68 N. Y. 543; Van Deusen v. Sweet, 61 N. Y. 378; Bennett v. Vonder Bosch, 26 App. Div. 311, 49 N. Y. Supp. 802; Booth v. Fuller, 35 App. Div. 117, 54 N. Y. Supp. 670; Clapp v. Byrnes, 155 N. Y. 535, 60 N. E. 277; Babcock v. Clark, 93 App. Div. 119, 86 N. Y. Supp. 976; Wilcox v. American Teleph. & Teleg. Co. 176 N. Y. 115, 98 Am. St. Rep. 650, 68 N. E. 153; Sullivan v. Traders' Ins. Co. 169 N. Y. 213, 62 N. E. 146; Thompson v. Leach, 1 Ld. Raym. 313; Ball v. Mannin, 1 Dow & Cl. 380; Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175; Jones v. Cohen, 82 N. C. 75; Brown v. Freed, 43 Ind. 253; Valpey v. Rea, 130 Mass. 384; Pope v. Nicholâ, 61 Kan. 230, 59 Pac. 257; Dougherty v. Powe, 127 Ala. 577, 30 So. 524; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766; Miles v. Lingerman, 24 Ind. 387; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Fitzgerald v. Shelton, 95 N. C. 519; Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504.

The bringing of the ejectment action was a sufficient act of avoidance of the deed.

Craig v. Van Bebber, 100 Mo. 584, 18 Am.

Case Note. — May deed of real property executed by an incompetent not judicially declared such be avoided in action at law.

The doctrine that a deed by an incompetent person may be avoided in an action at law to recover possession of the granted premises appears to be supported by a numerical preponderance of the decisions, although the weight of any argument based upon this circumstance is somewhat impaired by the fact referred to in the case reported, that in some of the jurisdictions adopting the doctrine the courts were for a long time without equity jurisdiction, so that resort for relief was necessarily had to the courts of law; as well as by the fact that equitable defenses are allowed in some states to be made in actions to recover possession of land.

It is nevertheless believed that the doctrine has a logical basis. The principal difficulty which has prevented its general acceptance has been the rule that the acts of an insane person who has not been judicially declared incompetent are not void, but merely voidable, from which it has been argued that, as the deed of such a person is efficient to pass the title, no cause of action or defense can be maintained which

St. Rep. 569, 13 S. W. 906; Jackson ex dem. Wallace v. Carpenter, 11 Johns. 539; Chadbourne v. Rackliff, 30 Me. 354; Drake v. Ramsay, 5 Ohio, 251; Doe ex dem. Moore v. Abernathy, 7 Blackf. 442; Scott v. Buchanan, 11 Humph. 469; Sims v. Everhardt, 102 U. S. 300, 26 L. ed. 87; St. Louis, I. M. & S. R. Co. v. Higgins, 44 Ark. 293; Watson v. Billings, 38 Ark. 278, 42 Am. Rep. 1; Stack v. Cavanaugh, 67 N. H. 149, 30 Atl. 350; Eagan v. Scully, 173 N. Y. 581, 65 N. E. 1116, 29 App. Div. 619, 51 N. Y. Supp. 680.

Mr. Edward W. S. Johnston, with Messrs. Charles E. LeBarbier, and James A. Boylan, for respondents:

The deed of a person claiming to be a lunatic, where it is conceded that there is

rests upon the assertion of the legal title in such grantor or one claiming through him.

From the dilemma thus created, the following way of escape is suggested, based upon the hypothesis that at common law there was originally no such thing as a voidable deed: Either a deed was void, or it was not; and, if the grantor had not been judicially declared incompetent, he was not permitted to stultify himself by alleging his own insanity. This situation gave rise to the practice of resorting to courts of equity for relief. These, in order to protect the rights of grantees who had dealt in good faith, were obliged to characterize the deed not as void, but as voidable, so as to permit the grantee to retain the title where he could not be placed *in statu quo*, or as a security that the consideration should be restored. The equity doctrine in this case, as in many other cases, finding its way into the common-law courts, undermined the rule that a man could not be allowed to stultify himself to avoid the consequences of his own acts, and thereby removed the obstacle to asserting in a court of law that a deed is in fact no deed because of the failure of the minds of the parties (the grantor's being wanting) to meet. Thus there is no difficulty in legal theory in holding that the deed of one in fact incompetent, but not judicially declared to be such, is inoperative to transfer title, while recognizing at the same time that the transaction may have given rise to equitable rights in the grantee, which, it may be, courts of law will protect, so far as possible, although possibly not so adequately as a court of equity, by requiring a tender of a return of the consideration received,—a point touched upon, but not decided, in the latter part of the opinion in SMITH v. RYAN.

In Alabama, the right to test the validity of a deed given by an alleged insane grantor, in an action of ejectment, seems to be recognized. See Dougherty v. Powe, 127 Ala. 577, 30 So. 524; Galloway v. Hendon, 131 Ala. 280, 31 So. 603.

In Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175, where the deed in question was 19 L.R.A. (N.S.)

no adjudication in lunacy, is merely voidable, and must be attacked in equity, and cannot be treated as a nullity.

Riley v. Carter, 76 Md. 581, 19 L.R.A. 489, 35 Am. St. Rep. 443, 25 Atl. 609; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; Miles v. Lingermer, 24 Ind. 387; Wait v. Maxwell, 5 Pick. 217, 16 Am. Dec. 391; Dennett v. Dennett, 44 N. H. 538, 84 Am. Dec. 97; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 717; Blakeley v. Blakeley, 33 N. J. Eq. 508; Snowden v. Dunlavy, 11 Pa. 525; Fitzgerald v. Reed, 9 Smedes & M. 94; Allen v. Berryhill, 27 Iowa, 540, 1 Am. Rep. 309; Elston v. Jasper, 45 Tex. 409; 1 Chitty, Contr. 11th Am. ed. 188; Parsons, Contr. 384; Myers v. Knabe, 51 Kan. 720, 33 Pac. 603; Gribben v. Maxwell, 34 Kan. 8, 55 Am.

made by one who had not been judicially declared incompetent, and who had become mentally incapacitated by a stroke of paralysis, it was held that it is competent to show the incapacity of the grantor of a deed, relied upon as a defense in an action of ejectment. In this case the grantee, being cognizant of the mental condition of the grantor at the time the deed was executed, was held not to be in a position to demand repayment of any valuable consideration which she may have given. From this conclusion, reached by two of the three justices constituting the court, Elliott, J., dissented upon the ground that it was necessary for the plaintiff, in order to show legal title in himself, to prove that the deed in question was absolutely void, which could not be done by showing the feeble-mindedness of the grantor, as, even assuming such to be her condition, her deed was not void, but merely voidable.

In Douglas v. Hartzell, 15 Ill. App. 251, it was held that a defendant in an action of forcible detainer may show that plaintiff's grantor was *non compos mentis*; the court saying: "If the grantor in the deed to appellee was insane or an imbecile at the time of the execution of the deed, and was incapable of understanding the transaction, then it was not her deed. This fact may as well be shown in a court of law as equity."

In Harbison v. Lemon, 3 Blackf. 51, 23 Am. Dec. 376, it was said, apropos of the abandonment of the doctrine that a man should not be permitted to stultify himself in order to be relieved from his obligation, that a deed may be avoided either at law or in equity if at the time of its execution the obligor was so destitute of understanding as not to know what he was doing; whether the incapacity were occasioned by idiocy, lunacy, or drunkenness.

In Brown v. Freed, 43 Ind. 253, a statutory suit to recover real property, it was held that the plaintiffs were entitled to introduce evidence to show that their ancestor, under whose deed the defendants claimed title, was insane when he executed the deed, upon the ground that, if the grantor was insane, the deed was void and no title

Rep. 233, 7 Pac. 584; Leavitt v. Files, 38 Kan. 26, 15 Pac. 891; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Arnold v. Richmond Iron Works, 1 Gray, 434; Allis v. Billings, 6 Met. 415, 39 Am. Dec. 744; Howe v. Howe, 99 Mass. 98; Seaver v. Phelps, 11 Pick. 304, 22 Am. Dec. 372; Den ex dem. State Bank v. Moore, 5 N. J. L. 470; Breckenridge v. Ormsby, 1 J. J. Marsh. 245, 19 Am. Dec. 71; Re Desilver, 5 Rawle, 111, 28 Am. Dec. 645; Yauger v. Skinner, 14 N. J. Eq. 389; Copenrath v. Kienby, 83 Ind. 18; Freed v. Brown, 55 Ind. 310; More v. Calkins, 85 Cal. 177, 24 Pac. 729; Burnham v. Kidwell, 113 Ill. 425; Lincoln v. Buckmaster, 32 Vt. 652, Carr v. Holliday, 40 N. C. (5 Ired. Eq.) 167; Rhoades

v. Fuller, 130 Mo. 170, 40 S. W. 760; Ashcraft v. De Armond, 44 Iowa, 229; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Rep. 431; Niell v. Morley, 9 Ves. Jr. 478; Molton v. Camroux, 2 Exch. 487; Beals v. See, 10 Pa. 59, 49 Am. Dec. 573; Lancaster County Nat. Bank v. Moore, 78 Pa. 414, 21 Am. Rep. 24; Wilder v. Weakley, 34 Ind. 181; Dane v. Kirkwall, 8 Car. & P. 679; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Campbell v. Hooper, 3 Smale & G. 153; Brown v. Cory, 9 Kan. App. 702, 59 Pac. 1098; Cockrill v. Cockrill, 79 Fed. 143; Imperial Loan Co. v. Stone, 61 L. J. Q. B. N. S. 449; Lack v. Brecht, 166 Mo. 242, 65 S. W. 976; Arnett v. Owens, 23 Ky. L. Rep. 1409, 65 S. W. 151; French Lumbering Co. v. Theriault, 107 Wis. 627, 51 L.R.A. 910,

passed. The court said: "Suppose that the appellants had attempted to defeat the title of the appellees by proof that the deed which purported to have been made by the said Jacob Nidiffer was a forgery, would anyone doubt that such proof was competent, and, if the fact was established, that the appellants were the owners in fee of such lands? If it would have been competent to have proved that the supposed deed had been forged and was therefore void, why was it not competent to prove that it was inoperative and void by reason of the want of mental capacity in the grantor to make any valid deed? We can see no difference, in principle, between the case supposed and the one involved in the case under consideration."

In *Nichol v. Thomas*, 53 Ind. 42, it was held that, although the deed of an insane man, before office found, is voidable merely, he may bring an action to recover the land without first restoring the consideration to the grantee.

In *Wall v. Hill*, 1 B. Mon. 290, 36 Am. Dec. 578, the right of an heir to test the validity of a deed, alleged to have been given by his ancestor while insane, in an action of ejectment, seems to be recognized, it being held that the right of entry by the heir is legal and perfect, without any restitution of the consideration paid to the ancestor; and that the equitable right to such restitution is not available in an action of ejectment.

In *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705, the right of one claiming through the heir of an alleged insane grantor to maintain a writ of entry for the land, and thereby to avoid the deed by reason of such insanity, was, in the absence of any ratification or affirmance, sustained.

In *Allis v. Billings*, 6 Met. 415, 39 Am. Dec. 744, which was a writ of entry, it was held that the jury should have been instructed that the fact that a grantor was insane when he executed the deed, if established, rendered the deed voidable; and that it was competent for the demandant to avoid it on that ground.

In *Valpey v. Rea*, 130 Mass. 384, it was 19 L.R.A. (N.S.)

held that, at the trial of a writ of entry, the demandant may show the insanity of a grantor under whom the occupant claims.

In *Den ex dem. State Bank v. Moore*, 5 N. J. L. 470, it was held that in ejectment, where plaintiff claims under a mortgage, defendant may show that he was insane and that the mortgage was fraudulently obtained; the court saying: "Whatever will avoid the bond and mortgage is a competent defense in such a case, and that which shows a fraudulent or illegal consideration will avoid them." And, after discussing the right to prove the illegality in the consideration, the court continues: "In considering this part of the case, it is important to remark that the defendant attempted to prove that, at the time of the execution of these writings, an afflicting dispensation of Providence had bereaved him of his understanding. His right to prove this was not questioned upon the argument; and the state of the case, the verdict of the jury, and the manner in which the allegation was met by the counsel, leave a full impression that this part of the defense was amply sustained upon the trial. It is under this full impression that the second point is considered; and I think it would be useless to spend much time upon it."

In *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716, the right of the plaintiff in an action of ejectment to attack the deed under which the defendant claimed, on the ground that at the time it was executed it was a fraud upon the grantor, who was a paralytic and imbecile, seems to be assumed as matter of course, although it was held that the deed was voidable only, and not void.

In *Van Deusen v. Sweet*, 51 N. Y. 378, it was held that the plaintiff in an action to recover possession of real property was entitled to show that the deed under which defendant claimed was executed by one *non compos mentis*, the court arguing that, if the fact of incompetency was satisfactorily established, the instrument never had any existence as a deed and was legally ineffectual and inoperative to pass a title to the premises, although the incompetency of the

where a deed has been duly executed and delivered, a subsequent surrender or destruction of it will not divest the estate conveyed, but that a reconveyance should be tendered. In *Feret v. Hill*, 15 C. B. 207, the only proposition decided was that representation as to the intended use of premises leased from the defendant being merely promissory and collateral could not defeat the tenant's right to possession in an action at law. The author concedes that the law in Massachusetts is the reverse of that stated by him. *Bassett v. Brown*, 106 Mass. 355. In this state it has been held that a judgment creditor may, without resort to equity, sell on execution lands conveyed by his debtor in fraud of creditors, and that the purchaser at the sale may recover the lands in ejectment (*Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347); and it has never been the practice with us, when resort is had to equity, either in a case of a deed fraudulent as to creditors, or in one where the deed has been obtained by fraud on the grantor, to do more than to declare the deed fraudulent and void, not to require a reconveyance by the grantee.

Accepting, however, the distinction made by the learned text writer between the principle applicable in realty and that applicable to personalty, there nevertheless are unquestionably certain kinds of fraud for which a deed can be avoided at law. It is said in *Story's Equity* (§ 60): "Thus, for example, although fraud, accident, and trust are proper objects of courts of equity, it is by no means true that they are exclusively cognizable therein. On the contrary, fraud is in many cases cognizable in a court of law. Thus, for example, reading a deed falsely to an illiterate person, whether it be so read by the grantee or by a stranger, avoids it as to the other party at law,"—citing *Thoroughgood's Case*, 2 Coke, 9. The same is true as to a deed executed by a blind man. *Shulter's Case*, 12 Coke, 90. There are two kinds of fraud which differ essentially in their character. In the one the grantor is induced to convey his property by fraudulent representations as to the value, nature, or character of the consideration he receives for the conveyance. This is sometimes called fraud in the consideration. In the other case the grantor is deceived into the execution of an instrument of the contents of which he is ignorant. This is sometimes called fraud in the execution of the deed. The distinction between the two cases lies just here. It is elementary law that the assent of the parties is necessary to constitute a binding contract. In the first case the assent of the party, though obtained by fraud, is nevertheless obtained, not only to the execution of the instrument, but to the

contract which it evidences. In the second case there is procured only the signature to and execution of, the written instrument, but not assent to the contract therein stated. In cases of this latter class the deed can be avoided at law. *Wilcox v. American Teleph. & Teleg. Co.* 176 N. Y. 115, 98 Am. St. Rep. 650, 68 N. E. 153. It seems to me plain that a deed by an incompetent person falls within the second class. The ground on which such deeds are avoided in case of fraud is that the party has been misled by deception, and has never assented to the contract. The ground on which the deed of an incompetent is avoided is that by infirmity of intellect he is incapable of giving assent. The element that avoids the deed is the same in the two cases,—lack of assent,—and it is not material whether it exists through deceit or through imbecility. The earlier authorities in this state so considered it. In *Jackson ex dem. Church v. Hills*, 8 Cow. 290, where a defense of fraud was ruled out, it was said by the supreme court: "The defense was that the lease was obtained by fraud, not that the defendant was incompetent, by reason of age, infirmity, or mental imbecility, to make a valid contract or that she was ignorant when she executed the lease of its nature and effect, but that the lessor was guilty of a misrepresentation as to a part of the consideration, or inducement to the making of the lease." This case is cited with approval in *Osterhout v. Shoemaker*, 3 Hill, 513, where again the distinction is pointed out between fraud in the consideration of a deed and fraud in its execution. In *Phillips v. Gorham*, 17 N. Y. 270, the action was to recover the possession of lands. The complaint stated title in the plaintiff as heir at law of a deceased ancestor; that the defendant was in possession claiming under a deed from said ancestor; that at the time of the making of such deed to the defendant said ancestor was of unsound mind and wholly incompetent to make the deed; and that the deed was obtained fraudulently by threats, false promises, and other improper influences. The trial court refused to charge the defendant's request that, before the deed could be avoided for fraud or undue influence, it was necessary to procure a judgment to that effect in an action brought for that special purpose. The action was tried at law before a jury. Recovery by the plaintiff was sustained; this court holding that, in an action to recover specific real property, the plaintiff might attack a deed under which the defendant claimed upon grounds which were formerly cognizable in equity as well as those cognizable at law. The only criticism that can be made on the application of that decision to the case at bar is that

in the case cited the complaint alleged a cause of action in equity as well as at law, while in the one before us the complaint states only a cause of action at law. It is to be observed, however, that the defendants' request to charge presented no contention that, so far as relates to the ground of imbecility, resort must be first had to equity, but was confined to the allegation of fraud. The case is cited with approval in *Mandeville v. Reynolds*, 68 N. Y. 528 (page 543), where it is said: "So if, in an action of ejectment, the defense rests upon a deed or will, the plaintiff can make proof that it was procured by fraud or other imposition." Finally, in *Van Deusen v. Sweet*, 51 N. Y. 378, the commission of appeals squarely decided that the deed of an incompetent person could be avoided in an action of ejectment, and that it was not necessary to resort to equity. That case, unless it is to be overruled, is decisive of the question before us. There, as in this case, the action was in ejectment; the complaint simply stating that the plaintiff was the owner in fee and entitled to the possession of the real estate therein described, and that the defendant unlawfully withheld possession thereof.

The rule stated seems to generally prevail in this country. In Massachusetts the deed of an incompetent person is voidable, not void. *Allis v. Billings*, 6 Met. 415, 39 Am. Dec. 744. Nevertheless ejectment lies to avoid the deed. The rule obtains in Pennsylvania (*Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766), in Maine (*Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705), in New Jersey (*Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716), in New Hampshire (*Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592), in Indiana (*Brown v. Freed*, 43 Ind. 253), and in North Carolina (*Fitzgerald v. Shelton*, 95 N. C. 519). It may be objected to the application of some of these authorities that the courts of Massachusetts and Pennsylvania being for a long time without equity jurisdiction resort for relief was necessarily had to the common-law courts, and that in Massachusetts it is not necessary to restore the consideration even where the contract with the incompetent person has been made in good faith and in ignorance of such incompetency. No state, however, has maintained more steadily the distinction between common-law and equity jurisdiction than New Jersey, and in that state, the same as in our own, a person dealing in good faith with an incompetent person, ignorant of his imbecility, is protected. Yet, as appears by the New Jersey case cited, in an action in ejectment a plaintiff may attack the deed of his ancestor for incompetency. The laws seems

to be the same in England. *Ball v. Mannin*, 1 Dow & C. 380.

Let us now turn to analogy. Nearly all the text writers and judicial decisions treat lunacy or mental unsoundness and infancy as disability similar in character and in their effect on the contracts of the parties. In *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285, Judge Bronson said: "Deeds procured by duress, or executed by persons of unsound mind, stand on nearly the same footing as the deeds of infants." In *Blinn v. Schwarz*, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542, Judge Vann quoted from Blackstone, Chancellor Kent, and the principal text writers on contracts to the effect that the contracts of lunatics and infants were of the same character, not void and mere nullities, but voidable only. It is clearly settled that an infant on arriving at age may avoid his deed in an action at law. *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 530; *Clapp v. Byrnes*, 155 N. Y. 535, 50 N. E. 277; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; *Miles v. Lingerman*, 24 Ind. 387; *Cole v. Pennoyer*, 14 Ill. 158. See *Tyler, Infancy*, p. 69. We see no reason why a different rule should apply in the case of persons of unsound mind. The learned judge who wrote for the majority of the court below relied on a previous opinion rendered by him in the case of *Blinn v. Schwarz*, 63 App. Div. 25, 71 N. Y. Supp. 343. The only case there cited as authority for the proposition that relief from the deed of a person of unsound mind must be had in equity alone is *Jacobs v. Richards*, 18 Beav. 300. But it could have decided no such proposition, for it was not an action at law, but a suit in equity. The action was for the foreclosure of a mortgage, and all that was there held was that the defense of lunacy must be set up by a cross bill. The only case that I can find supporting the position of the learned justice of the appellate division is the case of *Moran v. Moran*, 106 Mich. 8, 58 Am. St. Rep. 462, 63 N. W. 989; but, as conceded in the opinion there delivered, the decision is opposed to the current of authority elsewhere. It is doubtless true that an executed contract, made with a person of unsound mind in good faith, for a valuable consideration, without knowledge of such mental unsoundness, will not be set aside or avoided,—at least without a return of the consideration paid. *Mutual L. Ins. Co. v. Hunt*, 79 N. Y. 541. It may also be true that a court of equity could, in such case, deal with the rights of the parties more adequately than a court of law. But this cannot deprive the plaintiffs of their right to try the issue before a jury in a court of law, if that has hitherto been the

mode of trial of such an action. Nor is there so great embarrassment in such a trial as has been suggested. If in analogy to the case of fraud it is necessary for the plaintiffs to return the consideration paid before suit brought, and they have failed to tender such return (a question we do not decide), then the action will be dismissed, and it is the plaintiffs alone who will suffer by resorting to law instead of to equity. If, on the other hand, payment of a valuable consideration in good faith is in the nature of an equitable defense, still the Code of Civil Procedure (§ 500) in express terms authorizes the interposition and determination of such defenses in an action at law. *New York Cent. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 85. On this appeal we do not pass on those questions; for the record now before us does not show whether a valuable consideration was paid, or, if paid, whether it was paid in good faith, without knowledge of the infirmity of grantor.

The judgment appealed from should be reversed, and a new trial granted, costs to abide the event.

Gray, Vann, Werner, Willard Bartlett, and Chase, JJ., concur. Haight, J., not voting.

NEW YORK COURT OF APPEALS.

JENNIE F. HAWKINS, Resp't.,

v.

DANIEL A. HAWKINS, Appt.

(193 N. Y. 409, 86 N. E. 468.)

Husband and wife — suit for support — defense.

1. That a man had, without the knowledge of his wife, been guilty of adultery before abandoning her because of her adultery, for which cause his action for divorce failed, does not prevent his taking advantage of the statutory provision that in a statutory action for support because of abandonment defendant may set up in justification the misconduct of the plaintiff.

Judgment — divorce — statutory support — effect.

2. A decree refusing a divorce to a man because of his adultery does not prevent his setting up the adultery of the wife, on which the former action was based, in defense of a statutory action by her for support, in which the statute expressly authorizes such defense.

(Cullen, Ch. J., dissents.)

(November 17, 1908.)

19 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a special term for Kings County in plaintiff's favor in an action brought to compel defendant to furnish her with support. Reversed.

The facts are stated in the opinion.

Mr. John McCormick, for appellant:

Adultery by the wife forfeits her rights arising from the marriage relation, and frees the husband from his duties to her.

Doe v. Roe, 23 Hun, 19; *Constable v. Rosener*, 32 App. Div. 155, 81 N. Y. Supp. 376, affirmed in 178 N. Y. 587, 70 N. E. 1097; *Hunter v. Boucher*, 3 Pick. 289; *Cooper v. Lloyd*, 6 C. B. N. S. 519; *Atkins v. Pearce*, 2 C. B. N. S. 763; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73; *McCutchen v. McGahay*, 11 Johns. 281, 6 Am. Dec. 373; *Forster v. Forster*, 1 Hagg. Consist. Rep. 144; *Bostock v. Smith*, 34 Beav. 57; *Culley v. Charman*, L. R. 7 Q. B. Div. 89; *Carney v. State*, 84 Ala. 7, 4 So. 285; *State v. Schweitzer*, 57 Conn. 539, 6 L.R.A. 125, 18 Atl. 787; *State v. Gunzler*, 52 Mo. 173; *People v. Brady*, 13 Misc. 294, 34 N. Y. Supp. 1118.

The fact that the husband, too, has been guilty of adultery does not estop him from denying support.

Govier v. Hancock, 6 T. R. 603; *Wood v. Wood*, 2 Paige, 110; *R. v. Flintan*, 1 Barn. & Ad. 227; *Stimpson v. Wood*, 57 L. J. Q. B. N. S. 485; *People ex rel. Keller v. Shady*, 40 App. Div. 460, 58 N. Y. Supp. 143.

The adultery of the plaintiff is a bar to relief of any kind without reference to the guilt or innocence of the defendant.

Barrere v. Barrere, 4 Johns. Ch. 188; *Burtis v. Burtis*, Hopk. Ch. 557, 14 Am. Dec. 563; *Wood v. Wood*, 2 Paige, 108; *Forster*

Case Note. — *Effect of husband's own adultery to prevent him from relying on wife's adultery as a defense to an action for support.*

Aside from *HAWKINS v. HAWKINS* and the cases therein cited, very few cases have been found which shed any light on the question here annotated, and none which have presented the question in a manner similar to that in the above-mentioned case.

In *Phillips v. Wiseman*, 131 N. C. 402, 42 S. E. 861, it was held that, under a statute so providing, a married woman who committed adultery and was not living with her husband at the time of his death was precluded from claiming dower, although it appeared that her husband, before her own misdeed, had abandoned her and thereafter lived in adultery with another woman. The court took occasion to say: "Applying the statute to the facts found, plaintiff is barred from recovering dower in her husband's lands, and his Honor erred in rendering judgment for the plain-

v. Forster, *supra*; North v. North, 1 Barb. Ch. 241, 43 Am. Dec. 778; Devanbagh v. Devanbagh, 5 Paige, 554, 28 Am. Dec. 443; Griffin v. Griffin, 47 N. Y. 134; Brinckley v. Brinckley, 50 N. Y. 185, 10 Am. Rep. 460; Bedell v. Bedell, 1 Johns. Ch. 604; Uhlmann v. Uhlmann, 17 Abb. N. C. 236; Spahn v. Spahn, 12 Abb. N. C. 169; Crow v. Crow, 7 N. Y. Civ. Proc. Rep. 423; Deisler v. Deisler, 59 App. Div. 207, 69 N. Y. Supp. 326; Marsellis v. Thalheimer, 2 Paige, 35, 21 Am. Dec. 66; Hope v. Hope, 1 Swabey & T. 94; Drummond v. Drummond, 2 Swabey & T. 274; Otway v. Otway, L. R. 13 Prob. Div. 141; Clapp v. Clapp, 97 Mass. 531; Handy v. Handy, 124 Mass. 394; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; J. F. C. v. M. E. 6 Rob. (La.) 135; Doe v. Roe, *supra*; Rose v. Rose, 52 Hun, 154, 4 N. Y. Supp. 856.

Mr. Andrew J. Shipman, with Messrs. Blandy, Mooney, & Shipman, for respondent:

Where both parties are in the wrong, they stand towards each other as though they were living in separation by mutual consent; and the husband must support his wife.

1 Bishop. Marr. Div. & Sep. § 1231; Schiffer v. Pruden, 64 N. Y. 47; Van Cleef v. Burns, 118 N. Y. 549, 16 Am. St. Rep. 782, 23 N. E. 881.

tiff. She committed adultery during their marriage, and was not living with her husband at his death. It is not contended that there was any act of condonement. The fact that he did wrong can be no excuse for her to do likewise. His violation did not justify her in violating her marriage vow. So, the statute creating dower rights is framed for the benefit of the guiltless, not those *in pari delicto*."

A similar case is Brown v. Kerns, 6 Ohio N. P. 68, where it was held that the living in adultery of a woman while her husband is in the Army will preclude her from claiming dower, although after his return he marries another woman.

In Needham v. Bremner, L. R. 1 C. P. 583, an action was brought for necessities furnished the wife while living apart from her husband. The latter relied for a defense upon the adultery of his wife, to establish which he put in certain divorce proceedings, in which it was found by the jury that she had been guilty of adultery, but in which there was no decree because it was also found that he had been guilty of adultery. It was held, however, that the judgment of the divorce court had not altered the status of the parties, the woman still continuing to be the wife of the defendant, and, it being a mere verdict of the jury, although binding as between the parties to the suit, it was not as against other parties who came to litigate the same question.

19 L.R.A. (N.S.)

Hiscock, J., delivered the opinion of the court:

This action is one brought by the respondent to procure a judgment of separation from her husband, the appellant, and to compel suitable provision for her support and maintenance. Its determination will be governed by the application to rather unusual facts of §§ 1762 and 1765 of the Code of Civil Procedure.

Section 1762 provides that a wife may have judgment of separation and for support for either of the following causes:

" . . . (3) The abandonment of the plaintiff by the defendant. (4) . . . The neglect or refusal of the defendant to provide for her." The respondent alleged and has proved that at a certain date the appellant left her, and since then has refused either to live with her or support her, and on these facts she would be entitled to the judgment which was awarded to her in the court below. But § 1765 provides that in such an action as this "the defendant may set up, in justification, the misconduct of the plaintiff; and, if that defense is established to the satisfaction of the court, the defendant is entitled to judgment." Under this section, the appellant alleged, and has established beyond controversy, that his refusal to live with and support the respondent immediately followed and was the

In Beaty v. Richardson, 56 S. C. 173, 46 L.R.A. 517, 34 S. E. 73, it was held that a forfeiture of the right of dower of a widow who had lived in adultery after her husband had abandoned her to live in illicit relations with another woman and her efforts to win him back had been ineffectual is not made by a statute which declares the forfeiture of a wife's right of dower if she "willingly leave her husband and go away and continue with her adventurer."

An interesting case is Pilnik v. Numizinski, Rap. Jud. Quebec, 16 C. S. 231. Here a wife sought a divorce from bed and board because of her husband's adultery and his refusal to furnish her the necessities of life, and the husband pleaded the wife's adultery as a defense. Owing to a peculiar statute, it was found that, although the husband was living with another woman, he was not guilty of adultery. It was also found that the husband failed to prove his charge; but it was held that, even if the wife had been guilty of adultery, she nevertheless could maintain her action, since, if the husband objected, he should have sued the wife for a separation, his failure to do so being in effect a pardoning of her conduct. And in any event, so long as she had not been judicially separated from him, she enjoyed all the rights which her marriage gave her, and, among others, that of compelling him to furnish her the necessities of life.

result of his discovery that she had been guilty of adultery. On these facts, added to the others above stated, appellant unquestionably would be entitled to judgment dismissing the action, for it is settled that the adultery of the wife relieved the husband from the obligation to support her, and such misconduct is a defense to an action of this character. *Doe v. Roe*, 23 Hun 19; *Deisler v. Deisler*, 59 App. Div. 207, 69 N. Y. Supp. 326; *People ex rel. Keller v. Shradly*, 40 App. Div. 460, 58 N. Y. Supp. 143. See also *Nelson*, Div. & Sep. § 429; *Decker v. Decker*, 193 Ill. 285, 294, 55 L.R.A. 697, 86 Am. St. Rep. 325, 61 N. E. 1108.

But still further facts are established which it is claimed materially qualify the force of those last recited. It appears that the appellant was guilty of adultery before the respondent, although not known to the latter at the time of her offense; and that in an action brought by the former for absolute divorce the latter made a counterclaim based upon the appellant's wrongdoing, and the court, on familiar principles, refused to grant relief to either party. Under these circumstances, the respondent argues in support of her judgment that the appellant's misconduct somehow prevents him from successfully urging hers under § 1765 as a defense to this action, and especially that, inasmuch as the court refused to dissolve the marriage obligation on account of the said mutual acts of adultery, said obligation continues in full force notwithstanding those acts, and, as an incident thereto, the appellant can be compelled to support his wife. I am unable to agree with these contentions. In the first place, and disregarding for the moment the judgment in the divorce action, it is to be kept in mind that the respondent is not basing her action on general principles of law under which the court might be urged somehow to set off and balance against each other the mutual misdeeds of the parties, and so leave the respondent with all her original marital rights and claims unimpaired. On the other hand, her right of action is based on and limited by the absolute statutory provisions which have been quoted. One of these in effect provides that, even though she establishes the usual elements of an action for separation and support, she will not be allowed such affirmative relief based on the marriage contract which she herself has disregarded. It does not favor an assertion of marital obligations which is accompanied or preceded by their violation. This being so, and it fully appearing that respondent had been guilty of misconduct which is made a bar under the statute to her recovery, I fail to see how it justifies or excuses her misconduct, 19 L.R.A. (N.S.)

or changes the nature of her act, or avoids the consequences thereof, or contributes an element of support to her cause of action, to prove that her husband also at some time has been guilty of a similar violation. And especially is this so where, as here, there is no claim that the latter violation, even as a matter of moral influence, conduced to or mitigated the evil of the former. It is also to be borne in mind that this is not a case where the husband has been continuing and living in profligacy while he cast his wife off for a single offense. Of course, if the appellant were seeking affirmative relief, his conduct would be important and subject to the strictest scrutiny, and no other rule should be applied to him than is being urged against the respondent. But he is not. The respondent alone is seeking legal relief, and, in my opinion, the only material question relates to her act. Neither do I perceive how the force of this reasoning and conclusion, if otherwise correct, is affected or impaired by the decree in the divorce action. On the other hand, the logic of that judgment which refused relief with respect to the marriage obligation to the husband who had been guilty of violating it, seems to aid the appellant rather than otherwise. Certainly, if the respondent is permitted to maintain this action notwithstanding her adultery, she will be enabled to secure part of the very relief which was denied to her in the former action because of such adultery.

There was nothing in that decree which technically bars the appellant from urging the respondent's adultery as a defense in the present action. It refused to give him affirmative relief on account thereof in the former action because of his own similar fault, but that is not inconsistent with his right to urge the same act under the express provisions of the statute as a defense to the wife's request for affirmative relief in this action.

But it is urged that, the court having refused to dissolve the marriage tie, all the obligations of that contract, including that of support of the wife by the husband, must remain in full force. And, as sustaining this view, reference is made to the expression in *Wood v. Wood*, 2 Paige, 108, that, "if both parties [to a divorce action] are guilty, neither has any claim to relief; and they are in that case suitable and proper companions for each other," and to the remark in *Beeby v. Beeby*, 1 Hagg. Eccl. Rep. 790: "It is not unfit if he . . . who has first violated his marriage vow should be barred of his remedy. The parties may live together and find sources of mutual forgiveness in the humiliation of mutual guilt." I do not attribute to these opinions

and to the decree any such significance or effect as is claimed for them, but think that the only meaning legitimately to be deduced from them is that the court will not give affirmative relief to mutually guilty husband and wife by dissolving the marriage contract, but will leave them where it finds them subject to whatever burdens of that relation still remain; and the conclusion is not justified that such a decree amounts to an adjudication that all of the original obligations remain unimpaired. Independent of any statutory provision, it might be questioned whether a wife who has been guilty of adultery may successfully insist that her husband shall live with or support her, even though the court has refused to dissolve the marriage relation because of his similar fault. Certainly the decree denying dissolution does not preserve or confer such right in view of the express provisions of § 1765 that the misconduct of the wife shall be a bar to her right to support, for, of course, the legislature has the undoubted right to annex this consequence to her misconduct, and necessarily the provision making her misconduct a bar to an action for support must apply to a case where there has been no decree dissolving the marriage on account of adultery. If there had been a decree of divorce, there would be no occasion for the exemption of the husband from liability for support as a result of such misconduct.

Neither, in view of the statutory provision to which reference has been made, does it avail as an argument to say that the wife's right of dower and of administration on her husband's estate and possibly various other rights continue notwithstanding her adultery, so long as the marriage has been allowed to remain undissolved; and that it is not in harmony with the continuance of these rights that she should lose her right to support. This is a matter of statutory policy. It cannot be doubted that the legislature would have the power to cancel her right of dower and administration because of mere adultery without a decree of divorce founded thereon; and, if it had so enacted, I can hardly believe that she would have avoided the results of her misconduct by proving that at some time her husband had committed a similar sin. It has been expressly held otherwise in England. *Bostock v. Smith*, 34 Beav. 57.

Authorities are not wanting to sustain the proposition that, independent of any statutory provision such as we have, the destructive consequences to her conjugal rights of the wife's adultery are not prevented or compensated and avoided by similar fault of her husband. *Govier v. Hancock*, 6 T. R. 603, was an action to recover for neces-

saries furnished to a wife living apart from her husband. It appeared, however, that she had committed adultery after leaving him, and it was held that this exonerated him from liability for her support, although he had first committed a similar act and had otherwise treated her cruelly. In *Bostock v. Smith*, supra, it was held that the wife who left her husband and committed adultery came within the statute forfeiting her dower for such offense, even though she left her husband in consequence of his gross misconduct, "which was such as would justify, if anything could justify, her act. But nothing could justify it." In *Stimpson v. Wood*, 57 L. J. Q. B. N. S. 485, it was, in effect, held that a wife living in adultery lost all right of support, although her husband was doing the same thing. In *Culley v. Charman*, L. R. 7 Q. B. Div. 89, it was said by Hawkins, J.: "I do not think there is any need to cite authorities to show that a husband is not bound at common law to maintain a wife who has been guilty of adultery and who is living apart from him." In *Hope v. Hope*, 1 Swabey & T. 94, it appeared that each party had sought divorce for the adultery of the other, and had been denied relief on account of their mutual misdeeds; that thereafter the wife applied for a decree of restitution of marital rights, which in its important aspects was like the present case, an action to compel support. It was urged "that cohabitation is a duty resulting from marriage, and that neither party can lawfully withdraw from cohabitation without the judgment of a court, which in this case the husband not only had not obtained, but, having asked the proper tribunal to release him from that duty, his prayer was rejected; and, secondly, that the guilt of each being the same, their mutual delinquencies were thereby compensated, and both were restored to their original position as innocent parties." The court overruled both contentions. And to the same effect are the cases of *Drummond v. Drummond*, 2 Swabey & T. 274, and *Otway v. Otway*, L. R. 13 Prob. Div. 141. It may be said that these later English decisions are based on the principles of the ecclesiastical law, which have not been adopted in this country, and therefore are not applicable. There may be controversy as to how far the ecclesiastical law has been adopted, and it may be conceded for argument that these decisions would not be useful in interpreting the meaning of our statutes. When, however, the words of a statute being plain, certain facts have been developed under it, we have a right to consider what effect another court exercising jurisdiction over the same general subject and governed by prin-

ciples not unlike those embodied in our statute has given to similar facts.

As was said by Judge Folger in *Brinkley v. Brinkley*, 50 N. Y. 185, 190, 10 Am. Rep. 460: "Though it has been held that the ecclesiastical law of England is not a part of the common law of that country, and is no part of the common law thereof adopted in this state, . . . yet, when, by our statutes, any part of the jurisdiction exercised by those courts was given to our courts, the settled principles and practice of those courts became a precedent and a guide for our courts." The case of *People ex rel. Keller v. Shrady*, 40 App. Div. 460, 58 N. Y. Supp. 143, has not been overlooked, wherein it is written by Judge Barrett that in criminal proceedings against the husband for abandoning his wife it would not be a defense to show that the wife had been guilty of adultery, it also appearing that the defendant had been first guilty of similar fault which would prevent him from procuring a dissolution of the marriage. It is, however, to be noted that what was thus said was not necessary to the decision of the case; and, secondly, that it was expressly directed to the proposition that, under such circumstances, the husband would be bound not to permit his wife to become a "public charge." Independent of the Code provision and as a matter of public policy, there very well might be a distinction between proceedings by the guilty party for her individual benefit and those instituted in behalf of the people to prevent the burden of a public charge.

The judgments of the courts below should be reversed and a new trial granted.

Gray, Haight, Edward T. Bartlett and Werner, JJ., concur.

Cullen, Ch. J., dissenting:

I dissent from the decision about to be made. The statutory provisions now found in article 3, chap. 15, Code Civ. Proc., do not bar plaintiff's right to relief. Both plaintiff and defendant have been guilty of adultery, as was determined in an action previously brought by the defendant against the plaintiff for an absolute divorce. After the rendition of a decree therein, the defendant refused to live with the plaintiff or in any manner provide for her support. By subdivision 4 of § 1762 of the Code, the wife is entitled to a decree of separation and maintenance where the husband neglects or refuses to provide for her. Her prima facie right to relief is therefore conceded. The sole question is as to the sufficiency of the husband's defense. By § 1765, "the defendant may set up, in justification, the misconduct of the plaintiff; and, if that defense is

established to the satisfaction of the court, the defendant is entitled to judgment." What is the misconduct as intended by this section? Plainly only such misconduct as justifies the action or conduct of the husband in refusing to support her. It is urged that unquestionably the plaintiff's adultery was misconduct on her part. That is true, but the question is: Was it misconduct towards her husband, who himself had been guilty of a similar offense? Doubtless every dictate of honor, morality, and self-respect should keep a wife pure even when her husband has done wrong; but, if her only obligation to chastity rested on loyalty due to an adulterous husband, the plaintiff would not be subject to censure from the most strict of moralists. If the wife should commit an assault and battery on a third party, or larceny, and be sent to prison for either offense, it would undoubtedly be misconduct on her part; but would anyone pretend that by reason thereof the husband was forever afterwards relieved from the obligation of supporting her? In some states imprisonment under sentence for a felony is a ground for divorce; not so with us. Therefore, the simple question presented in this case is whether the defendant remains under any obligation to support the wife after the commission of adultery, he himself having been guilty of the same offense. It must be also borne in mind that there is here no claim that the plaintiff abandoned her husband's home and lived in open adultery, or that she is continuing adulterous intercourse. The evidence established a single act of adultery committed by the defendant in September, 1904, and one committed by the plaintiff in November of the same year. By reason of the mutual guilt a divorce was denied to either party.

In determining this question, we must not be misled by the false analogy of ordinary contracts, and the argument that where both parties have violated a contract neither can claim any right thereunder. Though based on contract, as distinguished from religious sacrament, marriage is not a contract in the accurate sense of that term. In *Wade v. Kalbsfleisch*, 58 N. Y. 282, 17 Am. Rep. 250, Chief Judge Church said: "It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community." The learned

judge quotes with approval the declaration in *Ditson v. Ditson*, 4 R. I. 87: "In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract . . . which they can make." Nor are we to be controlled by the decisions in England (which will be referred to hereafter) where both the law and public opinion view in very different lights unchastity in the wife and the same offense in the husband, and where even now, under the divorce act of 1857, not only is distinction made between adultery by the wife and that by the husband, but a divorce may be granted to a party guilty of adultery. The question is to be determined in the light of the public policy of this state as declared in its statute law, which imposes the obligation of marital fidelity equally on the husband and wife, which for a violation of that obligation grants the innocent party, whether wife or husband, the same right to relief, and, where both parties have been guilty, requires them to remain husband and wife. The obligation resting on the husband to support the wife does not spring from contract, but arises from the marital relation, and is imposed by law. It is not even within the power of the parties to contract to the contrary. Such was the rule of the common law, and it is expressly enacted in this state by § 21 of the domestic relations law: "Husband and wife cannot contract to alter or dissolve the marriage, or to relieve the husband from his liability to support his wife." Laws 1896, chap. 272, p. 215. When, therefore, the law says that man and wife who have each been guilty of adultery shall remain man and wife, it enacts that the marriage obligation shall continue between them in its full integrity. It is conceded that in all other respects except that of support the rights and obligations of the parties remain unaffected. On the death of the defendant the plaintiff will be entitled to her dower right in his real estate, and, if he dies intestate, to a share of his personality. The defendant has a similar right of inheritance in case of the plaintiff's death intestate. If either one should be killed by the wrongful or negligent act of a third party, the survivor will be entitled to sue for damages for the death. In case of intestacy the survivor will be entitled to take out letters of administration. Neither can adopt a child without the consent of the other. It is unnecessary to extend this enumeration of the respective rights of either party in the person and estate of the other. It is urged, however, in answer to this argument that these are matters of statutory policy, and that the legislature could abrogate all these rights. This is un-

doubtedly true, but it is equally a matter of statutory policy that the adulterous husband must retain as his wife an adulterous woman, and as for the suggestion that the legislature could abrogate these rights, were it not for the provision in the state Constitution forbidding divorce except by judicial decree, the legislature might abrogate the marriage itself, for it is not a contract within the protection of the Federal Constitution. *White v. White*, 5 Barb. 480.

The English ecclesiastical cases, which take a contrary view of the obligation of the adulterous husband to support an adulterous wife, are of recent date, long subsequent to the Revolution, and therefore not evidence of the ecclesiastical law of that country as it existed at the time of our separation. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 570, 19 Am. Rep. 211. The earliest of these is *Hope v. Hope*, 1 Swabey & T. 94, decided in 1858. There it was held that an adulterous wife cannot obtain a decree for the restoration of conjugal rights against an adulterous husband. The learned judge who decided the case states that the question had never been determined in the courts of that country, and admits that the canon law, which, though not adopted in its entirety, is concededly the foundation of the English ecclesiastical law, was directly contrary to the conclusion which he reached. He further admitted that there were *dicta* of that eminent ecclesiastical judge, Lord Stowell, evincing a different view. In *Proctor v. Proctor*, 2 Hagg. Consist. Rep. 292, where a separation was refused by reason of mutual adultery, Lord Stowell said: "It [the court] therefore presumes, when it withholds its decree of separation, that the parties return to cohabitation. All matters return to their former course, but with increased vigor. The husband and wife live again on their former footing, and there is no anticipation of separate debts, or of the probability of a spurious offspring. That such is the doctrine of the canon law is most certain. The authorities are numerous and precise to that effect." The *Hope Case* proceeded on two decisions of the common-law courts. The first was that of *Govier v. Hancock* (1796) 6 T. R. 603. The action was for board and lodging furnished to defendant's wife. The report thus states the case: "The defendant, having committed adultery with a woman of the name of Bazely whom he had brought home, treated his wife with great cruelty, and finally turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband would not receive her; and this action was brought for her board and lodging subsequent to that time." It was held

that the husband was not liable. In *R. v. Flintan*, 1 Barn. & Ad. 227, the defendant was convicted as a disorderly person in failing to maintain his wife by reason of which she became a charge on the parish. Both husband and wife had committed adultery. The conviction was reversed, the court holding that, as the defendant was not civilly liable for the supply of necessaries to his wife, he could not be held a disorderly person for not supplying them. The Irish case of *Seaver v. Seaver*, 2 Swabey & T. 665, was decided prior to *Hope v. Hope*, but the decision is not noticed in the later case. The *Seaver* Case was decided both in the consistorial court of Dublin and on appeal exactly the reverse of the *Hope* Case to which it was entirely similar in its facts. The court there said: "The sentence is not merely that the parties shall live together, but its effect in substance is that they shall fulfil all their matrimonial duties, of which fidelity to the nuptial bed is not the least important. I know that, according to the modern code of morals and feelings, it is hard for the husband to comply with such a sentence. According to this code a husband incurs no disgrace and need feel no shame for his own adultery, while his honor is ruined totally by the adultery of his wife. The disgrace thus caused by another's guilt is capable of only one possible aggravation, *viz.*, if he forgives her. This code cannot be recognized in a court Christian; nor will a man against whom adultery is charged and proved be permitted to allege any reluctance to associate with an adulteress because she happens to be his wife."

While the law in England as to judicial separations remains unchanged by the matrimonial causes act of 1857, which first authorized the courts to decree a dissolution of the marriage tie, the practice in suits for absolute divorce is so entirely foreign to the law and policy of this state as to render the decisions under that statute of no value here. There a husband may obtain a divorce from his wife for her adultery. A wife cannot obtain a divorce for the adultery of her husband unless it is accompanied by cruelty, abandonment, or the adultery is incestuous. The adultery of the plaintiff is not a bar to a divorce for the adultery of the other party. Under the statute the courts may, but are not bound, to deny relief for that reason. Alimony seems to be in the discretion of the courts and has been granted to a wife who has been divorced for adultery. A full collection of these cases can be found in the work of Gwynne Hall on Divorce and Matrimonial Causes.

My learned associate, who writes for the majority of the court, says: "Independent 19 L.R.A. (N.S.)

of any statutory provision, it might be questioned whether a wife who has been guilty of adultery may successfully insist that her husband shall live with and support her even though the court has refused to dissolve the marriage relation because of his similar fault." From this intimation I dissent *toto celo*. Its effect would be to set up one standard of morality for the woman, another for the man, a distinction which, whatever may be the view taken of it by society, is expressly repudiated by the statute law of this state by which adultery on the part of husband or wife is equally made a crime. I can only repeat the forcible language of the court in the *Seaver* Case, *supra*: "Nor will a man against whom adultery is charged and proved be permitted to allege any reluctance to associate with an adulteress because she happens to be his wife." I do not say that the commission of a single act of adultery on the part of the husband gives the wife unlimited license to commit adultery at all times thereafter and still compel her husband to support her, but this is equally applicable to the wife; and a single act of adultery on her part, possibly committed at a time long past, and sincerely repented of, should not enable the husband to cast her off without support, though he may be living a life of continuous and gross profligacy. The circumstances under which an offense is committed, while they may not affect the penalty which the law imposes on its commission, may form a controlling factor in determining the moral delinquency attributable to the act. The effect of the decision about to be made is to put the law of this state on the same basis as that declared by the King's bench in the *Govier* Case, *supra*; that is to say, that the adultery of the wife bars her right to support no matter how flagrant the misconduct of the husband may have been in the same direction. In the case before us the parties seem to have equally sinned. The plaintiff's right to relief, unless barred by her misconduct, was conceded. The burden was therefore upon the defendant to show that his wife's misconduct was of such a nature, or so far exceeded his own in moral obliquity, as to justify him in turning her off. No proof of the kind appears in the record. No finding to that effect has been made or requested. We have here the bare facts that the plaintiff committed an act of adultery and that the defendant also committed an act of adultery. These acts standing alone, I say, do not justify the defendant's refusal to support his wife.

The judgment appealed from should be affirmed, with costs.

Willard Bartlett, J., not sitting.

NORTH CAROLINA SUPREME COURT.

JOHN HOLLER AND WIFE

v.

WESTERN UNION TELEGRAPH COMPANY, Appt.

(— N. C. —, 83 S. E. 92.)

New trial — insufficient issues.

1. A new trial will be awarded if the issues submitted in a case are not sufficient to support the judgment rendered.

Telegram — failure to deliver — right to sue.

2. The mere fact that the wife of the addressee of a telegram was the sister of the one whose death the message announced is not sufficient to entitle her to recover damages for mental anguish for its nondelivery.

Same — findings — beneficiary.

3. To support a judgment in favor of the wife of an addressee of a telegram announcing the death of her sister, for mental anguish because of its nondelivery, where her interest in the message is denied by the company, there must be a finding that she was the legal beneficiary therein.

(Clark, Ch. J., dissents.)

(December 9, 1908.)

APPEAL by defendant from a judgment of the Superior Court for Iredell County in plaintiffs' favor in an action brought to recover damages for failure promptly to deliver a telegram. Reversed.

Statement by Walker, J.:

This action was brought by John Holler and wife to recover damages for delay in delivering a telegram. It is alleged in the complaint that Mrs. Hattie Hastings died on January 1, 1907, at 8 o'clock P. M., and J. D. Rogers, a relative, at 5 o'clock A. M., on January 2, 1907, requested the defend-

ant's operator at Huntersville, North Carolina, to send a message to John Holler and wife, who lived at Morrisville, North Carolina, notifying them of Mrs. Hastings's death, and paid the charges therefor. The operator was told that Mrs. Hastings was a sister of Mrs. Holler. He wrote the message for Rogers, and agreed to transmit it, but it was delivered at Morrisville too late for Mrs. Holler to reach Huntersville or the place of burial before the funeral, by reason of which she suffered mental anguish, and is entitled to recover damages therefor. The message, as written by the operator, was as follows:

Huntersville, N. C., Jan. 2, 1907.

To John Holler, Care of Bob White,

Morrisville, N. C.

Hattie died at 8 o'clock last night. Bury this afternoon. J. D. Rogers.

The defendant admitted that it had received and transmitted the message as above set forth, but denied the other allegations of the complaint. There was evidence tending to sustain the plaintiff's allegations.

Issues were submitted to the jury, which, with the answers thereto, are as follows:

(1) Did the defendant negligently fail to transmit and deliver the telegram as alleged in the complaint?

Answer. Yes.

(2) Did the sender of the telegram, Rogers, make known to the defendant at Huntersville, at the time the telegram was filed for transmission, the relationship existing between deceased, Hattie Hastings, and Maggie Holler?

Answer. Yes.

(3) If the said telegram had been delivered without delay, could and would the said Maggie Holler have attended the funeral of Hattie Hastings?

Answer. Yes.

Case Note. — Right of person not mentioned in telegram, and whose interest is not communicated to the company, to recover for mental anguish.

The earlier cases upon this subject are collected and discussed in a case note to *Helms v. Western U. Teleg. Co.* 8 L.R.A. (N.S.) 249. And, upon the general question of the liability of a telegraph company to an undisclosed principal of sendee, see case note to *Western U. Teleg. Co. v. Schriver*, 4 L.R.A. (N.S.) 678.

Some cases decided since the preparation of the former notes may be cited.

In *Western U. Teleg. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486, in an action by the sister of the sendee of a telegram for mental anguish because of failure of telegraph company promptly to deliver a message, the court said: "A telegraph com-

pany owes a duty to the transmission and delivery of messages only to persons of whose beneficial interest in the telegram the company receives information from the face of the telegram itself, or from other sources; and it is liable for special damages only where notice of the facts which give rise thereto is received either from the face of the telegram or from other sources."

So, also, in *Western U. Teleg. Co. v. Potts* (Tenn.) post, 479, 113 S. W. 789, it was held that damages for mental anguish could not be recovered by the undisclosed principal for delay in the transmission of a telegram announcing a death, although both the sender and the sendee were his agents.

But in *Western U. Teleg. Co. v. Northcutt* (Ala.) 48 So. 553, it was held that an undisclosed principal may sue on a contract to send a telegram made by his agent.

(4) What damage, if any, is plaintiff Maggie Holler entitled to recover?

Answer. \$500.

Exceptions were taken to several of the court's rulings, but it is not necessary to state but one, which is the exception to the rendition of judgment for the plaintiff Maggie Holler upon the verdict. Defendant appealed.

Messrs. Armfield & Turner and Tillett & Guthrie, for appellant:

The plaintiff had no interest in the telegram which would entitle him to recover.

Helms v. Western U. Teleg. Co. 143 N. C. 386, 8 L.R.A. (N.S.) 249, 118 Am. St. Rep. 811, 55 S. E. 831, 10 A. & E. Ann. Cas. 643.

Messrs. H. P. Grier and A. L. Starr for appellees.

Walker, J., delivered the opinion of the court:

Issues must be so framed that, when answered, they will be sufficient to support the judgment. "We are not inadvertent to the long line of decisions laying down the rule that the refusal of the court to submit an issue tendered by either party cannot be reviewed by this court unless exception is taken in apt time; nor do we wish to be understood as reversing or modifying it. That rule, when reasonably construed, does not conflict with the one herein laid down. What we now say is that § 395 of the Code is mandatory, binding equally upon the court and upon counsel; that it is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that, in the absence of such issues, or admissions of record, equivalent thereto, sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this court will remand the case for a new trial. Under this rule, there was error in the rendition of the judgment, and a new trial is therefore ordered." Tucker v. Satterthwaite, 120 N. C. 118, 27 S. E. 45. That case has since been approved. Strauss v. Wilmington, 129 N. C. 99, 39 S. E. 772; Hatcher v. Dabbs, 133 N. C. 239, 45 S. E. 562; Kelly v. Durham Traction Co. 133 N. C. 418, 45 S. E. 826. In Falkner v. Pilcher, 137 N. C. 449, 49 S. E. 945, the rule was stated thus: "It may be conceded as a general proposition that a party cannot complain because a particular issue was not submitted to the jury unless he tendered it, but the rule is subject to this qualification, that the issues submitted must in themselves be sufficient to dispose of the controversy, and to enable the court to proceed to

judgment, for in that respect the duty of the court to submit issues is mandatory."

It follows that, if the issues in this case were not sufficient to warrant the judgment which was rendered, there was error for which a new trial must be awarded. The judgment was rendered in favor of the *feme* plaintiff, Maggie Holler, alone, and the verdict, in our opinion, did not authorize it. There is no finding that Mrs. Holler had any beneficial interest in the message which the law recognizes as sufficient to sustain an action for damages, when there has been negligence, on the part of the telegraph company in its transmission, which has caused the plaintiff mental anguish and consequent damage. In Helms v. Western U. Teleg. Co. 143 N. C. 386, 8 L.R.A. (N.S.) 249, 118 Am. St. Rep. 811, 55 S. E. 831, 10 A. & E. Ann. Cas. 643, Justice Brown, for the court, says: "The right of the sendee to recover of a telegraph company for error or negligence in the transmission or delivery of a telegram is altogether denied in Great Britain. *Playford v. United Kingdom Electric Teleg. Co.* L. R. 4 Q. B. 706. In this country the English doctrine does not generally prevail. Here the weight of authority holds that the sendee may recover in his own name such damage as he may have sustained by reason of negligence when the message was intended for his benefit, and it was apparent on the face of the message, or the company otherwise had knowledge of it. 2 Shearm. & Redf. Neg. 5th ed. § 543; *Joyce, Electric Law*, § 1008; *Frazier v. Western U. Teleg. Co.* 45 Or. 414, 67 L.R.A. 320, 78 Pac. 330, 2 A. & E. Ann. Cas. 396." But we think this case is, in principle, not unlike *Cranford v. Western U. Teleg. Co.* 138 N. C. 162, 50 S. E. 585, in which we said: "There can be no recovery of damages for delay in transmission and delivery, when it does not in any way appear that the plaintiff was an intended beneficiary of the message. We could not well hold otherwise without subjecting the defendant to liability for damages alleged to have been sustained by those who are strangers to its contracts, and to whom it owed no duty whatever. The mental anguish suffered by the *feme* plaintiff cannot, under the facts and circumstances of this case, be traced to any wrong committed by the defendant. There is no causal connection between the breach of the duty owed by the defendant to N. P. Cranford and the anguish of his wife, which resulted from her failure to be present at the funeral of her grandchild, and for it, therefore, the law awards no compensation. It is not every one incidentally suffering a loss from the negligence of another who can maintain an action upon that ground. It has been said that there would be no bounds to liti-

gation if the ill effects of the negligence of men may be followed down the chain of results to their final attenuated effect." An analogous doctrine is laid down in *Williams v. Western U. Teleg. Co.* 136 N. C. 82, 48 S. E. 559, 1 A. & E. Ann. Cas. 359, in which it is said: "The principle uniformly sustained by the cases upon the subject, some of which we have cited, is that, unless the meaning or import of a message is either shown by its own terms, or is made known by information given to the agent receiving it in behalf of the company for transmission, no damages can be recovered, for failure to correctly transmit and deliver it, beyond the price paid for the service." We may well add what is so well stated in *Squire v. Western U. Teleg. Co.* 98 Mass. 237, 93 Am. Dec. 160, that "a rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound himself to perform, and to the compensation paid and received therefor." Let us apply these principles to the case in hand. The complaint alleges that the message was intended for John Holler and his wife, whereas the message, as sent, was addressed to John Holler alone; and, further, that the operator of the defendant was notified that Mrs. Hastings and Mrs. Holler were sisters. The defendant denies these allegations, except the allegation that the message was addressed to John Holler, and avers, in this connection, that the message so addressed was the only one received and transmitted by it. These allegations and denials raised issuable facts, and there is no finding that, in a legal sense, the message was sent to Mrs. Holler or for her benefit, or that she had any interest in the message which entitles her to recover damages for mental anguish, alleged to have been caused by the negligence of the defendant. The mere fact that she was related to the deceased, even though she was her sister, is not of itself sufficient to impose upon the company any legal duty or obligation to her. The nearness of the relation does not supply the missing link in the chain of causation, for the defendant cannot be said to have caused the alleged injury to her, unless, by its contract, it was, in law, obliged to prevent it, or omitted to perform some legal duty to her, which omission was the proximate cause of the injury. If any person who was related to the deceased can sue for damages, even if not mentioned in the mes-

sage, and without any showing that he is, in a legal sense, a beneficiary of the message or one to whom the company owed a legal duty, a liability would be imposed "wholly disproportionate to the nature of the act or service" which the company has bound itself to perform, and the aggregate recovery might be almost unlimited. A principle which would lead to such a result cannot be sanctioned by law. Our case in this respect comes directly within the rule we approved in *Cranford v. Western U. Teleg. Co. supra.* In that case it appeared that Mrs. Cranford was related to the deceased child, being her grandmother. We held that the relation alone did not entitle Mrs. Cranford to sue for damages resulting from mental anguish, and we so hold in this case; that the verdict by which the jury find merely that the *feme* plaintiff was related to Mrs. Hastings, being her sister, without also finding that she was the legal beneficiary of the message, is defective, and no judgment for the plaintiff can be based thereon.

The plaintiffs allege in the complaint that the defendant undertook to transmit and deliver the message addressed to John Holler, having knowledge that it was intended for the benefit of Holler and his wife, and also that Mrs. Hastings and Mrs. Holler were sisters. It is also alleged that the message which was actually delivered too late (at about 1 o'clock P. M.) was the one addressed to John Holler. The allegation that the defendant undertook to transmit and deliver the message addressed to John Holler is admitted in the answer, and the other allegations are denied. The charge of the court upon the first issue was confined to the transmission and delivery of the message addressed to John Holler, as will appear from the following instruction: "So on the first issue, to repeat, if you are satisfied by the greater weight of the evidence that the message, which has been offered in evidence, was delivered to the defendant's agent at Huntersville at 6 o'clock, or about 6 o'clock, in the morning, and was not transmitted and delivered to the sendee, John Holler, until 12:34, or about 1 o'clock, as you may find from the evidence, in the afternoon of the same day, then the court charges you that the duration of the time which elapsed between the time when the message was delivered to John Holler, or to the person in whose care it was sent, would be unreasonable delay; and, in the absence of some explanation, it would be your duty to answer the issue 'Yes;' otherwise answer the issue 'No.'" The first issue, by its very terms, relates to the transmission and delivery of the message, and not to any error in wording it, and the pleadings and case on appeal show that it was so understood by the parties and

the court and by the jury, if it be necessary to consider anything but the issues themselves and the answers thereto, in order to determine what the verdict is.

It follows that there was error. The verdict must be set aside, and a new trial awarded.

New trial.

Clark, Ch. J., dissenting:

A telegraph company, unlike the postoffice, does not transmit a paper writing. There is no statute which requires a telegram to be written. No rule or custom of the company to require it is shown in this case, and, if there had been, the company waived it, for it accepted the oral message, without objection. If there had been such rule, it must be shown that the sender had notice of it. *Hendricks v. Western U. Telegr. Co.* 126 N. C. 311, 78 Am. St. Rep. 658, 35 S. E. 543; *Carland v. Western U. Telegr. Co.* 118 Mich. 369, 43 L.R.A. 280, 74 Am. St. Rep. 394, 76 N. W. 762. In fact a large proportion of telegrams have always been orally delivered to the company for transmission, and this proportion of oral messages has been greatly increased by the use of the telephone, by which a larger number of messages are now orally delivered to the company. Whether the message is written down by the sender or the company is immaterial, for such writing is merely evidence of what the message was which the company received for transmission. The transmission itself is not by a process decipherable by the eye, but by the ear only, and is therefore orally, as it were. 1 *Joyce, Electric Law*, § 10. The defendant did not transmit a written message. The message in this case announced the death of *feme* plaintiff's sister and the time the burial would occur. The telegram was received by the defendant at 5:30 A. M., and was not delivered a few miles away till 1 P. M. The evidence is that Mr. Rogers went to defendant's office and directed the agent to send the message to "John Holler and wife," and the operator said, "I will write it down and send it as soon as I can get the wires." The jury found on the issues submitted: (1) That the defendant negligently failed to deliver the telegram alleged in the complaint; (2) that the sender made known to the operator, at the time the telegram was given in to be sent, that the deceased and John Holler's wife were sisters; (3) that, if the telegram had been delivered without delay, the *feme* plaintiff, Maggie, would have attended her sister's funeral; (4) that the *feme* plaintiff was entitled to recover \$500 damages.

The general rule is that messages of sickness or death need not disclose the relationship of the parties, the nature of the 10 L.R.A. (N.S.)

message being notice to the company of the necessity for prompt delivery. 2 *Joyce, Electric Law*, § 804, and many cases cited, among them, *Lyne v. Western U. Telegr. Co.* 123 N. C. 129, 31 S. E. 350; *Sherrill v. Western U. Telegr. Co.* 109 N. C. 528, 14 S. E. 94; *Landle v. Western U. Telegr. Co.* 124 N. C. 528, 32 S. E. 886; *Meadows v. Western U. Telegr. Co.* 132 N. C. 40, 43 S. E. 512; *Bright v. Western U. Telegr. Co.* 132 N. C. 317, 43 S. E. 841; *Hunter v. Western U. Telegr. Co.* 135 N. C. 458, 47 S. E. 745. This court has held that, if the company desires to know the relationship, the duty is on it to inquire. 2 *Joyce, Electric Law*, § 805; *Bennett v. Western U. Telegr. Co.* 128 N. C. 103, 38 S. E. 294. But here the jury find as a fact that the defendant was informed of the relationship, and therefore knew who was the beneficiary of the message, even if the operator had not been told to send the message to "John Holler and wife." Having received the message orally without demur, and taken the sender's money for the service, the defendant was bound to execute the contract. It was told that *feme* plaintiff was one of sendees. For brevity, or by negligence, it failed to put her name in the telegram. It knew, independently, the relationship, and therefore that *feme* plaintiff was the beneficiary of the contract. It negligently delayed eight and one half hours to get a death message a distance of 16 miles, with no relay point between. The message could have been conveyed by an ox cart in less time. The evidence brings the case within *Cranford v. Western U. Telegr. Co.* 138 N. C. 162, 50 S. E. 585, for that holds that it is sufficient if there are facts and circumstances to give the defendant notice that the plaintiff was either (1) the sendee or (2) that the message was sent for her benefit. Here there is direct evidence and finding by the jury of both facts. The jury, having found that the company was notified that the *feme* plaintiff was sister to the deceased, knew that she was the beneficiary of the message (independently of the sender's direction to send to "John Holler and wife"), and hence *Helms v. Western U. Telegr. Co.* 143 N. C. 386, 8 L.R.A. (N.S.) 249, 118 Am. St. Rep. 811, 55 S. E. 831, 10 A. & E. Ann. Cas. 643, does not apply.

It is impossible to see how the sender could do more than to tell the operator to send the message to John Holler and wife giving notice that said wife was sister to the deceased; nor how the defendant could have been more negligent than here, for the operator, said "I will write it down and send it," and then was negligent, both by leaving out the words "and wife," and further in not starting the telegram for eight and one half hours, for, the distance being only 16 miles with no relay point, its actual transmission

must have been instantaneous. The public are entitled to better treatment than the defendant gave this plaintiff, and the law ought to see that they get it.

TENNESSEE SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY,
NY, Appt.,

v.

A. B. POTTS AND WIFE.

(— Tenn. —, 113 S. W. 789.)

Telegram — delay in message — mental suffering — undisclosed principal.

Damages for mental anguish cannot be recovered by the undisclosed principal for delay in transmitting and delivering a telegram announcing death, although both the sender and sendee are his agents.

(November 7, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Hamilton County in plaintiffs' favor in an action brought to recover damages for failure promptly to deliver a telegram. Reversed.

The facts are stated in the opinion.

Messrs. George H. Fearons, Brown & Spurlock, Shields, Cates & Mountcastle, for appellant:

The undisclosed principal cannot recover damages for mental anguish occasioned by delay in transmitting and delivering the telegram announcing the death.

Western U. Teleg. Co. v. Kirkpatrick, 76 Tex. 217, 18 Am. St. Rep. 37, 13 S. W. 70; Western U. Teleg. Co. v. Adams, 75 Tex. 531, 6 L.R.A. 844, 16 Am. St. Rep. 920, 12 S. W. 857; Western U. Teleg. Co. v. Feegles, 75 Tex. 537, 12 S. W. 860; Western U. Teleg. Co. v. Moore, 76 Tex. 66, 18 Am. St. Rep. 25, 12 S. W. 949; Western U. Teleg. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961; Southwestern Teleg. & Teleph. Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686; Western U. Teleg. Co. v. Edmondson, 91 Tex. 209, 42 S. W. 549; Rogers v. Western U. Teleg. Co. 72 S. C. 290, 51 S. E. 773; Cranford v. Western U. Teleg. Co. 138 N. C. 162, 50 S. E. 585; Kennon v. Western

U. Teleg. Co. 126 N. C. 232, 35 S. E. 468; Western U. Teleg. Co. v. Stiles, 89 Tex. 312, 34 S. W. 438; Western U. Teleg. Co. v. Coffin, 88 Tex. 96, 30 S. W. 896; Morrow v. Western U. Teleg. Co. 107 Ky. 517, 54 S. W. 853; Williams v. Western U. Teleg. Co. 136 N. C. 82, 48 S. E. 559, 1 A. & E. Ann. Cas. 359; Pacific Exp. Co. v. Redman (Tex. Civ. App.) 60 S. W. 677.

The damages recoverable by the undisclosed principal are the same in all respects as the agent could have recovered himself had he brought the suit in place of the undisclosed principal.

Milliken v. Western U. Teleg. Co. 110 N. Y. 403, 1 L.R.A. 281, 18 N. E. 251; Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446; Cashion v. Western U. Teleg. Co. 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746; Landie v. Western U. Teleg. Co. 124 N. C. 528, 32 S. E. 886; Harkness v. Western U. Teleg. Co. 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811; Western U. Teleg. Co. v. Broesche, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734.

The mental-anguish doctrine, where recognized, includes only that suffered by relatives in blood.

Western U. Teleg. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; Western U. Teleg. Co. v. McMillan (Tex. Civ. App.) 30 S. W. 298; Western U. Teleg. Co. v. Garrett (Tex. Civ. App.) 34 S. W. 649; Western U. Teleg. Co. v. Gibson (Tex. Civ. App.) 39 S. W. 198; Davidson v. Western U. Teleg. Co. 21 Ky. L. Rep. 1292, 54 S. W. 830; Western U. Teleg. Co. v. Steenbergen, 107 Ky. 469, 54 S. W. 829; Western U. Teleg. Co. v. Ayers, 131 Ala. 391, 90 Am. St. Rep. 92, 31 So. 78; Poteet v. Western U. Teleg. Co. 74 S. C. 491, 55 S. E. 114.

Messrs. Murray & Murray for appellees.

Neil, J., delivered the opinion of the court:

Action to recover damages for failure to promptly deliver a telegram, recovery in the court below for \$500, and an appeal in error by the company.

The facts are as follows:

The mother of Mrs. Clara Potts, of Chattanooga, Tennessee, was lying at the point of death near Springville, Alabama. Mrs. Potts requested her brother, W. D. Self, to telegraph news of her mother's death to Chattanooga, when it should occur, in time to enable her to be present at the funeral. The arrangement between them was that the message was to be sent to her husband, A. B. Potts, at his place of business, and he promised his wife that on receiving such a message he would promptly deliver it to

Note. — Upon the question of the liability of a telegraph company to undisclosed principal of sendee, see case note to Western U. Teleg. Co. v. Schriver, 4 L.R.A. (N.S.) 678. Upon the question of right of person not mentioned in telegram, and whose interest is not communicated to the company, to recover for mental anguish, see case note to Helms v. Western U. Teleg. Co. 8 L.R.A. (N.S.) 249. And see Holler v. Western U. Teleg. Co., ante, —, 19 L.R.A. (N.S.)

her. Mr. Self complied with his promise by handing to plaintiff in error for transmission the following message:

Springville, Ala., 2/14, 1905.

A. B. Potts, c/o Master Mechanic, C. S. Shops, Chattanooga, Tenn.

Mother died this morning, seven o'clock; come to Springville, train one, to-night.

W. D. Self.

The message reached Chattanooga at 2:48 P. M. on the same day, and could have been delivered in ample time to enable Mrs. Potts to leave for Springville on the 6:30 P. M. train. If she had received the message in time, she could and would have reached Springville in ample time for the funeral. The company, however, negligently failed to deliver the message until after the 6:30 train had left. In consequence of this negligence Mrs. Potts could not leave for Springville until the next morning. She left on the earliest train possible after the delivery of the message to her husband, but was able to reach her mother's home only after the interment had taken place.

Mrs. Potts and her husband brought suit to recover damages on this state of facts, with the result already stated.

The company had no further knowledge or notice of the relations of the parties, or the probable consequences of a negligent failure to deliver the message, than such as was furnished by the face of the message itself.

The company moved for peremptory instructions in the court below, which was refused, and it insists here that the court erred in denying the motion.

The plaintiff in error insists that the facts stated do not make out a case of liability against it, since, as it claims, Mrs. Potts was neither sender nor sendee of the message, and there was nothing on its face indicating that she had any interest in it. Hence, it is said the consequences of Mrs. Potts, in the way of mental suffering or otherwise, or a failure on the part of the company to deliver the message, could not have been within reasonable contemplation.

At a former term of the court the judgment of the circuit court was affirmed, and a petition for rehearing was thereafter filed by the telegraph company, and was held under advisement.

It is not necessary to discuss the right to damages for mental anguish arising from delay in the delivery of a social telegram. That question has long been settled in this state. *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574; *Newport News & M. Valley R. Co. v. Griffin*, 92 Tenn. 694, 22 S. W. 737; *Western U. Teleg. Co. v. Mellon*, 96 Tenn. 66, 33 19 L.R.A. (N.S.)

S. W. 725; *Western U. Teleg. Co. v. Robinson*, 97 Tenn. 638, 34 L.R.A. 431, 37 S. W. 545; *Western U. Teleg. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Gray v. Western U. Teleg. Co.* 108 Tenn. 39, 56 L.R.A. 301, 91 Am. St. Rep. 706, 64 S. W. 1063; *Cumberland Teleph. Co. v. Brown*, 104 Tenn. 56, 50 L.R.A. 277, 78 Am. St. Rep. 906, 55 S. W. 155. The right to sue may be in either the sender or the sendee, and may be either on the contract or for breach of the statutory duty to promptly deliver. If on the contract, the right of the sendee is based on the proposition that the contract must be treated as made between the sender and the company for the benefit of the sendee; if under the statute, the sendee sues as the "aggrieved party." *Manier v. Western U. Teleg. Co.* 94 Tenn. 442, 448, 29 S. W. 732; *Gray v. Western U. Teleg. Co.* 108 Tenn. 39, 56 L.R.A. 301, 91 Am. St. Rep. 706, 64 S. W. 1063; *Western U. Teleg. Co. v. Mellon*, supra. The ground of the action, if on the contract, is for the breach thereof; if under the statute, it is for the failure to perform the duty imposed, and in effect the action is equivalent to one for negligence. *Gray v. Western U. Teleg. Co.* 108 Tenn. 39, 49, 50, 56 L.R.A. 301, 91 Am. St. Rep. 706, 64 S. W. 1063; *Wadsworth v. Western U. Teleg. Co.* supra; *Jones v. Western U. Teleg. Co.* 101 Tenn. 442, 47 S. W. 699; *Western U. Teleg. Co. v. Mellon*, supra. The measure of damages, whether the suit be on the contract or in tort, is, in this class of cases substantially the same, viz.: (1) If there has been a violation of the contract, or a breach of duty on the part of the company, the aggrieved party is entitled to recover, in any event, nominal damages. *Wadsworth v. Western U. Teleg. Co.*; *Jones v. Western U. Teleg. Co.*; *Western U. Teleg. Co. v. Mellon*; and *Gray v. Western U. Teleg. Co.*,—supra. (2) Such damages as may be fairly and reasonably considered as arising naturally, in the usual course of things, from the breach of the contract or the violation of public duty, or such damages as may be reasonably supposed to have been within the contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. *Wadsworth v. Western U. Teleg. Co. v. Newport News & M. Valley R. Co. v. Griffin*, supra; *Western U. Teleg. Co. v. Reid*, 120 Ky. 231, 70 L.R.A. 289, 85 S. W. 1171; *McPeck v. Western U. Teleg. Co.* 107 Iowa, 356, 43 L.R.A. 214, 70 Am. St. Rep. 205, 78 N. W. 63; 27 Am. & Eng. Enc. Law, 2d ed. p. 1059. (3) In a proper case, punitive damages. *Western U. Teleg. Co. v. Frith* and *Western U. Teleg. Co. v. Mellon*, supra. The company may learn the grounds on which it may base an estimate

of, or anticipate, the damages that may result or naturally flow from a failure to properly deliver the message, either from facts communicated to its agents *dehors* the message, or from the face of the message itself. *Pepper v. Western U. Teleg. Co.* 87 Tenn. 554, 558, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783; *Western U. Teleg. Co. v. Frith*, supra; *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L.R.A. 844, 16 Am. St. Rep. 920, 12 S. W. 857; *Postal Teleg. Cable Co. v. Lathrop*, 131 Ill. 675, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583; *Western U. Teleg. Co. v. Feegles*, 75 Tex. 537, 12 S. W. 860; *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L.R.A. 583, 24 N. E. 163; *Western U. Teleg. Co. v. Swearingin*, 97 Tex. 293, 104 Am. St. Rep. 876, 78 S. W. 491; *Bright v. Western U. Teleg. Co.* 132 N. C. 317, 43 S. E. 841; *Davis v. Western U. Teleg. Co.* 107 Ky. 527, 92 Am. St. Rep. 371, 54 S. W. 849; *Western U. Teleg. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549.

It is not necessary to a recovery that the suit should be brought either by the person whose name appears in the telegram as the sender, or by the one whose name appears as the sendee. It may be brought by one whose name appears upon the face of the message as the beneficiary thereof, though neither the sender nor the sendee. *Western U. Teleg. Co. v. Mellon*, supra; *Whitehill v. Western U. Teleg. Co.* (C. C.) 136 Fed. 499, 500. Or it may be brought by the undisclosed principal of the sender. *Milliken v. Western U. Teleg. Co.* 110 N. Y. 403, 1 L.R.A. 281, 18 N. E. 251; *Leonard v. New York, A. & B. Electro Magnetic Teleg. Co.* 41 N. Y. 544, 1 Am. Rep. 446, 454; *Harkness v. Western U. Teleg. Co.* 73 Iowa. 190, 5 Am. St. Rep. 672, 34 N. W. 811; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734.

It would seem to follow, from the principles above stated, that the undisclosed principal of the sendee might also bring the action; but the contrary has been held in two cases. *Lee v. Western U. Teleg. Co.* 51 Mo. App. 375; *Western U. Teleg. Co. v. Schriver*, 4 L.R.A.(N.S.) 678, 72 C. C. A. 596, 141 Fed. 538. And there seems to be a general disinclination to extend the right of recovery for mental anguish, as distinguished from physical injury, beyond the point already reached by the authorities. However, it seems to be recognized that, where the person interested in the telegram is the undisclosed principal of both the sender and the sendee, he may recover. *Leonard v. New York, A. & B. Electro Magnetic Teleg. Co.* and *Milliken v. Western U. Teleg. Co.* supra.
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This is the case we have before the court now for consideration. Both the sender and the sendee were the agents of the undisclosed principal, Mrs. Clara Potts.

The petition to rehear and the accompanying brief, so far as they need be noticed, make the point that the court, in the former opinion, erred in respect of the measure of damages. It is conceded that the undisclosed principal of the sender of a telegram could sue for breach of the contract; but it is said that he would have to adopt the contract as he found it, that he would be entitled to recover only such damages as the apparent sender could recover, and that this would necessarily exclude damages for the mental anguish of the undisclosed principal; that the telegraph company and the apparent sender, together with the language of the message, would be the persons and the matter for consideration; that the company would be presumed to have in contemplation the language, purport, and effect of the message, and the relation of the apparent sender thereto, and would be liable to the apparent sender, in case of a breach of duty in respect of the message, for all such damages as might be considered as arising naturally, in the ordinary course of things, from such breach of contract or violation of duty, but this could not be held to include a special injury to a third person, whose particular relation to the matter could not be held in contemplation, because not only unknown, but unsuggested by the language of the message or otherwise; that, where the subject of the message is some commercial matter, and a breach of duty occurs on the part of the telegraph company, the nature of the business, which is the subject of the telegram, places the parties thereto in possession of data from which they may contemplate the probable effect of a failure in correct and seasonable transmission and delivery on the part of the company, and that an undisclosed principal can obtain the benefit of this as fully as the agent, the apparent sender; but that the case is different in respect of social messages, since in these the personal element enters of the special relation of the parties thereto, and, unless the existence of such parties and the fact that they have an interest in the message be called to the attention of the company by something in the language of the message itself or by collateral information given to the company or its agent in the course of the transaction, it is impossible that there should have been had in contemplation the relationship and interest of such parties, and the probable result to them of a breach. It is said that it was on this principle that the recoveries were based in

favor of the undisclosed principal in the two commercial cases referred to in the original opinion (*Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. and Harkness v. Western U. Teleg. Co.* supra), and on which relief for mental anguish was denied in *Western U. Teleg. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564, and *Pacific Exp. Co. v. Redman* (Tex. Civ. App.) 60 S. W. 677, and that the two mental-anguish cases relied upon in the original opinion (*Cashion v. Western U. Teleg. Co.* 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746, and *Landie v. Western U. Teleg. Co.* 124 N. C. 528, 32 S. E. 886) have, since the delivery of our former opinion, been discredited by the supreme court of North Carolina; the first-mentioned case having been in terms overruled, and the second in effect, by the case of *Helms v. Western U. Teleg. Co.* 143 N. C. 386, 8 L.R.A.(N.S.) 249, 118 Am. St. Rep. 811, 55 S. E. 831, 10 A. & E. Ann. Cas. 643, it having been held in the case last cited, and the two Texas cases (4 Tex. Civ. App. 280, 23 S. W. 564, and [Tex. Civ. App.] 60 S. W. 677), that the undisclosed principal in a social telegram could not recover for his mental anguish, but only such damages as the apparent sender could recover,—that is, the cost of the telegram.

This view of the matter was not suggested by counsel at the former hearing, nor did it occur to the court; but, after further examination of the authorities and careful reflection, we are of the opinion that this is the correct view. Of course, there never could have been any doubt of the general proposition that an undisclosed principal of the sender could have the benefit of a contract made for him by his agent in the name of the latter; but the conditions which he must submit to in availing himself of such contract were not sufficiently attended to in due correlation to the measure of damages in cases of the character before us.

In our own case of *Foster v. Smith*, 2 Coldw. 474, 478, 88 Am. Dec. 604, the court said: "It will make no difference in such cases . . . that the principal, at the time of entering into the contract, is unknown or unsuspected, nor that the third person has dealt with the agent, supposing him to be the sole principal. The only effect of the last consideration is that the principal will not be permitted, while insisting upon the contract, to intercept the right of such third person in regard to the agent; but he must take the contract, subject to all the rights of such third person, in the same way as if the agent was the sole principal, and, subject to these rights, the principal may generally sue upon such contract in the same manner as if he had personally made it. Neither can it make any difference that the contract be of that character that the agent

may maintain a suit upon it in his own name. In cases where a third person deals with an agent supposing him to be the principal, and without any knowledge that the property involved in the transaction belongs to another, such third person may acquire rights which will be protected; and, to this end, it can make no difference whether the action be in the name of the principal or agent. The right to sue upon the contract entered into by the agent, within the scope of his power, and to the enjoyment of all its benefits and advantages by operation of law, flows to the principal, though he may be unknown; and the fact that the third person dealing with the agent, believing him to be the principal, cannot defeat the rights of the principal. Neither will the fact that the name of the principal was conceded, while such third person was induced to contract with the agent believing him to be the principal, be permitted to defeat the rights of such third person under or growing out of such contract, even though the action be brought in the name of the principal; and in all such cases it may be said the principal 'steps into the shoes of the agent.'"

In *Western U. Teleg. Co. v. Kerr*, supra, it appeared that, the husband of Mrs. Kerr being ill, she asked one Henderson to send a message to Dr. J. C. Jones, at Gonzales, Texas. This message was sent, but was signed only by Henderson, and it was not known to the telegraph company, or to its agent, that Henderson was acting as agent for Mrs. Kerr. The message was not delivered promptly, the husband of Mrs. Kerr died, and the suit was brought to recover compensation for mental anguish and for suspense experienced by her, as the result of the failure of Dr. Jones to arrive as she expected. On this subject the court said: "The telegram, according to the petition, was sent by the agent of appellee, for her benefit. A breach of the contract thus made would give rise to a cause of action for damages legitimately resulting. That this is true, if Henderson acted as plaintiff's agent, appellant's counsel does not deny. The second question presented does not involve a denial of the right of an undisclosed principal to sue upon a broken contract made by his agent for his benefit, but a question as to the character of damages recoverable."

After adverting to the fact that the telegraph company had no notice that Henderson was acting as agent for Mrs. Kerr, the court continued: "There was nothing in the despatch, or the circumstances attending its delivery, to excite any inquiry as to the plaintiff's connection with it. How can it be said that a condition of her mind, to result from the failure to deliver it entered into the calculations of the parties when it

was sent? It may be true that she can enforce the contract, if made by her agent for her benefit; but she must adopt it as it was and can recover nothing but what the agent could recover if he sued in his own name. All defenses and rights which the defendant could urge against the agent, if suing, it may urge against the plaintiff. Mechem Agency, § 773. Can it be contended that, in a suit on this telegram by Henderson, an element of damages would be mental anguish of Mrs. Kerr? . . . That the fact of the agency was not communicated may be immaterial to some questions, but very material to others. The principal may sue for breach of the contract made for his benefit, whether his existence and connection with it were disclosed or not; but he cannot, in our opinion, recover a class of damages affecting his person, which an ignorance of his existence put beyond the contemplation of the other contracting party."

The case of *Pacific Exp. Co. v. Redman*, supra, is in strict accord. In that case it appeared that Miss Redman, through her agent, N. B. Pruett, ordered certain medicine, by express, from a neighboring town. By reason of the negligence of the express company the medicine was not promptly delivered, and as result thereof Miss Redman averred that she suffered great physical and mental pain, and her recovery was seriously retarded. It was not known to the express company that Mr. Pruett was acting as her agent. He made the order in his own name, and it was held that Miss Redman could not recover any damages peculiar to herself, but only such as Pruett could have recovered if he had been suing.

In view of what has been said in this opinion, we think that the conclusion reached in the former opinion, as to the liability of the company, was erroneous, and that a peremptory instruction should have been given in favor of the company, to the extent, at least, of directing a verdict for nominal damages only,—that is, for the price of the message, 40 cents. A judgment will accordingly be entered now. The plaintiff in error will pay the costs of this court, and the defendant in error the costs of the court below.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH OF PENNSYLVANIA
v.

FRANK PALMER, Appt.

(222 Pa. 299, 71 Atl. 100.)

Homicide — self-defense — burden of proof.

Where an intentional killing by the use
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of a deadly weapon has been established, accused has the burden of showing that it was in self-defense, by a fair preponderance of facts.

(October 12, 1908.)

APPEAL by defendant from a judgment of the court of Oyer and Terminer for Berks County convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. D. N. Schaeffer and Robert Grey Bushong, for appellant:

If the evidence made it doubtful whether a killing was done in self-defense or not, it would raise a doubt as to malice, and an acquittal should follow.

Territory v. Lucero, 8 N. M. 543, 46 Pac. 18; *People v. Coughlin*, 65 Mich. 704, 32 N. W. 905; *State v. Dillon*, 74 Iowa, 653, 38 N. W. 525; *State v. Bone*, 114 Iowa, 537, 87 N. W. 507; *State v. Donahoe*, 78 Iowa, 486, 43 N. W. 297; *Lewis v. State*, 120 Ala. 339, 25 So. 43; *King v. State*, 74 Miss. 576, 21 So. 235; *Gravelly v. State*, 38 Neb. 871, 57 N. W. 751; *Miller v. State*, 107 Ala. 40, 19 So. 37; *State v. Hill*, 69 Mo. 451; *Trumble v. Terri-*

Case Note. — Applicability of rule of reasonable doubt to self-defense in homicide.

It should be stated at the outset that it is intended, as indicated in the title, to confine this note to cases involving the question of the extent of proof of self-defense required in homicide; but, as the courts in many instances do not clearly distinguish between self-defense and matters of mitigation or excuse only, and in other instances cite cases of assault as authority for their decision in cases of homicide, some cases not involving self-defense in homicide strictly have been cited; but these cases have been used solely for the purpose of more fully showing the established rules upon the question indicated in the title. Cases have been excluded which merely determine what presumptions are raised from the use of dangerous weapons, or from what malice may be presumed. Cases have also been excluded which turn upon the substantive question as to the elements necessary to self-defense, or upon the question of evidence, whether such elements have been shown, without passing upon the question as to the burden of proof in this respect.

In the discussion of any question involving the subject of "burden of proof" the ambiguity of the phrase creates, probably, the chief difficulty. In many of the text-books the different meanings of this phrase are discussed and elaborately defined, but in others and in many decisions the distinction is ignored, or even denied. The phrase is used in at least two distinct senses, and frequently without any discrimination between the two. In what may be termed the primary meaning of the phrase the "bur-

tory, 3 Wyo. 280, 6 L.R.A. 384, 21 Pac. 1081; *People v. Riordan*, 117 N. Y. 71, 22 N. E. 455; *People v. Shanley*, 49 App. Div. 56, 63 N. Y. Supp. 449; *People v. Epaski*, 57 App. Div. 91, 67 N. Y. Supp. 1033; *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811.

The burden of proof never shifts, but is on the commonwealth throughout.

Thayer, Ev. p. 336; 17 Am. Law Rev. 892; *Sellers v. Holman*, 20 Pa. 321; *Peters's Appeal*, 106 Pa. 340; *Reynolds v. Richards*, 14 Pa. 205; *Porter v. Nelson*, 121 Pa. 528, 15 Atl. 852; *Unger v. Philadelphia, B. & W. R. Co.* 217 Pa. 106, 66 Atl. 236; *Devlin v. Beacon Light Co.* 198 Pa. 583, 48 Atl. 482; *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49; *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626; *State v. Jones*, 78 Mo. 278; *State v. Patterson*, 45 Vt. 314, 12 Am. Rep. 200;

Mitchell v. State, 129 Ala. 23, 30 So. 348; *State v. Dillard*, 59 W. Va. 197, 53 S. E. 117; *State v. Moss*, 77 S. C. 331, 57 S. E. 1098; *Com. v. Herold*, 5 Pa. Dist. R. 623; *Com. v. Lovick*, 12 Pa. Dist. R. 109; *Com. v. Martin*, 7 Pa. Dist. R. 219; *Com. v. Ellenger*, 1 Brewst. (Pa.) 352.

Mr. Harry D. Schnaeffer, for appellee:

If the evidence clearly establishes the intentional killing with a deadly weapon, the burden then falls upon the prisoner to show that he acted in self-defense.

Com. v. Ferruchi, 219 Pa. 155, 68 Atl. 41; *Com. v. Drum*, 58 Pa. 9; *Com. v. Brown*, 17 Pa. Dist. R. 89.

Brown, J., delivered the opinion of the court:

The victim of this homicide was a woman with whom the prisoner had lived in illicit

den of proof" means the obligation resting on a party who alleges the existence of a fact or thing necessary in the prosecution or defense of an action, to establish it by proof to a legally required extent. In a secondary sense the phrase is used to designate the obligation resting upon a party to meet with evidence a prima facie case which has been created against him. The same ambiguity exists where the phrase is used in civil cases, and in some such cases the difference is more clearly defined than in cases of homicide.

Thus, the two meanings are clearly distinguished in *Cody v. Market Street R. Co.* 148 Cal. 90, 82 Pac. 666, where the court said: "The term 'burden' or 'burden of proof' is frequently used to signify simply the burden of meeting a prima facie case, rather than the burden of producing a preponderance of evidence."

So, in *Buswell v. Fuller*, 89 Me. 600, 36 Atl. 1059, the court said: "Generally, the burden of proof upon any affirmative proposition necessary to be established as the foundation of a suit does not shift from plaintiff to defendant, while the burden of evidence, or of the weight or preponderance of evidence, or the burden of explanation, may shift from one side to the other according to the testimony. There is a manifest distinction between the burden of proof and the burden of evidence."

This distinction is also very clearly brought out in *State v. Wingo*, 66 Mo. 181, 27 Am. Rep. 329 (which was a homicide case), where the court said: "That it devolves upon the state to establish by evidence the guilt of the accused beyond a reasonable doubt will not be controverted. The defendant, by his plea of not guilty, puts in issue every material allegation in the indictment. He is not required to plead specially any matter of justification or excuse. The case is not divided into two parts, one of guilt, asserted by the state, the other of innocence, asserted by the accused. He does not plead affirmatively 19 L.R.A. (N.S.)

that he is innocent, but negatively that he is not guilty; and on that issue, and that alone, the jury are to try the case throughout. There is no shifting of the burden of proof. It remains upon the state throughout the trial. The evidence may shift from one side to the other. The state may establish such facts as must result in a conviction, unless the presumption they raise be met by evidence, but still the burden of proof is on the state to establish the guilt of the accused beyond a reasonable doubt."

Numerous other decisions to the same effect might be cited to show that the phrase "burden of proof" is used in different senses. It should, however, be borne in mind that very many, if not the majority, of the cases ignore this distinction; and this fact renders impractical any classification of the cases upon the subject of homicide from the holding upon the question of the burden of proof.

Practically every case upon the subject of self-defense in homicide holds that the burden, in some sense at least, rests upon the defendant in regard to such a defense. If the prosecution has introduced evidence raising the question of self-defense, he may rest upon that; but even those cases holding most favorably for the defendant (with but few, if any, absolute exceptions) admit that, if the prosecution has established the guilt of the defendant beyond reasonable doubt, and has introduced no evidence tending to show self-defense, the defendant is called upon to answer the prima facie case of the prosecution. But, on the other hand, those cases which state unqualifiedly that the burden of proof is upon the defendant to show self-defense if he relies upon it hold generally that the jury must determine the question of self-defense from the entire evidence,—the evidence of the prosecution as well as that of the defendant,—and in fact many of them hold that the burden of proof is not shifted to the defendant if the evidence of the prosecution raises the question of justification; but these cases are not agreed as

relations. He admitted the killing, but attempted to justify it as an act of self-defense. His story on the trial was that they had quarreled a number of times; that, on the evening of the killing, they went to a lonely spot in the city of Reading, where they again quarreled; that she there drew a revolver upon him, which he took from her and threw away; that she then grabbed him, and struck him with some object; that, before he started with her to the place of the killing, he had put a razor in his pocket for his protection, thinking she would attempt to do him bodily harm, and that when she grabbed him a second time, believing his life was in danger, he threw his arm around her neck and, holding her head back, cut her throat; that, without releasing him, she sank down, and he then, sitting upon her stomach, cut her throat a second time.

to what degree the proof must extend. From a careful examination of the various cases, it would appear that, regardless of what the holding of the particular case may be as to the burden of proof, the essential question to be determined is what degree of proof of self-defense is necessary,—or better, perhaps, to what extent the self-defense must appear. Some cases go to the extent of holding that the defendant must show self-defense beyond a reasonable doubt, and some go to the other extreme of holding that the burden is upon the prosecution affirmatively to prove the absence of self-defense,—that is, that the state, to prove its case, must affirmatively and conclusively prove the absence of self-defense beyond a reasonable doubt as one of the essential elements of the crime. Between these two extreme views the cases apparently take every possible position.

As is always the case where a decision may turn upon the particular language of an instruction, many of the cases merely approve or disapprove the particular language used, so that it is frequently impossible to tell what the position of the court upon the general subject would be from its ruling in a particular case. For this reason, the cases following will, for the most part, be grouped by states, so that, by a comparison of the different decisions in the state, the established rule may be learned. In a number of states, also, earlier decisions have been overruled, and a consideration of such cases apart from the overruling cases would be misleading.

The great majority of the cases, although differing in some minor points, may be grouped into three classes: First, those holding that a reasonable doubt as to the self-defense entitles the defendant to an acquittal; second, those holding that the self-defense must be proven by a preponderance of the evidence; third, those holding that the self-defense must be proven to the satisfaction of the jury. The cases will be grouped accordingly. Some cases not lend-

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The uncontradicted evidence was that there were five cuts upon her body.

On this appeal, two errors are alleged to have been committed by the court below, the first in the following instruction to the jury: "As to whether a reasonable doubt shall establish the existence of a plea of self-defense, I take the law to be this: If there be a reasonable doubt that any offense has been committed by the prisoner, it operates to acquit; but, if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burden then falls upon the prisoner, and not on the commonwealth, to show that it was excusable as an act of self-defense. If, then, his evidence leaves his extenuation in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some

ing themselves readily to this grouping are placed under "miscellaneous cases."

It should be noted that most of the cases (excepting the Alabama cases, which will be considered by themselves) which discuss the question of the burden of proof also couple with that discussion a statement as to the degree of proof necessary; and this seems to be the important practical question to determine, rather than the more theoretical question as to the burden of proof.

In some states there are statutes to the general effect that, upon the killing being proved or admitted, the burden of proof is upon the defendant to prove self-defense unless it appears from the evidence of the prosecution. In some states the statute is considered as merely declaratory of the common law, and in few, if any, does the existence of such a statute affect the question under discussion. Where the decision does apparently turn upon a statute of that character, the fact will be noted.

Rule that reasonable doubt of self-defense is sufficient.

The rule followed by the majority of the cases, and the one which seems best grounded in principle, is that the jury must acquit if they have a reasonable doubt, whether from the evidence of the prosecution or the defendant, that the latter acted in self-defense. Under this rule, many cases hold that the burden of proof, in the primary sense, does not shift, but remains upon the state throughout. Others hold that, when the homicide is proven or admitted, the burden is upon the defendant to prove self-defense, unless it is shown by the evidence which proved the killing. In the latter case the phrase "burden of proof" is evidently used in the secondary sense; the cases are not in reality opposed in principle to the other cases, and the practical result is the same.

A very clear exposition of this view is

of its grades of manslaughter at least." These are the exact words of Agnew, J., in his charge to the jury when specially presiding in *Com. v. Drum*, 58 Pa. 9. That charge was accepted at the time by his associates in this court as a clear and correct exposition of the law of homicide, and as a precedent and guide in the trial of such cases. We have since frequently approved it, the present chief justice very recently saying of it: "Its substantial accuracy has never been challenged." *Com. v. Paese*, 220 Pa. 371, 17 L.R.A. (N.S.) 793, 123 Am. St. Rep. 699, 69 Atl. 891. When the commonwealth clearly establishes an intentional killing by the use of a deadly weapon, an illegal homicide is presumed. If the defense be insanity, the burden of sustaining

it is upon those having charge of the defense, for the accused is presumed to be sane, and his insanity must be established by a fair preponderance of the testimony. *Ortwein v. Com.* 76 Pa. 414, 18 Am. Rep. 420; *Meyers v. Com.* 83 Pa. 131; *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397; *Com. v. Barner*, 199 Pa. 335, 49 Atl. 60. And so of self-defense, for there is no presumption, in the face of clear evidence of intentional killing with a deadly weapon, that life was taken that life might be spared. The presumption is otherwise in the absence of anything developed to the contrary in the commonwealth's presentation of its case, and, when the attempt is made to rebut that presumption by the affirmative plea of self-defense, it must be made out by a fair pre-

given in *People v. Shanley*, 49 App. Div. 56, 63 N. Y. Supp. 449, where the court said: "In criminal cases the burden of proof always remains the same, and rests upon the prosecution. After the prosecution has introduced its evidence, if it be sufficient in weight to make a prima facie case of guilt, it is to be submitted to the jury with instructions that, in order to convict, they must be satisfied from the evidence beyond a reasonable doubt that the defendant is guilty of the crime charged in the indictment, or some degree of the crime, the defendant under such circumstances being entitled to have considered as bearing thereon all of the circumstances surrounding the transaction, and the inferences arising therefrom. If the defendant introduces evidence in denial of the commission of the offense or in justification of the act, or of any other matter which tends to exculpate him from the charge of guilt, he is entitled to have such testimony considered, not alone upon the question as to whether the exculpating circumstances establish a defense by a preponderance of proof, but also upon the question of whether all of the evidence, both of the prosecution and of the defendant, raises a reasonable doubt of his guilt. If so, the defendant is entitled to an acquittal; and at all times, during the whole course of the trial, from the beginning to the end, the burden remains upon the prosecution to establish the crime charged, to the satisfaction of the jury, beyond a reasonable doubt. . . . When the people have made a case which establishes the guilt of the defendant beyond a reasonable doubt, it may always be said that the defendant is called upon to answer, and in a sense it may be said that he is required to establish his defense. In this sense he bears a burden; but he is not required to satisfy the jury of anything. If his proof fall short of establishing justification, it may yet be sufficient to establish a defense by creating a reasonable doubt of his guilt, and if it go to this extent he is entitled to an acquittal."

So, in *Petty v. State*, 76 Ark. 516, 89 S. W. 465, it was held that, under the statute in that state, when the killing is proved, if 19 L.R.A. (N.S.)

the state produces no evidence tending to mitigate or excuse the homicide, it devolves on the accused to do so; but, when any evidence is introduced, either on the part of the state or the defendant, which, taken in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt of the guilt of the defendant, they should acquit. And to the same effect were the decisions in *Cogburn v. State*, 76 Ark. 110, 88 S. W. 822, and *Tignor v. State*, 76 Ark. 489, 89 S. W. 96.

And the rule was thus stated in *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018; "It is not incumbent upon the defendant in a criminal case, either by his own evidence or that of the people, or both combined, to prove anything to the satisfaction of the jury. It is sufficient to sustain the plea of self-defense if the defendant, by any evidence in the case, succeeds in raising a reasonable doubt in the minds of the jury of the truth of any essential element of the charge made against him." And to the same effect were the following Colorado decisions: *Hill v. People*, 1 Colo. 436; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Boykin v. People*, 22 Colo. 496, 45 Pac. 419.

So, in *Kent v. People*, 8 Colo. 563, 9 Pac. 852, the court said: "The proposition of defendant's counsel that the burden of proof never shifts on the defendant at any stage of the proceedings is not strictly correct. It is true the state must prove the offense charged beyond a reasonable doubt. The statute then casts the burden of proof as to matters of mitigation or excuse upon the defendant. . . . He is not required by the statute, however, to prove such circumstances beyond a reasonable doubt, or to the extent of satisfactorily establishing his defense. He is only required to prove the same as any other facts are required to be proved; and, if the matters relied on be supported by such proof as would produce a reasonable doubt in the minds of the jury as to the guilt of the prisoner, when the whole evidence concerning the transaction comes to be considered by the jury, the rule of law is that there must be an acquittal."

In *Gladden v. State*, 12 Fla. 562, the court

ponderance of evidence. The guilt of the accused must be established in the first instance beyond a reasonable doubt; and, when so established, he is not to be acquitted because the jury, after hearing him or his witnesses, may be in doubt whether he acted in self-defense. In making that defense he admits his intentional killing of another,—a crime under divine and human law, unless it appear in the proof of the killing that it was excusable,—and the burden is rightly upon him to show that it could not be avoided. "We may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of the law, excused on the account of accident or self-preservation, or alleviated into man-

slaughter by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation it is incumbent upon the prisoner to make out to the satisfaction of the court and jury, the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former how far they extend to take away or mitigate guilt. For all homicide is presumed to be malicious until the contrary appeareth upon evidence." 4 Bl. Com. 201. The burden of proving self-defense is not placed heavily upon one accused of taking life. Sacred as is human life, he is not bound to show beyond all doubt that he was

declared the following rule: "Before a person can avail himself of the defense that he used a weapon in defense of his life, and be justified, he must satisfy the jury that that defense was necessary at the time; that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such great bodily harm as would give him a reasonable apprehension that his life was in immediate danger."

But in *Hubbard v. State*, 37 Fla. 156, 20 So. 235, an instruction in language almost identical was declared erroneous upon the ground that it required the defendant to satisfy the jury that the act producing the death was necessary, ignoring the established rule of law that, if the evidence upon the question of self-defense, or on any other material question in the case, went far enough to raise a reasonable doubt in the minds of the jury, it was sufficient for acquittal whether the jury was satisfied or not; and further ignoring the well-established rule that the threatened danger to life or person that would excuse the killing of an assailant did not in fact need to be real, but might be apparent only. And to the same general effect were the decisions in *Hathaway v. State*, 32 Fla. 56, 13 So. 592; *Lane v. State*, 44 Fla. 105, 32 So. 896.

And in *Dorsey v. State*, 110 Ga. 331, 35 S. E. 651, it was held that, if the state submitted sufficient evidence to remove the presumption of innocence, the accused was required to establish his defense of self-defense only to the reasonable satisfaction of the jury—in other words, if all the evidence—the people's as well as the defendant's—raised a reasonable doubt of his guilt, the defendant was entitled to an acquittal.

So, in *Alexander v. People*, 96 Ill. 96, it was held that an instruction was erroneous which told the jury that it was incumbent upon the defendant satisfactorily to establish self-defense. The court said that a defense, though not satisfactorily proven, might be supported by such proof as would produce grave doubts as to the guilt of the prisoner and entitle him to an acquittal. And this case was cited with approval, and followed generally, by numerous other Illinois L.R.A. (N.S.)

cases. *Wacaser v. People*, 134 Ill. 438, 23 Am. St. Rep. 683, 25 N. E. 564; *Smith v. People*, 142 Ill. 117, 31 N. E. 599; *Halloway v. People*, 181 Ill. 544, 54 N. E. 1030; *Appleton v. People*, 171 Ill. 473, 49 N. E. 708; *Lyons v. People*, 137 Ill. 602, 27 N. E. 677.

And in *Plummer v. State*, 135 Ind. 308, 34 N. E. 968, it was held that, as long as there is reasonable doubt whether a homicide was not committed in the reasonable exercise of the right of self-defense, there is a reasonable doubt of the guilt of the accused; and instructions are erroneous which require the defendant to prove his innocence in that respect beyond a reasonable doubt. And to the same general effect were the decisions in *Smith v. State*, 142 Ind. 288, 41 N. E. 595, and *Lawson v. State* (Ind.) 84 N. E. 974.

So, in *Trogdon v. State*, 133 Ind. 1, 32 N. E. 725, it was held that a defendant in a criminal cause is never required to satisfy the jury of the existence of any fact which, if true, is a complete defense, even though it is affirmative in character like self-defense.

To warrant a conviction in a prosecution for homicide, it was held in *Riley v. Com.* 94 Ky. 206, 22 S. W. 222, that the jury must be satisfied of the existence of facts which will deprive the defendant of the right of self-defense beyond a reasonable doubt; it is not sufficient that they are established by a preponderance of evidence. And to the same effect were the decisions in *Allen v. Com.* 86 Ky. 642, 6 S. W. 645; *Thacker v. Com.* 24 Ky. L. Rep. 1584, 71 S. W. 931. But in these cases, however, the question as to which party should furnish proof was not directly discussed.

So, in *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72, it was held that the burden of proof was upon the prosecution to satisfy the jury beyond a reasonable doubt that the killing was not in self-defense, and that no reasonable belief existed in the defendant's mind at the time that he was in great bodily danger as the facts and circumstances then appeared to him.

And in *Hawthorne v. State*, 58 Miss. 778, it was held error to charge the jury that

compelled to take it, but is humanely permitted to satisfy the jury by a fair preponderance of the testimony that he killed under circumstances justifying his belief that his own life could not otherwise have been saved. To doubt, however, even to reasonably doubt, that life was taken in self-defense, is not to be satisfied that it was so taken, and, when this affirmative defense

is left in doubt, it has not been established at all as a basis for acquittal.

There was nothing in the case justifying the presentation of the prisoner's sixth point, and it was therefore properly declined and not read to the jury.

Both assignments of error are overruled, the judgment is affirmed, and the record remitted for the purpose of execution.

the burden of showing that the killing was justifiable was upon the defendant, and, unless he did this to the satisfaction of the jury, he was to be found guilty.

In *Harris v. State*, 47 Miss. 318, an instruction was approved which made it incumbent on the defendant to produce circumstances of alleviation, excuse, or justification to the satisfaction of the jury. But such an instruction was condemned in *Ingram v. State*, 62 Miss. 142, in which case *Hawthorne v. State*, supra, was approved.

And in *Blalack v. State*, 79 Miss. 517, 31 So. 105, it was held error to refuse to give the following charge: "The court instructs the jury, for defendant, that the law presumes the defendant innocent, and that the burden of proving beyond all reasonable doubt every material allegation necessary to establish defendant's guilt rests upon the state throughout the trial, and that the burden of proof never shifts to the defendant, and that the law does not require the defendant to prove by his evidence excuse or justification; but if, from all the evidence, the jury entertains a reasonable doubt as to whether the killing was done in the heat of passion, or proceeded from the principle of self-defense, they will find the defendant not guilty."

And in *McKenna v. State*, 61 Miss. 589, it was held that it was not incumbent on the prisoner to do anything more than to raise a doubt in the minds of the jury as to whether he had a right to believe that the deceased was at the time seeking to do him great bodily harm, and that the only way of avoiding this was to take the life of the deceased. And to the same effect was the decision in *Lamar v. State*, 63 Miss. 265. To the same effect, also, was the decision in *King v. State*, 74 Miss. 576, 21 So. 235, where the court said: "First, a state must make out her case to a moral certainty. Then, and not until then, is the accused required by the law of the land to do anything, and then he need only, from the whole body of the evidence adduced for him and against him, raise a reasonable doubt of his guilt, to entitle him to an acquittal."

In criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence, a conviction can be had only when the jury are satisfied from a consideration of all the evidence, of the defendant's guilt beyond a reasonable doubt. That rule applies not alone to the case as made by the state, but to any distinct substantive defense which may be interposed by the accused to justify 19 L.R.A. (N.S.)

or excuse the act charged. *Gravely v. State*, 38 Neb. 871, 57 N. W. 751.

In *State v. McCluer*, 5 Nev. 132, the court said: "The statute, it is true, declares that, when the homicide is proven by the state, and no circumstances of mitigation, excuse, or justification are shown, the burden of establishing such mitigation, excuse, or justification devolves upon the defendant; but nothing is said about the degree of proof necessary to be adduced by him to maintain his defense. He is not required to establish the facts constituting his defense beyond a reasonable doubt, . . . nor by evidence preponderating over that produced against him by the state; but only to raise such doubt in the mind of the jury that they cannot be satisfied of his guilt beyond a reasonable doubt."

In *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811 (affirmed in 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77), it was held that, on the trial of an indictment for murder, where the justification is self-defense, it is entirely proper to instruct the jury that the burden is on the accused of proving to the satisfaction of the jury a situation and circumstances under which the right of self-defense might be lawfully exercised, provided that they are also instructed that the accused is entitled to the benefit of the reasonable doubt upon the entire case. The court clearly held that the defendant was entitled to the benefit of a reasonable doubt, even as to self-defense. And this decision was cited with approval, and followed, in *State v. Jones*, 71 N. J. L. 543, 60 Atl. 396.

So, in *State v. Hazlett*, 16 N. D. 426, 113 N. W. 374, in a very elaborate opinion the court held that, upon the trial of a person charged with murder, and in which one of the defenses relied on is justifiable homicide, or self-defense, it is prejudicial error to instruct the jury that the burden of proof is upon the defendant to establish such defense by a preponderance of the evidence. The burden never shifts to the defendant to establish by a preponderance of the evidence either facts and circumstances in mitigation or excuse, or facts establishing an affirmative defense. Under § 10,023, Rev. Codes 1905, where the commission of such homicide has been established by the state, the burden is upon defendant of proving circumstances of mitigation, excuse, or justification, unless the state's proof tends to show that such crime amounts only to manslaughter, or that defendant's act was justifiable or excusable. But this does not mean that defendant is required to do more than show circumstances creating a reason-

able doubt as to such matters. And the court expressly disapproved the earlier cases of *State v. Yokum*, 11 S. D. 544, 79 N. W. 835, and *United States v. Crow Dog*, 3 Dak. 106, 14 N. W. 437, in which the decision was that the defendant must establish self-defense by the preponderance of evidence.

And in *Hamilton v. State*, 97 Tenn. 452, 37 S. W. 194, the court said: "No prisoner is bound to establish his defense or innocence beyond a reasonable doubt. All doubts must be resolved in favor of the innocence of the prisoner, and the state must disprove his theory, and make out his guilt beyond a reasonable doubt, in order to convict the defendant." And to the same effect was the decision in *Frazier v. State*, 117 Tenn. 430, 100 S. W. 94.

In *Cupps v. State*, 120 Wis. 504, 102 Am. St. Rep. 996, 97 N. W. 210, 98 N. W. 546, it was held that proof that a person took the life of another by an act naturally calculated to effect that result *prima facie* establishes guilt; and such proof casts upon the defendant the burden to rebut the case made against him to the extent of at least creating a reasonable doubt in regard to its being justifiable.

In *Trumble v. Territory*, 3 Wyo. 280, 6 L.R.A. 384, 21 Pac. 1081, it was held that the accused is presumed to be innocent until his guilt is established, and the prosecutor must establish, beyond reasonable doubt, every element of guilt, or the accused must be acquitted; hence, the burden of proof is never upon the accused. And to the same effect *State v. Churchill* (Wash.) 100 Pac. 309.

In *United States v. Lewis*, 111 Fed. 630, the court, in the charge to the jury, said that the burden of proof rested upon the government throughout the entire case.

In California the cases generally hold that, where an intentional killing has been established, the burden of proof is upon the defendant to show that he acted in self-defense. There is some difference of opinion, however, whether this must be shown by a preponderance of the evidence, or whether it is sufficient where, from all the evidence, the jury has a reasonable doubt as to whether or not the defendant acted in self-defense. In the earlier cases the defendant was required to show self-defense by a preponderance of the evidence.

Thus, in *People v. Milgate*, 5 Cal. 127, the court said: "The general doctrine of the books appears to be that, if a jury should find the fact that the prisoner made a felonious assault upon the deceased with an unlawful weapon, inflicting a mortal wound, which produced instant death, and that there was some evidence tending to prove that such wound was given in the heat of blood in sudden and mutual combat, but that the proof of such fact did not preponderate over the proof against it, though it raised some doubt in their minds that the matter of extenuation would not be sufficiently made out, and the judgment of the court would be against the prisoner for the higher offense."

And in *People v. Stonecifer*, 6 Cal. 405, 19 L.R.A. (N.S.)

it was held that, where the killing was admitted, the presumption of guilt arises, and the onus is laid upon the prisoner of disproving the guilt; this cannot be done by raising a doubt in the minds of the jury, but by establishing the fact by preponderating proof. And to the same general effect was the decision in *People v. Arnold*, 15 Cal. 476.

In *People v. West*, 40 Cal. 610, a section of the Criminal Code read as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." And the court held that, under such a statute, it was clearly erroneous to instruct the jury that the burden of proof was upon the defendant, and that he was bound to establish the justifying or mitigating circumstances by a preponderance of the evidence, where there was some evidence upon the part of the prosecution which, though perhaps insufficient in itself to convince the jury of defendant's innocence, tended in some degree to show a state of facts which would justify the killing or reduce the defense to manslaughter. The effect of the statute is sufficient to distinguish this case from the earlier cases.

In *People v. Smith*, 59 Cal. 607, the following instruction was held error: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof, on the part of the prosecution, tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable, or excusable, and this he may show by a preponderance of evidence merely. By a preponderance of evidence is meant that degree of proof which induces the mind of a reasonable man to believe one side of an issue in preference to the other." The decision in this case, however, turned upon another point.

In *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52, the trial court charged the jury as follows: "To justify the commission of a homicide upon the ground that it was necessary in defense of one's property, it must be made to appear, by a preponderance of the testimony, that the person killed was manifestly endeavoring and intending to commit a felony." The court held that this was error as it was sufficient if the jury found the circumstances such as to excite the fears of a reasonable man, and the defendant, acting under the influence of such fears, killed the aggressor, although the circumstances might be insufficient to prove by a preponderance of the evidence that the aggressor was actually about to commit a felony. In this case it does not appear that the court had in mind the distinction between proof furnished by the plaintiff and that furnished by the defendant, but the

language of the court would seem to indicate that, under any circumstances, all that was necessary was that a reasonable doubt as to the self-defense be raised. The court said: "In substance, the jury were told that, unless they found that the justification upon which the defendant relied was made to appear by a preponderance of the evidence, they must convict. But the testimony may have fallen short of such proof, and yet have been sufficient in itself, or in connection with the evidence of the prosecution, to create a reasonable doubt of the defendant's guilt, to the benefit of which the defendant was entitled in law." None of the earlier cases are cited in this opinion.

In *People v. Hong Ah Duck*, 61 Cal. 387, the court distinguished *People v. West*, supra, upon the ground that there was no evidence in the prosecution's case tending to show a state of facts which justified the killing, and held that, under these circumstances, the Penal Code required that the proof on the part of the defense be in some degree stronger than the proof on the other side, or, in other words, that it must preponderate. And this decision was cited with approval, and followed, in *People v. Raten*, 63 Cal. 421. It may be well to note that in *People v. Hong Ah Duck*, supra, the *Flanagan Case* is ignored while the earlier cases are cited with approval.

But in the well-considered case of *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549, the *Flanagan Case* was cited with approval, and the *Hong Ah Duck* and *Raten Cases* were overruled. The court said: "The section casts upon the defendant the burden of proving circumstances of mitigation, or that justify or excuse the commission of the homicide. This does not mean that he must prove such circumstances by a preponderance of the evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc., is thereby cast upon him. He is only bound, under this rule, to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged."

And the principles of the *Bushton Case* were followed in *People v. Elliott*, 80 Cal. 296, 22 Pac. 207; *People v. Lanagan*, 81 Cal. 142, 22 Pac. 482; *People v. Powell*, 87 Cal. 348, 11 L.R.A. 75, 25 Pac. 481; *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405; *People v. Marshall*, 112 Cal. 422, 44 Pac. 718; *People v. Matthai*, 135 Cal. 442, 67 Pac. 694.

In *People v. Boling*, 83 Cal. 380, 23 Pac. 421, the court, in sustaining an instruction, said: "The instruction does undoubtedly require that the defendant shall remove by some kind of evidence in the case (whether appearing in his own or the people's evidence is not important) the presumption which arises from his having killed the deceased, and to that extent the law does shift the burden of proof on him; but the instruction does not declare that it shall be incumbent on him to remove the presumption by a 19 L.R.A. (N.S.)

preponderance of evidence, which was the vice found in the instruction declared erroneous in the *Bushton Case*, supra."

Where the evidence of the prosecution showed no circumstances of mitigation or justification, it was held in *People v. Milner*, 122 Cal. 171, 54 Pac. 833, that the burden of proof of justifying or excusing the act rested upon the defendant. The court said: "At the close of the prosecution's case the presumption against the defendant was that he had committed an unlawful homicide. It may not be said that the presumption of innocence countervailed against this, since, by the express provision of the law, the presumption of innocence was overcome and a presumption of guilt took its place when the required facts were proven. . . . But here the burden of proving circumstances exonerating the defendant, or reducing the grade of the crime, was cast upon him; and, even though there be no direct contradictory evidence in the record, the jury was not bound to decide in accordance with the defendant's statement, if the presumption the better satisfied their minds."

Where the voluntary killing of deceased was established and admitted, it was held, in *People v. Phelan*, 123 Cal. 551, 56 Pac. 424, that a *prima facie* case was made out, and it devolved upon the defendant to show facts which would justify, excuse, or mitigate the killing; and, although his own evidence set out a clear case of justifiable self-defense, yet there was some evidence to the contrary, and, under such circumstances, the court would not set aside a verdict of guilty upon the ground that there was no evidence to support it.

In Arizona, where the statute was taken from California, the courts have adopted the rule in *People v. Bushton*, supra; *Foster v. Territory*, 6 Ariz. 240, 56 Pac. 738; *Anderson v. Territory*, 9 Ariz. 50, 76 Pac. 636; *Bryant v. Territory (Ariz.)* 100 Pac. 455.

In Iowa the rule seems to be well established that the burden of proof is upon the state to show that the defendant was not acting in self-defense, and the state must do so by evidence sufficiently strong to remove all reasonable doubt.

Thus, in *State v. Fowler*, 52 Iowa, 103, 2 N. W. 983, it was held that the burden of proof was upon the state to show from the circumstances attending the commission of the offense that the defendant did not act in self-defense.

So, in *State v. Dillon*, 74 Iowa, 653, 38 N. W. 525, it was held that a charge was erroneous which said, in effect, that, if the defendant in the first instance sought a disturbance or fight with the deceased, but afterwards sought to avoid difficulty, the burden of proving that he inflicted the wound in self-defense is upon the defendant, and he must satisfy the jury that such was the fact; and that this portion of the charge was in conflict with a portion previously given which stated that "the burden of proof is on the state to show the absence of self-defense and the want of sufficient provocation, and the burden of proof at no stage of the

case in this class of cases is cast upon the defendant except where the defense is wholly disconnected from the body of the offense and is distinct affirmative matter, as insanity, an alibi, or the like."

And in the *State v. Porter*, 34 Iowa, 131, it was held that an instruction was erroneous which required the defendant to establish by a preponderance of evidence that he acted in self-defense, as he is entitled to an acquittal if he shows, by the facts attending the commission of the offense proved either by himself or the state, that there is a reasonable doubt that his act was wilful. And to the same effect were the decisions in *State v. Morphy*, 33 Iowa, 270, 11 Am. Rep. 122; *Tweedy v. State*, 5 Iowa, 433, and *State v. Donahoe*, 78 Iowa, 486, 43 N. W. 297.

So, in *State v. Shea*, 104 Iowa, 724, 74 N. W. 687, it was held that the law in that state was settled that the burden is upon the state to show that the defendant was not acting in self-defense, and that it must do so by evidence sufficiently strong to remove all reasonable doubt. The court said: "No instruction to this effect was given. Such omission in view of the instruction asked was prejudicial error. Contention is made that, as no evidence was adduced by the state tending to show that the act was in self-defense, the burden was upon the defendant to establish the claim that his act was so done. This proposition is mooted, but not decided, in *State v. Cross*, 68 Iowa, 180, 26 N. W. 62. The court, as now constituted, cannot see any good reason for incorporating such qualification into the rule."

And the principles in the *Shea* Case are followed generally by the later Iowa cases: *State v. Young*, 104 Iowa, 730, 74 N. W. 693; *State v. Bone*, 114 Iowa, 537, 87 N. W. 507; *State v. Williams*, 122 Iowa, 115, 97 N. W. 992; *State v. Smith* (Iowa) 99 N. W. 579; *State v. Usher*, 126 Iowa, 287, 102 N. W. 101; *State v. Sharp*, 127 Iowa, 526, 103 N. W. 770; *State v. Morris*, 128 Iowa, 717, 105 N. W. 213; *State v. Partipilo* (Iowa) 116 N. W. 1049.

In *State v. Yates*, 132 Iowa, 475, 109 N. W. 1005, the rule of the *Shea* Case was acknowledged; but it was held that it was not error for the trial court to refuse or neglect to charge in regard to self-defense where the defense was intoxication and there was a total absence of any evidence of self-defense as a ground of justification.

In *State v. Hayden*, 131 Iowa, 1, 107 N. W. 929, the court said: "What we mean is that an unexplained killing with a deadly weapon is evidence of malice, and that the burden is on the accused in that sense that he must make proof of legal excuse, justification, or extenuation, or take the risk of a conviction upon the presumption or inference of malice." While this case may be distinguished in principle from the *Shea* Case, nevertheless the language used would indicate that the court did not wholly agree with the principle enunciated in that case.

The cases in Missouri are contradictory, but the decisions which apparently are the 19 L.R.A. (N.S.)

most carefully considered hold that the defendant is entitled to the benefit of a reasonable doubt of his guilt arising on the whole case.

Thus, in *State v. Wingo*, 66 Mo. 181, 27 Am. Rep. 329, it was held error to charge the jury to the effect that, if the defendant shot and killed deceased, the law presumed that it was murder, in the absence of proof to the contrary; and it devolved upon the defendant to show from the evidence in the case, to the reasonable satisfaction of the jury, that he was guilty of a less crime or acted in self-defense. The court said: "The state's interest is not promoted by the conviction and punishment of any of her citizens for crimes of which they are innocent, and it is as much the duty of those who represent her to protect the innocent as to convict the guilty. If the Massachusetts doctrine in regard to homicide be correct, the prosecuting attorney has but to introduce those witnesses who saw nothing to justify the defendant, to throw the burden of proving his innocence upon the defendant, and impose upon him the duty of proving by a preponderance of evidence, as in civil cases, the facts he relies upon for justification or excuse. This is 'the careful management of a case on the part of the government' by which the burden is shifted in Massachusetts in prosecutions for homicide. The defendant is entitled to the benefit of a reasonable doubt of his guilt on the whole case, not only as to whether the case made by the state is open to reasonable doubt. But, if the evidence for the state be clear, and, in the absence of other evidence, conclusive, still if the evidence adduced by the accused, whether it establishes the facts relied upon by a preponderance of evidence or not, creates a reasonable doubt of his guilt in the minds of the jury, he is entitled to an acquittal. At no stage of the trial does he stand asserting his innocence."

And in *State v. Alexander*, 66 Mo. 148, the rule in *State v. Wingo*, was approved, but it was held not reversible error to give the charge criticized in the *Wingo* Case, where the jury was clearly informed by the charge taken as a whole, that the burden of proof was upon the people, and that the justification need be proved but to the reasonable satisfaction of the jury. The court said: "We would suggest that, instead of declaring as in the fifth instruction, the court, after stating as in that instruction the presumption of law from an intentional killing with a dangerous weapon, should instruct the jury that it devolves upon the defendant to adduce evidence to meet or repel that presumption." To the same general effect were the decisions in *State v. Hill*, 69 Mo. 451; *State v. Hickam*, 95 Mo. 323, 6 Am. St. Rep. 54, 8 S. W. 252; *State v. Jones*, 78 Mo. 278.

But the contrary doctrine was enunciated in *State v. Tabor*, 95 Mo. 585, 8 S. W. 744, where the court, after citing *Com. v. Drum*, 58 Pa. 9, said: "The doctrine in the case just cited from Pennsylvania, from which state our statute respecting murder was ob-

tained, that a homicide being proven or admitted by the prisoner, and no countervailing circumstances being evolved by the testimony of the prosecution, the burden is then cast upon the prisoner to show to the reasonable satisfaction of the jury such circumstances of excuse or palliation as will take away the presumption drawn by the law, that the killing was murder in the second degree, and show that he was guilty of a less crime, or that the homicide was committed in his lawful self-defense, is well settled in this state."

In *State v. Brown*, 64 Mo. 367, it was stated generally that the court did not err in refusing to give an instruction to the effect that the burden of proof was on the state to prove a case against the defendant, not only that he killed the deceased, but that he did so without any justifiable or legal excuse.

In *State v. Beckner*, 194 Mo. 281, 3 L.R.A. (N.S.) 535, 91 S. W. 892, the court upheld a general instruction upon the question of self-defense. In regard to that instruction, the court said: "It does not entail upon the defendant, as the learned counsel claim, the burden of establishing his innocence, but simply that, from all the evidence, it must appear to the jury that there was sufficient cause for the defendant to apprehend that his adversary was about to slay him or do him some great bodily harm, and that it was imminent."

The rule in New York is that the burden of proof is upon the prosecution throughout, and that the defendant is entitled to the benefit of a reasonable doubt as to the entire evidence.

Thus, in *People v. Riordan*, 117 N. Y. 71, 22 N. E. 455, it was held that the defendant was entitled to the benefit of a reasonable doubt, not only to the case made out by the prosecution, but also to any defense interposed; and therefore it was error to charge to the effect that the burden was upon the defendant to establish that defense beyond a reasonable doubt.

And the *Riordan* Case has been cited with approval, and followed, in a number of New York cases: *People v. Downs*, 123 N. Y. 558, 25 N. E. 988; *People v. Cassata*, 6 App. Div. 386, 39 N. Y. Supp. 641; *People v. Shanley*, 49 App. Div. 56, 63 N. Y. Supp. 449 (for opinion, in special term, on application for certificate of reasonable doubt, see 30 Misc. 290, 62 N. Y. Supp. 389); *People v. Epaski*, 57 App. Div. 91, 67 N. Y. Supp. 1033; *People v. Hill*, 65 Hun, 420, 20 N. Y. Supp. 187.

To the same general effect was the decision in *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492, where, under the statute defining the various degrees of homicide, it was held that an instruction to the effect that the law would imply murder from the fact of the killing was erroneous. The court said: "It was in effect instructing the jury that, although the people must prove all these facts, yet they had done so by proving the killing, and by that the case of the prosecution was fully and entirely made out, and 10 L.R.A. (N.S.)

that this proof made it the duty of the prisoner to satisfy them that it was not murder which the law would imply from that proof, thus in effect instructing the jury that the proof of the killing cast the burden of proof upon the prisoner to show that it was not murder, but manslaughter, or justifiable homicide. No such burden of proof was, by that, cast upon the prisoner."

Some of the earlier New York decisions, however, are to the contrary.

Thus, in *Patterson v. People*, 46 Barb. 625, it was held that, where the killing was proved and conceded, it was for the defendant to satisfy the jury that it was in self-defense. The court said: "It would be reversing the whole order of the trial, and the burden of proof, if it devolved upon the people not only to prove the killing, but to negative any possible defense that the statute or common law affords to an alleged offender charged with crime."

And in *People v. Schryver*, 42 N. Y. 1, 1 Am. Rep. 480, it was held that in all cases of voluntary homicide it was sufficient for the people to prove beyond a reasonable doubt that the prisoner killed the person, and then the burden is upon the prisoner to show that it was justifiable or excusable, and he must show this by a preponderance of the evidence.

In *People v. McCarthy*, 110 N. Y. 309, 18 N. E. 128, it was held that, while the burden of proving the accusation was upon the people, the burden of justifying the use of a deadly weapon was upon the defendant. In connection with this case, it may be well to call attention to *People v. Shanley*, *supra*, where this decision is criticized and overruled upon the authority of *People v. Riordan*, *supra*.

In Texas the cases uniformly hold that it is sufficient if the jury have a reasonable doubt as to the self-defense, and the burden of proof is upon the state at all times. *Cogdell v. State*, 43 Tex. Crim. Rep. 178, 63 S. W. 645; *Vann v. State*, 45 Tex. Crim. Rep. 434, 108 Am. St. Rep. 961, 77 S. W. 813; *Slade v. State*, 29 Tex. App. 381, 16 S. W. 253.

In *Pratt v. State*, 50 Tex. Crim. Rep. 227, 96 S. W. 8, it was held that, where the prosecution offered in evidence the admissions and confessions of the defendant, which also embraced statements upon his part that the act was committed in self-defense, the burden was upon the state to prove the falsity of the defendant's statement that he acted in self-defense.

Rule that the burden of proof is upon defendant to show self-defense by a preponderance of evidence.

In many cases the courts assert the rule that the burden of proof is upon the defendant to show self-defense by a preponderance of evidence. Under such a rule, the burden of proof shifts to the defendant upon the establishment by the prosecution of the intentional killing by the defendant. It

should be noted that, under this rule, as in nearly all other cases involving this question, there is some apparent ambiguity of terms; and the practical question determined by these cases is rather the fact that the defense of self-defense must appear by a preponderance of evidence, than the fact that the court states the rule to be that the burden of proof is upon the defendant to show self-defense.

Thus, in *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373, it was held that, when the intentional killing has been established without excuse or justification apparent from the evidence of the prosecution, the burden is upon the defendant to prove and fact of extenuation, such as self-defense, by preponderating proof; and it is not sufficient to raise a reasonable doubt of such facts.

So, in *Territory v. McAndrews*, 3 Mont. 158, it was held that an instruction that the burden of proof is upon the prosecution throughout and does not shift in criminal cases was not correct where a statute provided that, the killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the accused was justified or excused.

In Ohio the rule as laid down in *Silvus v. State*, 22 Ohio St. 90, is that, where it is sought to excuse an act of killing upon the ground of self-defense, it is incumbent upon the defendant to prove the excuse by a preponderance of evidence. And to the same effect are a number of other Ohio decisions: *Weaver v. State*, 24 Ohio St. 584; *Turner v. State*, 5 Ohio C. C. 537; *Carr v. State*, 21 Ohio C. C. 43; *State v. Snelbaker*, 8 Ohio Dec. Reprint, 466.

And in *State v. Ballou*, 20 R. I. 607, 40 Atl. 861, it was held that, if the defendant wishes to justify by self-defense, the burden is upon him to prove such self-defense by a preponderance of the evidence.

And in *State v. Yokum*, 11 S. D. 544, 79 N. W. 835, where the statute provided, when homicide is proved, the burden of proving justification is upon defendant unless the state's evidence tends to show it, it was held that self-defense must be established by accused by a preponderance of the evidence, and it is not enough that the evidence raises a reasonable doubt as to the defense. And to the same effect was the decision in *United States v. Crow Dog*, 3 Dak. 106, 14 N. W. 437, which was decided prior to the statute. These cases, however, were disapproved in *State v. Hazlett*, 16 N. D. 426, 113 N. W. 374.

As was suggested in the opinion in *Com. v. PALMER*, the leading case in Pennsylvania is *Com. v. Drum*, 58 Pa. 9, and the holding in that case is sufficiently set out in that opinion. To the same general effect were the decisions in *Cathcart v. Com.* 37 Pa. 108; *Tiffany v. Com.* 121 Pa. 165, 6 Am. St. Rep. 780, 15 Atl. 462; *Com. v. Brown*. 7 Pa. Co. Ct. 640.

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In *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49, it was held that the defendant must sustain the claim that a homicide was committed in self-defense by preponderance of evidence. And to the same effect was the decision in *People v. Tidwell*, 4 Utah, 506, 12 Pac. 61.

And in *Vaiden v. Com.* 12 Gratt. 717, it was held that, to make out a case of self-defense in a case of homicide, the accused must show to the jury that the defense was necessary to protect his own life, or to protect himself against grievous bodily harm; and that, with regard to the necessity that will justify the slaying of another in self-defense, the accused must not have wrongfully occasioned the necessity, for a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself. And to the same effect were the decisions in *Clark v. Com.* 90 Va. 360, 18 S. E. 440; *Lewis v. Com.* 78 Va. 732; and *Hill v. Com.* 2 Gratt. 595.

In South Carolina the general rule is that, while the state must prove the offense beyond a reasonable doubt, yet, if the defendant relies upon self-defense, he must prove such self-defense by a preponderance of the evidence.

Thus, in *State v. Welsh*, 29 S. C. 4, 6 S. E. 894, it was held that while, in a criminal prosecution, the accused is allowed the benefit of all reasonable doubts, yet, if a party charged with a crime pleads a particular defense, such as self-defense, the fact must be proved by him by a preponderance of the evidence.

So, in *State v. Bodie*, 33 S. C. 117, 11 S. E. 624, it was held that while the state, in a criminal case, is bound to prove every essential element of the charge made beyond a reasonable doubt, the same strictness of proof is not required of a defendant who sets up a special defense, for he is required only to prove such defense by a preponderance of the evidence; but this is subject to the general rule that if, upon the whole testimony, both upon the part of the state and the defendant, the jury entertains a reasonable doubt as to any material point in the case, the defendant is entitled to such doubt. And to the same effect are numerous other South Carolina decisions: *State v. Brown*, 34 S. C. 41, 12 S. E. 662; *State v. Summers*, 36 S. C. 479, 15 S. E. 369; *State v. Ariel*, 38 S. C. 221, 16 S. E. 779; *State v. Way*, 38 S. C. 333, 17 S. E. 39; *State v. Workman*, 39 S. C. 151, 17 S. E. 694; *State v. McIntosh*, 40 S. C. 349, 18 S. E. 1033; *State v. Petsch*, 43 S. C. 132, 20 S. E. 993; *State v. Hutto*, 66 S. C. 449, 45 S. E. 13; *State v. Reeder*, 72 S. C. 223, 51 S. E. 702; *State v. Way*, 76 S. C. 94, 56 S. E. 653; *State v. Moss*, 77 S. C. 391, 57 S. E. 1098; *State v. Owens*, 79 S. C. 125, 60 S. E. 305; *State v. Kibler*, 79 S. C. 170, 60 S. E. 438; *State v. Franklin*, 80 S. C. 332, 60 S. E. 953; *State v. Lindsay* (S. C.) 63 S. E. 1044.

The apparent inconsistency in the language as used in the South Carolina cases is to be explained, doubtless, by the fact that self-

defense is looked upon as an affirmative defense, and the absence of self-defense as not one of the elements of the crime.

In *State v. Thraikill*, 71 S. C. 136, 50 S. E. 551, it was held that the absence of other probable means of escape was an essential element of the plea of self-defense, and, like its other elements, must be established by a preponderance of the evidence.

The rule in West Virginia, as laid down by *State v. Dillard*, 59 W. Va. 197, 53 S. E. 117, is, that, where a homicide is proved and the prisoner relies upon self-defense, the burden is upon him to establish such defense by a preponderance of evidence; and the fact that the state, in proving the homicide, shows facts from which it may be concluded that the killing was justifiable, cannot alter the rule where self-defense is relied upon; but facts introduced by the state in proving the *corpus delicti*, which at the same time show, or tend to show, want of malice or that the killing was in self-defense, are to be considered in determining whether or not the evidence does preponderate in favor of self-defense. And to the same effect were the earlier decisions: *State v. Cain*, 20 W. Va. 679; *State v. Jones*, 20 W. Va. 704; *State v. Greer*, 22 W. Va. 801; *State v. Zeigler*, 40 W. Va. 593, 21 S. E. 763; *State v. Staley*, 45 W. Va. 792, 32 S. E. 198; *State v. Manns*, 48 W. Va. 480, 37 S. E. 613; *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626; *State v. Johnson*, 49 W. Va. 684, 39 S. E. 665; *State v. Prater*, 52 W. Va. 132, 43 S. E. 230; *State v. Cottrill*, 52 W. Va. 363, 43 S. E. 244.

Rule that jury must be satisfied of the self-defense.

In some cases it is held that the burden of proof is upon the defendant to prove self-defense, not by a preponderance of the evidence, but to the satisfaction of the jury. This is the recognized rule in North Carolina.

Thus, in *State v. Ellick*, 60 N. C. (2 Winst. L.) 56, 86 Am. Dec. 442, it was held that the onus of proving justification, excuse, or mitigation is upon the prisoner, who must prove his case to the satisfaction of the jury; but the doctrine of reasonable doubt does not apply to matter of mitigation or excuse which the prisoner is required to establish.

And this doctrine was reasserted in *State v. Willis*, 63 N. C. 26, where it was held that the defendant must prove his case to the satisfaction of the jury, and not by preponderance of the evidence; and the earlier decision of *State v. Johnson*, 48 N. C. (3 Jones, L.) 266, in which it was held that it was incumbent upon the prisoner to establish the matters of excuse beyond a reasonable doubt was expressly overruled.

And the doctrine of the Willis Case has been upheld by a large number of other decisions in that state: *State v. Haywood*, 61 N. C. (Phill. L.) 376; *State v. Smith*, 77 N. C. 488; *State v. Vann*, 82 N. C. 632; *State v. Brittain*, 89 N. C. 481; *State v. Carland*, 90 N. C. 668; *State v. Mazon*, 90 N. C. 676; *State v. Gooch*, 94 N. C. 987; *State v. Rollins*, 113 N. C. 722, 18 S. E. 394; *State v. 19 L.R.A. (N.S.)*

Byrd, 121 N. C. 634, 28 S. E. 353; *State v. Barrett*, 132 N. C. 1005, 43 S. E. 832; *State v. Castle*, 133 N. C. 769, 46 S. E. 1; *State v. Clark*, 134 N. C. 698, 47 S. E. 36; *State v. Walker*, 145 N. C. 567, 59 S. E. 878; *State v. Quick* (N. C.) 64 S. E. 168; *State v. Peterson* (N. C.) 63 S. E. 87.

So, in *State v. Byers*, 100 N. C. 512, 6 S. E. 420, the doctrine set forth by the other North Carolina cases was upheld, and the court approved a charge to the jury to the effect that, when the killing was proved to have been done with a deadly weapon or admitted by the prisoner, the burden of showing the mitigating circumstances shifted to the prisoner, and this he must show, not by preponderance of testimony or beyond a reasonable doubt, but to their satisfaction; and, if the jury were left in doubt as to the mitigating circumstances, it would be a case of murder.

And in numerous Delaware cases a charge has been delivered to the jury to the effect that the burden is upon the defendant to establish self-defense to the satisfaction of the jury: *State v. Powell*, 5 Penn. (Del.) 24, 61 Atl. 966; *State v. Brown*, 5 Penn. (Del.) 339, 61 Atl. 1077; *State v. Cephus* (Del.) 67 Atl. 150; *State v. Honey* (Del.) 65 Atl. 764.

In *State v. West*, Houst. Crim. Rep. (Del.) 371, the judge charged the jury that the defense of self-defense admits the killing, and, as the law presumes it to have been unlawfully and feloniously done by him, until the contrary satisfactorily appears from the evidence in the case, the burden of establishing that defense to the satisfaction of the jury beyond a reasonable doubt also rests on the prisoner, unless it otherwise so appears from evidence produced on the part of the state. This is an extreme ruling, and doubtless may be considered overruled by the other Delaware cases preceding.

Miscellaneous cases.

In numerous cases the decision is ambiguous, and the language is such that it is impossible to classify it under any of the foregoing rules. It will be noted that some state only that the burden of proof is upon the defendant, and do not state to what degree the proof must extend. But, as was suggested above, the ruling in many of such cases was only the approval or disapproval of the charge of the trial court.

In *State v. Bailey*, 79 Conn. 589, 65 Atl. 951, the court expressly states that the burden of proof (in the primary sense indicated above) is upon the defendant to show self-defense; yet, if there is a reasonable doubt upon the whole case, even as to the self-defense, the defendant should be acquitted. In speaking of the charge of the court, the court said: "The defendant has no reason to complain of the charge thus given. It is elementary law that a party defendant to a judicial controversy of any kind, who relies upon some distinct ground of defense not necessarily connected with the transaction on which the charge against him is founded, assumes as to the fact constituting such defense the

burden of proof; that is, he presents an issue upon which he goes forward with his evidence and the other side rebuts. . . .

The trial court, after stating, in conformity with this principle, that all the circumstances of the necessity of the self-defense claimed by the defendant were to be proved by him, added that such proof was to be by a fair preponderance of evidence. Whether such instructions, standing alone, would be, in view of the situation disclosed by the record, a correct statement of the law, we need not consider; for they were immediately qualified by a clear statement of the duty of the jury to acquit if on the whole evidence, including that as to self-defense, a reasonable doubt were raised as to the defendant's guilt. This, in effect, was to say that, even if the evidence which the defendant produced did not suffice to establish by a preponderance of proof the necessity of self-defense, yet it must be considered by them in connection with all the other evidence, and was sufficient to require a verdict in his favor, if, when so considered, a reasonable doubt of his guilt should exist."

In *Bell v. State*, 69 Ga. 752, it was held that, after charging the different degrees of manslaughter and stating the presumption in favor of the defendant, there was no error in charging that such presumption might be removed by proof of the fact of the killing as charged in the indictment, and the onus be shifted to the defendant to show that it was justifiable.

In *Green v. State*, 124 Ga. 343, 52 S. E. 431, it was held that, if the evidence relied upon by the state to show the killing contained circumstances of alleviation or justification, the burden of proving that the crime was murder was not shifted, for malice would not be presumed to exist where the evidence showed circumstances of mitigation.

In *People v. Tubbs*, 147 Mich. 1, 110 N. W. 132, it was held that, a charge in regard to self-defense, to the effect that, unless the facts constituting reasonable cause to believe himself in imminent danger had been established by the defense in the case, there could not be an acquittal on the ground of self-defense, was not reversible error where, from the whole charge, the burden of proof was clearly placed on the prosecution, and the jury could not have been misled.

In *State v. Peterson* (N. C.) 63 S. E. 87, it was held that, where the killing with a deadly weapon was admitted, the burden was upon the defendant to show self-defense.

In *Goodall v. State*, 1 Or. 333, 80 Am. Dec. 396, it was held that the mere fact that the killing was admitted by the prisoner did not devolve upon him the necessity to prove that it was justifiable. And this decision was cited with approval, and followed, in *State v. Whitney*, 7 Or. 386.

In *State v. Bertrand*, 3 Or. 61, the following charge was made to the jury: "The burden is on the state, in the first instance, to remove the presumption of innocence, and to show that the defendant did the acts

that constitute the crime. But, when the state shows beyond a reasonable doubt that a defendant purposely did the killing charged in the indictment, with a weapon that was designed for the very purpose of taking life, as soon as that point is established, the burden of proof changes, and the burden then rests upon the defendant. And, if there is not proof to show that the act was justifiable, or to show that it was excusable, the defendant is not entitled to be acquitted for the lack of evidence on the subject of justification or of excuse. Where voluntary killing with a gun is fully proved, and some evidence is offered tending to show a justification or an excuse, if there is not a preponderance of evidence in favor of justification or excuse, the defense is not made out." And a similar charge was given in *State v. Conally*, 3 Or. 69.

In *State v. Gray*, 46 Or. 24, 79 Pac. 53, the court, by implication, held that it would be error to instruct the jury to the effect that the burden of showing that the killing was in self-defense was imposed upon the defendant.

In *Rice v. State*, 51 Tex. Crim. Rep. 255, 103 S. W. 1156, the trial court charged the jury as follows: "And, in this connection, you are instructed that, unless you believe from the evidence beyond a reasonable doubt that the defendant did not act in his own self-defense as above defined, then you will give him the benefit of the doubt and acquit him." On appeal it was held that this charge either shifted the reasonable doubt upon the defendant, or it was absolutely unintelligible and confusing; and therefore such a charge was error. While it is true that the language of the charge is somewhat confusing, it is difficult to see how it shifts any question of reasonable doubt onto the defendant.

The rule in Alabama.

In Alabama, where the cases are very numerous, the general rule is that, where the killing is proven or admitted, the burden of proving self-defense is upon the defendant; but the cases are not entirely harmonious in regard to the burden of proving the different elements of self-defense, nor the degree of proof necessary. The cases are so numerous and so little in accord with the other cases that they have been grouped separately.

Thus, in *Lawson v. State* (Ala.) 46 So. 259, it was held that the burden of proving self-defense is upon the defendant, and, unless the jury are satisfied from the evidence that the plea is sustained, the defense fails, as a reasonable doubt as to whether the plea of self-defense is sustained or not is not sufficient to justify an acquittal.

And in *Etheridge v. State*, 141 Ala. 29, 37 So. 337, it was held not error to refuse to charge: "The burden of proof is upon the state to prove to the jury from the evidence, beyond a reasonable doubt, that the defendant was not free from fault in bringing on the difficulty, before the defendant

will be precluded from invoking the doctrine of self-defense."

But in *Henson v. State*, 112 Ala. 41, 21 So. 79, it was held error not to charge the jury that, if "all the evidence raises in the minds of the jury a reasonable doubt as to whether he acted in self-defense, the defendant should be acquitted." And this decision was cited with approval, and followed, in *Ragsdale v. State*, 134 Ala. 24, 32 So. 674.

In *Lewis v. State*, 120 Ala. 339, 25 So. 43, it was held that a charge was correct which told the jury that the burden of proof of self-defense was upon the defendant, and, to entitle him to a discharge, it must be proved by a sufficient amount of evidence to raise at least a reasonable doubt of his guilt.

Where the defendant was under no obligation to retreat, and there was no evidence that he was at fault in bringing on the quarrel, it was held, in *Harris v. State*, 96 Ala. 24, 11 So. 255, that the trial court should have charged the jury to the effect that, if they entertained a reasonable doubt as to whether the defendant acted upon a reasonable belief that he was acting under impending necessity, or acted before such necessity arose, he was entitled to an acquittal.

In many decisions it is held that the burden is upon the defendant to show certain of the elements of self-defense, while the burden of showing absence of freedom from fault is upon the state; but in none of these does the court state the extent of proof required.

In one of the leading cases in this state, *Cleveland v. State*, 86 Ala. 1, 5 So. 426, the court laid down the following general rules in regard to the burden of proof of self-defense: "The manslayer must be free from fault in bringing on or provoking the difficulty. The onus of disproving this freedom from fault is not on the defendant. He must be exposed to present, impending peril,—that is, he must be presently exposed to imminent danger of losing his life, or of suffering grievous bodily harm, or must reasonably appear to be so, from which he has no other reasonable mode of escape, without apparently increasing the imminence of his peril. The burden of proving this is on him." And the doctrine of the *Cleveland Case* as to burden of showing pressing necessity and inability to retreat was followed in the following cases: *Lewis v. State*, 88 Ala. 11, 6 So. 755; *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96, 8 So. 98; *Stitt v. State*, 91 Ala. 10, 24 Am. St. Rep. 853, 8 So. 669; *Springfield v. State*, 96 Ala. 81, 38 Am. St. Rep. 85, 11 So. 250; *Keith v. State*, 97 Ala. 32, 11 So. 914; *Webb v. State*, 100 Ala. 47, 14 So. 865; *Holmes v. State*, 100 Ala. 80, 14 So. 864; *Naugher v. State*, 105 Ala. 26, 17 So. 24; *McBryde v. State* (Ala.) 47 So. 302.

And the rule of the *Cleveland Case* to the effect that the burden of disproving freedom from fault is not upon the defendant was followed in *Keith v. State*, supra; *McDaniel v. State*, 76 Ala. 1; *Gibson v. State*, supra; 19 L.R.A. (N.S.)

Dent v. State, 105 Ala. 14, 17 So. 94; *Naugher v. State*, supra; *Howard v. State*, 110 Ala. 92, 20 So. 365; *Andrews v. State* (Ala.) 48 So. 858.

To the same general effect was the decision in *Wilkins v. State*, 98 Ala. 1, 13 So. 312, where the court said: "When the state proved the intentional killing of deceased by defendant with a deadly weapon, the burden rested on the defendant to show a pressing, imperious necessity to take life in self-defense, unless the fact arose out of the evidence produced against him, to prove the homicide. If this were shown, the burden was then on the state to show that defendant was in fault in provoking the difficulty, which, being established, was a full answer to the plea of self-defense. The law does not presume such provocation, so as to impose the burden of its disproof on defendant."

So, in *Linehan v. State*, 113 Ala. 70, 21 So. 497, it was held that the burden was upon the defendant to show the various elements of self-defense, unless the evidence which proved the homicide also proved its excuse or justification. The court said: "The burden of proof that defendant was not free from fault in bringing on the difficulty is never on the state until the ingredients of self-defense have been established by the defendant."

And in *Wright v. State*, 148 Ala. 596, 42 So. 745, it was held that the burden was not on the state to show that the defendant was not free from fault in bringing on the difficulty until the defendant had shown that he was in imminent peril of life and great bodily harm, and could not have retreated without increasing his peril. To the same general effect was the earlier decision in *Pugh v. State*, 132 Ala. 1, 31 So. 727.

The rule as to the burden of proof is thus stated in *Brown v. State*, 83 Ala. 33, 3 Am. St. Rep. 685, 3 So. 857: "The use of a deadly weapon, creating the presumption of malice, shifts on the defendant the burden of repelling such presumption, when it is not rebutted or overcome by the evidence which proves the killing. The onus to prove a present pressing necessity, real or apparent, to take life, is on the defendant. But, when he shows this, the prosecution may avoid its effect by proving that the defendant was at fault in bringing on the difficulty, or could have reasonably escaped. The state holds the affirmative of these negative propositions of the plea of self-defense." This decision is criticized in *Gibson v. State*, supra, upon the ground that the burden was upon the defendant to show that he could not reasonably retreat; but the *Gibson Case* reasserted the doctrine that the burden was upon the state to show that the defendant was at fault in bringing on the difficulty, and not on the defendant to prove that he did not provoke it.

So, there are numerous other Alabama cases which hold generally that the burden of proof as to self-defense is upon the defendant: *Smith v. State*, 86 Ala. 28, 5 So.

478; *Garrett v. State*, 97 Ala. 18, 14 So. 327; *Roden v. State*, 97 Ala. 54, 12 So. 419; *Miller v. State*, 107 Ala. 40, 19 So. 37; *Howard v. State*, *supra*; *Compton v. State*, 110 Ala. 24, 20 So. 119; *Hendricks v. State*, 122 Ala. 42, 26 So. 242; *Kilgore v. State*, 124 Ala. 24, 27 So. 4; *Stewart v. State*, 133 Ala. 105, 31 So. 944; *Mann v. State*, 134 Ala. 1, 32 So. 704; *Allen v. State*, 146 Ala. 61, 41 So. 624, second trial 148 Ala. 588, 42 So. 1006; *Kennedy v. State*, 147 Ala. 687, 40 So. 658; *Robinson v. State* (Ala.) 45 So. 916.

In *De Arman v. State*, 71 Ala. 351, it was held that the burden of proving that a homicide was committed in self-defense rests on the defendant, unless it can be deduced from the facts and circumstances which prove the killing. And to the same effect was the decision in *Hadley v. State*, 55 Ala. 31.

So, in *Bluett v. State*, 151 Ala. 41, 44 So. 84, it was held that the burden was upon the defendant, unless the evidence which proved the homicide proved also the self-defense. And to the same effect was the decision in *McCurley v. State* (Ala.) 30 So. 1022.

Self-defense when shown by evidence of prosecution.

In many of the cases it is stated or suggested that self-defense may be shown by the evidence either of the prosecution or defendant. In no case is it held that the defendant must introduce the evidence which supports his case, and in numerous cases it has been held that instructions to that effect are erroneous.

Thus, in *Crawford v. State*, 12 Ga. 149, it was held to be fatal error to charge that the prisoner is required to produce evidence of justification on his part, as the mitigation or justification may as well be shown by the evidence on the part of the state as by proof introduced by the prisoner. The court said that, if the defense was made out by the witnesses on the part of the prosecution, then the defendant need not call any; but, if not, then the defendant must call witnesses and make out his defense by proof.

And in *People v. Lemperle*, 94 Cal. 45, 29 Pac. 709, it was held that the jury may look to testimony introduced by the prosecution as well as that introduced by the defendant for evidence of mitigating circumstances, or to justify or excuse the act.

And in *Alexander v. People*, 96 Ill. 96, it was held that any charge which put upon the defendant the burden of introducing evidence to prove justification was erroneous; if the evidence of the prosecution raises a reasonable doubt of the defendant's guilt, it is sufficient. And to the same effect was the decision in *Kipley v. People*, 215 Ill. 358, 74 N. E. 379.

So, in *State v. Castle*, 133 N. C. 769, 46 S. E. 1, it was held that the trial judge should have told the jury that the defendant could rely upon the state's evidence for acquittal upon the ground of justification, and 19 L.R.A. (N.S.)

that it was not essential that he himself should introduce the evidence showing justification.

And in *State v. Moss*, 77 S. C. 391, 57 S. E. 1098, it was held that, if the accused conceived that the state had made proof of self-defense for him, he might adopt and rely on that proof as a discharge of his burden to make the proof; but the burden did not on that account shift from the defendant to the state.

So, in *Richardson v. State*, 9 Tex. App. 612, it was held error to charge that "it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the act," as the proof, in order to convict, is to be found in the evidence adduced on the trial, from whatsoever source it may come.

And in *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93, it was held that a charge in these words, "every homicide is presumed to be committed with malice aforethought, and it devolves upon the prisoner to prove the circumstances which excuse the act," was too broad and unrestricted, and implied that the defendant must himself furnish the evidence. It should also have contained the important addition, "unless they arise out of the evidence produced against him." And to the same general effect was the decision in *Head v. State*, 44 Miss. 731.

Duty of state affirmatively to prove that killing was not in self-defense.

In some decisions it has been expressly held that the state need not, by affirmative evidence, prove the negative proposition that the killing was not in self-defense, to establish its case.

Thus, in *Blanton v. State*, 52 Fla. 12, 41 So. 789, it was held that a charge was erroneous which required the state to prove expressly, by affirmative evidence, that the homicide was without justification. The court said: "The burden is upon the state in every prosecution for crime to establish by proof, beyond a reasonable doubt, every material element of the crime charged; and in a prosecution for murder in the first degree it must prove, beyond a reasonable doubt, that the defendant slew the deceased unlawfully and from a premeditated design to effect his death, and, if these material facts are established by the proof, of necessity it will have been proved that such killing was not justifiable. The burden upon the state is to prove the affirmative proposition; the negative proposition, flowing out of it as a necessary corollary, it does not have to prove by express or affirmative proof, as the charge in question erroneously requires it to do." And this case was followed by *Maloy v. State*, 52 Fla. 101, 41 So. 791.

So, also, in *State v. Cross*, 68 Iowa, 180, 26 N. W. 62, it was held that, where no evidence introduced by the state tended to show that the homicide was justifiable, it would have been error to instruct that the

burden was upon the state to prove the negative proposition.

And in *People v. Shanley*, 49 App. Div. 56, 63 N. Y. Supp. 449, it was held that the people, having established the commission of a crime, might rest upon the presumption that the accused person is sane; and, in the absence of proof upon the subject, such presumption will stand as a fact established; and the same rule must be applied to any criminal case where the evidence tends to exonerate the defendant from the consequences of a given act.

The refusal to give an instruction which put upon the state the burden of negating beyond a reasonable doubt defensive matter like self-defense, the burden of affirmatively showing which is upon the defendant, was held proper in *Padgett v. State*, 40 Fla. 451, 24 So. 145, and in *Alvarez v. State*, 41 Fla. 532, 27 So. 40.

And in *Kent v. People*, 8 Colo. 563, 9 Pac. 862, the court said: "The public prosecutor cannot be compelled to search for and put in evidence all the facts connected with the transaction, or exculpatory facts in the prisoner's favor. The policy of the law, as evinced by the presumption of innocence and the doctrine of reasonable doubt, would require the public prosecutor to introduce such proof as will give a fair account of the transaction. This being done, it devolves upon the defendant to produce in evidence such matters of mitigation, justification, or excuse, if any such exist, as may tend to explain his action and show the necessity thereof; otherwise a verdict of guilty must necessarily be returned against him."

In *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200, it was held error to charge that, when the fact of the killing was established, it devolved upon the defendant to excuse the killing, as the true rule was that the jury must find the defendant guilty as charged, beyond a reasonable doubt, upon all of the evidence of the case.

But to the contrary are the Iowa cases cited and sufficiently set out above.

SOUTH CAROLINA SUPREME COURT.

GEORGE CONTOS et al., Appts.,
v.

THOMAS F. JAMISON et al., Respts.

(81 S. C. 488, 62 S. E. 867.)

Tenant — Injury to property — Imputed negligence of landlord.

Tenants are not precluded from holding one who causes the fall of a wall of the building occupied by them through negligent excavation of the adjoining lot liable for the injury thereby caused to their goods, by the fact that one of the proximate and

efficient causes of the falling of the wall was negligence of their landlord.

(November 16, 1908.)

APPEAL by plaintiffs from a judgment of the Common Pleas Circuit Court for Greenville County in defendants' favor in an action brought to recover damages for injuries to plaintiffs' goods, through alleged negligent excavation on an adjoining lot. Reversed.

The facts are stated in the opinion.

Messrs. Sirrine & Charles, for appellants:

Persons who stand in the relation of joint tortfeasors may be sued separately by the injured party.

6 Thomp. Neg. § 7435; Pom. Code Remedies, 4th ed. § 208; *Larson v. Metropolitan Street R. Co.* 110 Mo. 234, 16 L.R.A. 331, 33 Am. St. Rep. 439, 19 S. W. 416; *Gildersleeve v. Hammond*, 109 Mich. 431, 33 L.R.A. 50, 67 N. W. 519; *Bonaparte v. Wiseman*, 89 Md. 12, 44 L.R.A. 484, 42 Atl. 918; *Davis v. Summerfield*, 131 N. C. 352, 92 Am. St. Rep. 781, 42 S. E. 818.

Messrs. B. A. Morgan and Cothran, Dean, & Cothran, for respondents:

The landlord owes no obligation to the tenants to protect the premises from injuries to which they are liable by reason of

Case Note. — *Is the landlord's negligence in relation to the premises imputable to the tenant, or vice versa, so as to prevent a recovery from a negligent third person?*

An extensive search fails to disclose any other cases where, as in *CONTOS v. JAMISON*, it was sought to impute the negligence of the landlord in relation to the premises to the tenants, so as to prevent the latter from recovering against a third person who was also negligent; and only one case has been found which deals with the other side of the question,—that is, whether the negligence of the tenant may be imputed to the landlord, so as to prevent his recovery. This case is *Boehm v. Bethlehem*, 4 Pa. Super. Ct. 385, where an action was brought by the owner of a building against a borough for damages resulting from an overflow caused by a negligent obstruction of a sewer. and it was held, *obiter*, that, even if the plaintiff's tenants had contributed to the obstruction by throwing refuse in the sewer, it would not relieve the defendants from liability, or prevent the owner of the building from sustaining his action.

For cases dealing with the question whether the negligence of a bailee may be imputed to the bailor, in an action by the latter against a third person for destruction of property, see case note to *Sea Ins. Co. v. Vicksburg, S. & P. R. Co.* 17 L.R.A. (N.S.) 925.

excavations upon an adjoining lot by a third person.

18 Am. & Eng. Enc. Law, p. 217; Brewster v. DeFremery, 33 Cal. 341; Sherwood v. Seaman, 2 Bosw. 127; Ward v. Fagin, 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738; 1 Thomp. Neg. § 1135; 21 Am. & Eng. Enc. Law, pp. 485, 497; Marble v. Worcester, 4 Gray, 395; Bailey v. Gray, 53 S. C. 503, 31 S. E. 354; Kansas City Northwestern R. Co. v. Schwake, 70 Kan. 141, 68 L.R.A. 683, 78 Pac. 431, 3 A. & E. Ann. Cas. 118; Gildersleeve v. Hammond, 109 Mich. 431, 33 L.R.A. 50, 67 N. W. 519.

Jones, J., delivered the opinion of the court:

The plaintiffs occupied a storeroom known as 210 North Main street, Greenville, South Carolina, as lessees of W. C. Gibson, owner. Defendant Carrie V. Cauble, as guardian and agent, owned the lot adjacent to the south side and employed the defendants Jamison & Morris as contractors to erect certain buildings thereon. On August 8, 1908, while said contractors were excavating close to the side wall of the store occupied by plaintiffs, the wall collapsed and fell, destroying the goods and property of plaintiffs in their storeroom. This action was brought to recover damages, actual and punitive, for the destruction of their property, alleged to have resulted from the grossly negligent and reckless manner in which the work of excavating was done. A nonsuit was granted as to the Cauble defendants, and they are now eliminated from the case. The defendants Jamison & Morris answered, setting up, besides a general denial, that plaintiffs and W. C. Gibson, the owner, had notice of the progress of the excavation and of the manner in which it was done and of the character of the soil, and made no objection to the progress and manner of the work, and did nothing to protect said wall, which negligence on their part contributed as a proximate cause to the injury. The suit resulted in a verdict and judgment for defendants.

The exceptions of plaintiffs-appellants to the admission of certain testimony do not require any extended notice and cannot be sustained. The testimony referred to had been previously admitted without objection, and had some relevancy to the question whether defendants were wantonly negligent.

The vital question raised by the appeal relates to the instruction given to the jury. The court, in giving certain instructions requested by defendants, and in declining to give certain instructions requested by plaintiffs, in the general charge and in the special 19 L.R.A. (N.S.)

charge when the jury returned to the courtroom for further instructions on that point, impressed upon the jury that, if the negligence of the owner, Gibson, was one of the proximate and efficient causes of the falling of the wall under the circumstances, the plaintiffs could not recover. This we think was erroneous and prejudicial. The general law is well settled that a proprietor excavating on his own premises is liable for damages done to the adjacent owner's soil if in its natural condition, whether damage results from negligence or not; but, when buildings or other improvements are erected upon the soil, and its natural condition is thus altered, no action lies against such excavator except upon allegation and proof of negligence. Bailey v. Gray, 53 S. C. 518, 31 S. E. 354. There was such allegation in this case, and testimony tending to establish negligence proximately causing injury to plaintiffs' property; but under the charge plaintiffs, as lessees, were denied right of recovery if the landlord Gibson's negligence proximately contributed to the injury, thus imputing to the lessees the negligence of the lessor. No authority has been cited for such a view, and we have found none. The supreme court of Indiana, in Knightstown v. Musgrove, 116 Ind. 121, 9 Am. St. Rep. 827, 18 N. E. 452, approved in Louisville, N. A. & C. R. Co. v. Creek, 130 Ind. 143, 14 L.R.A. 736, 29 N. E. 482, declares: "Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other in respect to the matter then in progress as that, in contemplation of law, the negligent act of the third person was, upon the principles of agency or co-operation in a common or joint enterprise, the act of the person injured." In Koplitz v. St. Paul, 86 Minn. 373, 58 L.R.A. 75, 90 N. W. 794, the supreme court of Minnesota declared that "negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it." These quotations are made the basis of the text in 29 Cyc. Law & Proc. p. 542. In Watson v. Southern R. Co. 66 S. C. 50, 44 S. E. 375, this court refused to impute to a child *non sui juris* the contributory negligence of the child's parent or guardian. There is nothing in the mere relation of lessor and lessee which should affect a lessee without fault himself with the negligence of the lessor. There is no agency nor co-operation in a common enterprise, nor power of lessee to control, applicable

here, which should excuse the negligence of others. There is a privity between the lessee and the lessor in the lessee's right of possession, but such privity cannot excuse the negligence of another, whether combined with that of the lessor or not. The lessor, Gibson, is not a party in this case, and it was improper to confuse the case with the question of his contributory negligence. The question was: Did the negligence of the defendants Jamison & Morris injure plaintiffs as alleged, and, if so, were the plaintiffs themselves guilty of contributory negligence, excusing the defendants from liability?

The judgment of the Circuit Court is reversed, and the case remanded for a new trial.

TEXAS SUPREME COURT.

GULF, COLORADO, & SANTA FÉ RAILWAY COMPANY, Plff. in Err.,

v.

MRS. ELLIS OVERTON.

(— Tex. —, 110 S. W. 736.)

Damages — mental suffering — injury to relative.

1. One accompanying her invalid sister on a railroad journey, who does not make the contract for the transportation, cannot recover damages for mental suffering due to the physical suffering of the invalid because of the wrongful acts of the carrier in its manner of placing her on the train and neglecting to assist her off.

Carrier — incivility to passenger — inability.

2. A passenger on a railroad train may recover damages for inconvenience and injury suffered by failure of the carrier to exercise toward her that degree of care which is due to a passenger.

(May 20, 1908.)

Case Note. — Right to recover for mental suffering on account of another's mental or physical suffering.

This note, as suggested by the title, is confined to those cases which involve the right of the plaintiff to recover for mental anguish because of the suffering, mental or physical, of another,—that is, because of sympathy with the suffering of another; and it does not include cases which involve the right to recover for mental anguish for the death of another under statutes giving a right of action for wrongful death. Cases involving the right to recover for mental anguish for wrongs to another which tend to attach disgrace or publicity to the plaintiff or his family, such as seduction, assault, libel, etc., have also been excluded.

In GULF, C. & S. F. R. Co. v. OVERTON it 19 L.R.A. (N.S.)

ERROR to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming a judgment of the District Court for Johnson County in plaintiff's favor in an action brought to recover damages for breach of defendant's duty as a passenger carrier. Reversed.

The facts are stated in the opinion.

Messrs. Terry, Cavin, & Mills, Brown & Lomax, and Charles K. Lee, for plaintiff in error:

Plaintiff could not recover damages for mental suffering because she witnessed mistreatment of and the consequent suffering of her sister.

Watson, Damages for Personal Injuries, § 406; 8 Am. & Eng. Enc. Law, pp. 664, 665; Missouri P. R. Co. v. Martino, 2 Tex. Civ. App. 635, 18 S. W. 1066, 21 S. W. 781; Pacific Exp. Co. v. Black, 8 Tex. Civ. App. 363, 27 S. W. 830; Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335, 28 S. W. 96; St. Louis Southwestern R. Co. v. Gregory (Tex. Civ. App.) 73 S. W. 28; Gulf, C. & S. F. R. Co. v. Reed (Tex. Civ. App.) 22 S. W. 283; Spierier v. Ott, 116 La. 1087, 7 L.R.A. (N.S.) 518, 114 Am. St. Rep. 587, 41 So. 323; Covington Street R. Co. v. Packer, 9 Bush, 455, 15 Am. Rep. 725; Hutchinson v. Stern, 115 App. Div. 791, 101 N. Y. Supp. 145; Keyes v. Minneapolis & St. L. R. Co. 36 Minn. 290, 30 N. W. 889.

Messrs. S. C. Padelford and D. W. Odell for defendant in error.

Brown, J., delivered the opinion of the court:

The honorable court of civil appeals refers for a statement of the facts in this case to Gulf, C. & S. F. R. Co. v. Coopwood (Tex. Civ. App.) 96 S. W. 102, and from the facts stated in that case we make the following condensed statement: Mrs. M. J. Coopwood was a widow whose family con-

was sought to make the mental anguish suffered because of another's suffering an element of damages in an action which also embraced direct personal injury. A distinction might be drawn between the question thus raised and the question, Can mental anguish be the basis of the action? As a practical matter, however, this distinction does not appear to have been made.

The weight of authority is to the effect that one cannot recover for mental suffering caused by sympathy with the suffering of another.

Thus, in Western U. Teleg. Co. v. Cooper 71 Tex. 507, 1 L.R.A. 728, 10 Am. St. Rep. 722, 9 S. W. 598, in an action by a husband for the failure of a telegraph company to deliver a message summoning a physician to attend his wife, the court said: "It is impossible to see upon what principle the

sisted of an unmarried daughter, Miss Minnie, a granddaughter, and the appellee, who was a widow and resided with her mother. Mrs. Coopwood, with the members of her family, were on their way to San Angelo with Miss Minnie, who was quite sick, and when they arrived at the depot of the plaintiff in error in Brownwood Miss Minnie was placed in a chair, she being unable to walk. Mrs. Coopwood purchased tickets for all of the party from Brownwood to San Angelo, and paid the regular fare therefor. When the train arrived at Brownwood the porter and brakeman came into the depot, and Mrs. Coopwood explained to them that her daughter was unable to walk, and requested them to carry her into the car, which they agreed to do. About

this time Mrs. Overton stated in the presence of the conductor and the porter that she would go onto the train and secure a seat for her sister. "The porter and brakeman picked up the chair Miss Minnie Coopwood was on and carried her out towards the engine and baggage car, with the intention of putting her in the baggage car. Miss Minnie Coopwood asked them not to put her in the baggage car, and cried out to her mother to stop the porter and brakeman and not let them put her in the baggage car. Mrs. Coopwood called to them and asked them not to put her daughter in the baggage car, but they proceeded towards the baggage car, and said that was the place for her if she was sick. Miss Minnie Coopwood begged not to be put on the baggage

husband can claim damages for injury to his feelings. His suffering could only be from alarm and sympathy for his wife's suffering. His distress is merely a reflection from her distress, and that might be very considerable; but it is too remote and consequential. She is allowed to recover in this suit, or rather he is, under the forms of law, on account of her injuries of body and mind. To allow him damages for the same injuries would be to allow two recoveries upon the same cause of action. We know of no authority that would justify such a conclusion. The person who suffers the injuries proximately resulting from the wrong done, and such person alone, is entitled to compensation, except in cases where death results, and the cause of action is made to survive to the relatives by virtue of a statute. The husband can sue for such injuries to his wife, but he cannot recover on his own account for his anxiety and sympathy."

And in *Woodstock Iron Works v. Stockdale*, 143 Ala. 550, 39 So. 335, 5 A. & E. Ann. Cas. 578, the court said: "Under no theory could the plaintiff recover for the mental suffering of himself caused by the sickness and suffering of his wife, as the right to recover for mental suffering resulting from bodily injuries is restricted to the person who has received the bodily hurt. Mental distress caused by sympathy for another's suffering is not a recoverable element of damage."

So, in *Bube v. Birmingham R. Light & P. Co.* 140 Ala. 276, 10 Am. St. Rep. 33, 37 So. 285, in an action to recover damages for personal injuries inflicted on the son of the plaintiff, it was held that the father could not recover damages for mental suffering on account of the injuries received by his son. And this decision was cited with approval, and followed, in *Reaves v. Anniston Knitting Mills (Ala.)* 45 So. 702.

And in *Western U. Teleg. Co. v. Strate-meier*, 6 Ind. App. 125, 32 N. E. 871, it was held that it is not proper to consider as a substantive element of damages any mental distress arising out of sympathy with the sorrow of others.
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So, in *Pullman Palace Car Co. v. Trimble*, 8 Tex. Civ. App. 335, 28 S. W. 96, the court said: "We think the complaining party must be restricted to the mental anguish which emanates from the wrong done himself, and not extended to that which he may experience in contemplating the sufferings of others who may be injured at the same time, however near to him they may be. Were the rule otherwise, each passenger in a railroad wreck might claim the right to recover, not only for the distress of mind which arose from his own injuries, but also for that which he sustained from contemplating the mangled condition of his fellow passengers. And even one who sustained no physical injury himself might be allowed to recover a large verdict for the anguish he endured while witnessing the bleeding forms of his companions and relatives, and listening to their heartrending cries."

And in *Gilligan v. New York & H. R. Co.* 1 E. D. Smith, 453, it was held that, in an action for alleged loss of services of the plaintiff's son, who was injured by being run over by a railroad car, the pain and mental anguish of the parent was to be wholly excluded in estimating the damages.

So, a recovery was denied the plaintiff in the following cases, for mental anguish because of the physical or mental sufferings of another under the circumstances noted, upon the ground that such mental anguish was not a proper element of damages: *Pullman Palace Car Co. v. Trimble*, supra (fright and distress of six-year-old nephew negligently carried with plaintiff beyond the proper station); *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830 (physical suffering of sick wife because of negligent delay in forwarding medicine); *Hyatt v. Adams*, 16 Mich. 180, and *Stone v. Evans*, 32 Minn. 243, 20 N. W. 149 (physical suffering of wife through malpractice of the defendant physician); *Missouri P. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781, (physical and mental suffering of wife injured by negligence of defendant); *Covington Street R. Co. v. Packer*, 9 Bush, 455,

car, and about this time some man, a stranger, walked up and told the porter and brakeman to stop and not put her in the baggage car, to which one of them replied, 'Boss, there ain't enough room in the other car for her,' and the stranger remarked, 'Make the passengers make room for her.' Miss Minnie was then put into a day coach, where she remained in the care of her mother until San Angelo was reached. Shortly before the train got to San Angelo Mrs. Coopwood told the conductor that she wanted him to help them off just as soon as the depot was reached, and the conductor said he would when he got through helping the other passengers off the train. As the train was running into San Angelo Miss Coopwood said to the conductor: 'Please help me off now. I am very sick and suffering.' And Mrs. Coopwood also called to him before he got to the car door and asked him to help them off. To which the conductor made no reply, or, if so, it was not heard by Mrs. Coopwood. When the train stopped at San Angelo, and while the conductor was assisting other passengers off, Mrs. Coopwood asked him to help her daughter off the train, that she was suffering excruciating pain in her lungs, and that she wanted to get her to a house where she could have her taken care of and give

her medical aid. The conductor said that when he got through helping the passengers off he would help her off; but, according to Mrs. Coopwood's statement, she did not see him any more, and after all the passengers were off the train except herself and daughters the brakeman came in the coach, and said the conductor had gone home and the train would have to be switched down into the yards. After this a negro porter came in the car, and she asked him to tell the conductor to help them off the train, and he made no reply, but shut the door and left. John Abney, a coach cleaner in the employ of appellant, with whom Mrs. Coopwood was acquainted, next came into the car, and he said they would have to switch the coach off of that track. The coaches were then switched down into the yards probably 100 yards distant from the depot, and John Abney ordered a carriage, and Mrs. Coopwood and her daughters were put in it, and they left, seeking a hotel. The principal hotel of San Angelo had been previously burned, a fact known to appellant's conductor at this time. The passengers who disembarked from the train before Mrs. Coopwood and daughters, who were able to do so, had secured lodging in the hotels, and Mrs. Coopwood and her daughters were compelled to drive to three different places before accom-

15 Am. Rep. 725 (physical suffering of son injured by negligence of the defendant railroad company); *Harford County v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739 (physical suffering of son injured by defective highway).

In *Black v. Carrollton R. Co.* 10 La. Ann. 33, 63 Am. Dec. 586, it was held that, in estimating damages sustained by a father for injuries to an infant son, it was error for the jury to take into view the shock to the paternal feelings and the solicitude and anxiety of the parents for the sufferer.

In some cases of this character a recovery has been denied because the mental anguish could not have been within the contemplation of the parties.

Thus, in an action by a husband to recover for mental anguish because of the failure of a telegraph company to deliver to him a telegram from his wife announcing the fact that she had missed her train and would not arrive at her home until the following morning, it was held, in *Dayvis v. Western U. Teleg. Co.* 139 N. C. 79, 51 S. E. 898, that the admission of evidence of privations of the wife and her children would be reversible error.

And in *Jones v. Western U. Teleg. Co.* 70 S. C. 539, 50 S. E. 198, it was held that mental anguish because of the suffering of the sender's wife and child could not be recovered by reason of the negligent failure of the telegraph company to send a message requesting merely that the sender be met at a certain place and time, as such 19 L.R.A. (N.S.)

suffering could not naturally and reasonably have been anticipated from a failure to deliver the message.

No recovery can be had by a mother who was carried beyond her destination with a sick child for mental anguish because of the increased suffering of the child through lack of contemplated medical attendance, where such a result could not have been contemplated by the railroad company. *Chicago, R. I. & T. R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247.

A father cannot recover from a telegraph company for mental anguish in witnessing the suffering of his child because of failure of the company promptly to deliver a telegram summoning the doctor to relieve him,—at least where there is nothing on the face of the telegram to apprise the company that such a claim will be the result of its negligence. *Western U. Teleg. Co. v. Reid*, 120 Ky. 231, 70 L.R.A. 289, 85 S. W. 1171.

In a few cases it has been held that mental anguish suffered because of the suffering of another is a proper element of damages.

Thus, in *Gosa v. Southern R. Co.* 67 S. C. 347, 45 S. E. 810, it was held no error on the part of the trial court to give a ruling to the effect that one person may recover damages for mental anguish caused by injuries inflicted upon another.

And in *Western U. Teleg. Co. v. Cavin*, 30 Tex. Civ. App. 152, 70 S. W. 229, it was held that a father could recover damages for

modations could be secured. Mrs. Coopwood and her daughters remained in the car after the train reached San Angelo before they secured a carriage and left it probably a half hour or longer. She and her daughter Mrs. Overton were physically unable to carry Miss Coopwood on and off the train, and this fact, as well, also, as the helpless condition of Miss Coopwood, was well known to appellant's conductor and other employees in charge of the train upon which they were traveling." This suit was brought "to recover of the defendant damages for the physical and mental suffering sustained by Mrs. Overton on account of the alleged wrongful and negligent conduct of the servants in control of one of appellant's passenger trains upon which she was a passenger, at the time of its arrival at Brownwood and thereafter at the town of San Angelo. She also, in addition, seeks to recover for mental suffering sustained by her on account of the alleged negligent and wrongful treatment of her invalid sister, who was partially in her charge and also in the charge of her mother, Mrs. Coopwood, when passengers at Brownwood and at San Angelo." The case was tried before a jury, and a verdict and judgment rendered in favor of the appellee for the sum of \$500.

In his work on personal injuries Mr. Wat-

son states the general rule governing this class of cases thus: "There can be no recovery for such mental suffering as merely results from sympathy for another's mental or physical pain, the right of action in such cases being restricted to the person who has directly sustained the injury." Watson, *Damages for Personal Injuries*, § 406; *Western U. Teleg. Co. v. Cooper*, 71 Tex. 512, 1 L.R.A. 728, 10 Am. St. Rep. 772, 9 S. W. 598. There are numerous exceptions to the general rule stated above, but the facts as found by the court of civil appeals do not bring this case within any one of the exceptions. Mrs. Overton was not a party to the contract for carrying Miss Minnie Coopwood, nor did the railroad company, by undertaking to transport the sister, place itself under any duty to Mrs. Overton, and there can be no negligence as to Mrs. Overton, unless there was some duty which was due from the company to her. The honorable court of civil appeals rested its decision upon the case of *Gulf, C. & S. F. R. Co. v. Coopwood*, which was a companion case to this. The application for writ of error in that case was denied because Mrs. Coopwood was the mother of the injured party, and in control of her at the time, and in exercising that control entered into a contract with the railroad company for the transportation of

increased mental anguish incurred while watching the suffering of his sick child, when such increased suffering was occasioned by the negligent failure of the telegraph company promptly to deliver a message addressed by the parent to a physician directing him to come to the sick child at once.

In *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419, it was held that the mental anguish of the plaintiff in seeing his wife suffer because of the failure of a telegraph company promptly to send a message summoning a physician was a proper element of damages. And to the same effect was the decision in *Western U. Teleg. Co. v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. 148.

In some cases the decision upon this question is somewhat vague.

Thus, in *Gulf, C. & S. F. Teleg. Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689, the court said: "The charge of the court properly placed the right of the father to recover upon the existence of his own distress, and not as compensation for the sufferings or death of the child,—any further, at least, than the sufferings of the child were the inducement to his own distress."

And in *Gulf, C. & S. F. R. Co. v. Coopwood* (Tex. Civ. App.) 96 S. W. 102, a mother brought suit against a railroad company for wrongful treatment of an invalid daughter by the servants of the company, and the company or its servants knew of the relationship at the time that

the tickets were bought. The court held that the wrongful and negligent acts of the carrier's servants toward the sick and dependent daughter was a violation of the duty imposed by law upon the carrier, and the carrier would be held liable in damages for the mother's own mental anguish emanating therefrom, but would not be liable for such mental anguish as may have been caused by the mother's sympathy for her child. The court said: "Her recovery must be restricted to such mental anguish as may have been caused her as a direct result of such wrongful or negligent acts independent of the child's suffering." The distinction attempted to be made by the court in this case seems to be rather finely drawn, and it is difficult to see how the mother, under the circumstances of the case, could suffer mental anguish because of the treatment of the daughter which would be distinct from the mental anguish suffered because of sympathy with the daughter in her ill-treatment. Attention should be called to the fact that this case arose out of the same facts as did *GULF, C. & S. F. R. Co. v. OVERTON*, but in this case the action was brought by the mother, who had made the contract with the railroad company.

Upon the question of parent's mental anguish as an element of damages at common law for personal tort to minor child, see case note to *Sperier v. Ott*, 7 L.R.A. (N.S.) 518.

her invalid daughter from Brownwood to San Angelo. The acts of the employees of the railroad company and its negligence towards Miss Minnie was a direct violation of the contract with the mother. Therefore this court held, in acting upon the application, that the railroad company owed to Mrs. Coopwood the duty to carry her daughter to San Angelo with that care which was due to a passenger. Mrs. Coopwood's injury resulted from a violation of this contract and a failure to perform that duty.

There is evidence which tends to show that Mrs. Overton suffered some inconvenience and injury from the failure of the railroad company and its employees to exercise that degree of care towards her that was due to a passenger, and for such injury she is entitled to recover. It is therefore ordered that the judgment of the Court of Civil Appeals and of the District Court be reversed, and that this cause be remanded to the District Court for trial in accordance with this opinion.

TEXAS SUPREME COURT.

PETER BURNETT AND WIFE

v.

FORT WORTH LIGHT & POWER COMPANY et al.

(—Tex. —, 112 S. W. 1040.)

Electricity — defective insulation — trespasser — liability.

An electric company which maintains defectively insulated wires over another's roof for violation of a penal ordinance of the municipal corporation is not liable for the death of a boy who, in trespassing upon the roof, comes in contact with the wires and is killed.

(October 28, 1908.)

CERTIFICATION by the Court of Civil Appeals for the Second Supreme Judicial District for the opinion of the Supreme Court of a question arising upon appeal by plaintiffs from a judgment of the District Court for Tarrant County in defendants' favor in an action brought to recover damages for the alleged negligent killing of plaintiffs' son. Answer returned favorable to appellees.

The facts are stated in the opinion.

Note. — As to measure of duty of one maintaining electric wires on another's premises, toward trespasser or licensee on such premises, see case note to *Guinn v. Delaware & A. Teleg. & Teleph. Co.* 3 L.R.A. (N.S.) 988. 19 L.R.A. (N.S.)

Messrs. Booth & Knight, for appellants:

The defendants were guilty of violating the city ordinances, and such violations were the direct and proximate cause of the injuries complained of, for which they are liable.

Bott v. Pratt, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237; *Osborne v. McMasters*, 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543; *Swift & Co. v. Fue*, 66 Ill. App. 651; *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, 58 N. W. 531; *Shellabarger v. Fisher*, 5 L.R.A. (N.S.) 250, 75 C. C. A. 9, 143 Fed. 937; *Texas & P. R. Co. v. Brown*, 11 Tex. Civ. App. 503, 33 S. W. 146; *Missouri, K. & T. R. Co. v. Owens* (Tex. Civ. App.) 75 S. W. 579; *Mexican Nat. R. Co. v. Mussette*, 86 Tex. 708, 24 L.R.A. 642, 26 S. W. 1076; *Lexington R. Co. v. Fain*, 24 Ky. L. Rep. 1443, 71 S. W. 628; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; *Macon v. Paducah Street R. Co.* 110 Ky. 680, 62 S. W. 496; *Geismann v. Missouri-Edison Electric Co.* 173 Mo. 654, 73 S. W. 660.

An electric company violating city ordinances cannot escape liability for injuries occasioned thereby by showing that the person injured was not on his own property, or was not engaged in any special business mission at the time and place he was injured.

Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Gulf, C. & S. F. R. Co. v. Matthews*, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788; *Erb v. Morasch*, 8 Kan. App. 61, 54 Pac. 323; *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 So. 142; *Alabama & V. R. Co. v. Carter*, 77 Miss. 511, 27 So. 993; *Western & A. R. Co. v. Meigs*, 74 Ga. 857; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51; *Schmidt v. Milwaukee & St. P. R. Co.* 23 Wis. 186, 99 Am. Dec. 158; *Blair v. Milwaukee & P. du C. R. Co.* 20 Wis. 254; *Siemers v. Eisen*, 54 Cal. 418; *Davenport, R. I. & N. W. R. Co. v. DeYaeger*, 112 Ill. App. 537; *Wittleder v. Citizens' Electric Illuminating Co.* 47 App. Div. 410, 62 N. Y. Supp. 297; *Davoust v. Alameda*, 149 Cal. 69, 5 L.R.A. (N.S.) 536, 84 Pac. 760, 9 A. & E. Ann. Cas. 847.

Messrs. R. L. Carlock and Capps, Cantey, Hanger, & Short for appellees.

Gaines, Ch. J., delivered the opinion of the court:

This is a certified question for our decision by the court of civil appeals for the second supreme judicial district. The certificate is as follows:

"On January 15, 1908, the judgment in

this case was reversed and the cause remanded in an opinion that day filed by us, a copy of which accompanies this certificate, wherein the case was thus briefly stated: 'A negro boy about twelve years old went with a companion near the same age to the roof of the Dundee building, in Ft. Worth, Texas, passing up a stairway and out through a trapdoor, and was there instantly killed by coming in contact with a live guy wire which had become charged with electricity through the failure of the appellees to comply with one or more of the penal ordinances of the city of Ft. Worth. This suit was brought by the parents of the deceased boy against the appellees to recover damages on account of their failure to observe said ordinances. The court instructed the jury to return a verdict in favor of the appellees, and to this the errors are assigned.'

"Since then the case of *Greenville v. Pitts* (Tex.) 14 L.R.A. (N.S.) 979, 107 S. W. 50, has been decided by your honors and brought to our attention by the appellees, who have filed a motion for rehearing, which is now pending. We are inclined to distinguish this case from the one before us on the ground that the case cited was one of common-law liability, whereas in the one we have to deal with the liability is exclusively statutory; and also, upon closer examination of *Brush Electric Light & P. Co. v. Lefevre*, 93 Tex. 604, 49 L.R.A. 771, 77 Am. St. Rep. 898, 57 S. W. 640, to further distinguish that case on the same ground, since it was there held that the statutory liability should have been eliminated on demurrer; our inclination being, as said in *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51, to treat the ordinance or ordinances relied on as 'a contract with each and every inhabitant of the city,' and, on the alleged trespass feature, to follow *Davoust v. Alameda*, 149 Cal. 69, 5 L.R.A. (N.S.) 536, 84 Pac. 760, 9 A. & E. Ann. Cas. 847. See also *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369.

"But, inasmuch as we entertain serious doubts as to whether this course would finally be sustained by your honors, and as this could not be determined without another trial and appeal, after considerable delay and expense, we deem it advisable to now certify to your honors for decision the question raised by the counter propositions, other than the first, set out and discussed in our opinion above referred to, and particularly by the third counter proposition, which denied liability on the ground 'that the roof of the Dundee building was not a place to which the public had a right to

resort, that, in going out upon said roof, the boy was an intruder or trespasser, and that, from all the circumstances, the appellees could not reasonably have anticipated or expected that some trespasser would go out upon the roof of said building and come in contact with said wire;' that is, Did the court err in instructing a verdict on that ground, the evidence showing that the boy had no business on the roof and had no permission from the owner to be there, although a way of access had been provided by means of a stairway from the street and a trapdoor to the roof?

"For a fuller statement of the question involved, we respectfully refer to our opinion and the briefs of both parties."

In the case of *Greenville v. Pitts*, supra, referred to in the certificate, it was distinctly held that the city was not liable for the injury inflicted in that case, for the reason that the plaintiff went upon the building in pursuit of his own business, without invitation or express permission from the owner thereof. This was in accordance with the ruling in the case of *Brush Electric Light & P. Co. v. Lefevre*, supra, which is also referred to in the certificate. The reasoning of the court upon which that opinion is based is that, since there was not a scintilla of evidence that the awning over which the wires were stretched "had ever been used by any person as a place of resort, either for pleasure or business," therefore the injury could not have been anticipated, and the defendant was not liable. In that case there was an attempt to plead an ordinance making it the duty to keep its wires insulated, but a special demurrer was sustained to the allegation for vagueness of pleading. There is not a suggestion in the opinion in the case that, if the ordinance had been well pleaded, it would have made any difference. It is almost universally held that the violation of a statutory duty is negligence *per se*. But as we understand it this is the difference between negligence at common law, usually a question of fact, and the violation of a statutory duty,—"only this and nothing more." When a plaintiff sues for the neglect of the provisions of a statute or of the ordinance of a city, and proves such violation, and that he has been injured as the proximate cause thereof, he has established the first postulate in his case; that is, the negligence of the defendant. But does this preclude the defendant from showing that he has been guilty of contributory negligence?

We have been unable to find any authority which countenances a contrary doctrine in any of the books. We find nothing in the case of *Clements v. Louisiana Electric Light Co.* supra, to sustain the doctrine. In that

case Clements was employed to go upon the roof of a gallery to make some repairs, and while there, without negligence on his part, came in contact with an electric wire belonging to the defendant company, which was not insulated as required by an ordinance of the city of New Orleans. The defendant, having a right to be upon the roof and not being shown to be guilty of contributory negligence, was held entitled to recover. The case of Davoust v. Alameda, supra, is sufficiently shown by the following part of the headnote: "An electric light company causing the death of a person by negligently leaving a live wire on the ground cannot escape liability because such person was at the time on a path leading across a vacant lot, where the owner had for many years permitted the public to use the path, so that the deceased might be regarded as a licensee." It is evident from this that the point we have under consideration could not have been decided in that case. So in Hayes v. Michigan C. R. Co. supra, it was held, where a person was injured by falling into an excavation along the line of the track of the company, which it had been required to fence by an ordinance of the city, that, "if a railroad company which has been duly required by a municipal corporation to erect a fence upon the line of its road within the corporate limits for the purpose of protecting against injury to persons fails to do so, and an individual is injured by the engine or cars of the company in consequence, he may maintain an action against the company and recover, if he establishes that the accident was reasonably connected with the want of precaution as a cause, and that he was not guilty of contributory negligence."

On the other hand, the doctrine is laid down in England that a person who sues for damages for an injury resulting from the failure of defendant to comply with a statutory duty cannot recover if it be shown that he is guilty of contributory negligence. "That a person guilty of contributory negligence should not recover, even when the injury arises from neglect to observe a statutory duty, is not only reasonable, but clear law." 1 Beven, Neg. p. 337. In the case of Caswell v. Worth, 5 El. & Bl. 849, Mr. Justice Coleridge says: "The statute makes the omission of a certain act illegal, and subjects the parties omitting it to penalties. But there can be no doubt that a party receiving bodily injury through such omission has the right of suing at common law. The action, however, must be subject to the rules of common law; and one of those is that a want of ordinary care, or wilful misconduct, on the part of the plaintiff, is an answer to the action." See also Britton v. Great Western Cotton Co. L. R. 19 L.R.A. (N.S.)

7 Exch. 130; Caswell v. Worth, supra. The same doctrine is laid down in the following American cases: Queen v. Dayton Coal & I. Co. 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; O'Donnell v. Providence & W. R. Co. 6 R. I. 211. In the Tennessee case and the Rhode Island case just cited it was held, although the duty of the defendant was statutory, contributory negligence was a defense to the suit.

We have found no cases except those of Greenville v. Pitts and Brush Electric Light & P. Co. v. Lefevre, which decides the proposition that a trespasser is without remedy in such a case; but in neither of the cases last mentioned was there any other defense, and in neither was the plaintiff held entitled to a recovery. We fail to see how a trespasser acquires any right by reason of the negligence arising from the violation of an ordinance of a city or a statute, rather than from negligence at common law. In Bishop on Written Laws the author sums up the law on the subject discussed as follows: "One who disobeys the law subjects himself to any proceeding, civil or criminal, which the same law has ordained for the particular case, in the absence of which ordaining, or in the presence of it when not interpreted as excluding other methods, he is liable to those steps which the common law has provided for cases of the like class, as to an indictment, or to a civil action, or to both, according to the nature of the offending. The civil action is maintainable when, and only when, the person complaining is of a class entitled to take advantage of the law, is a sufferer from the disobedience, is not himself a partaker in the wrong of which he complains, or is not otherwise precluded by the principles of the common law from his proper standing in court." Bishop, Written Laws, par. 141. See also cases there cited.

We answer that in our opinion, since the deceased boy was clearly a trespasser upon the roof of the building where its wires were strung, the plaintiffs are not entitled to recover.

PENNSYLVANIA SUPREME COURT.

ELIZABETH McKIM, Appt.,

v.

CITY OF PHILADELPHIA.

(217 Pa. 243, 66 Atl. 340.)

Highway — obstruction — liability of municipality.

1. A municipal corporation permitting the maintenance by an electric railway company of a trolley pole in the street in such a manner as to constitute a dangerous obstruction

to public travel is liable to a traveler injured thereby.

Same — nighttime.

2. The rule requiring city streets to be kept clear of dangerous impediments applies to the nighttime.

Same — unobstructed space.

3. The fact that there is ample space for travel between the curb and a trolley pole set in the middle of the street does not render the pole any the less a dangerous obstruction to travel after dark when no light is maintained near it.

Evidence — opinion — dangerous obstruction.

4. It is not error to exclude the opinion of witnesses as to the dangerous character of an obstruction in a street, where it can be easily described, and the question wheth-

er or not it was dangerous easily determinable by the jury.

(March 11, 1907.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County in defendant's favor in an action brought to recover damages for the alleged negligent killing of her husband. Reversed.

The facts are stated in the opinion.

Mr. Joseph R. Fahy, for appellant:

An elevation or hump in the form of the trolley base 3 feet square and rising 15 inches above the street level was such a defect in the highway as rendered it unsafe for ordinary travel.

Subject Note. — Liability of municipal corporation for permitting obstruction to be placed in street.

I. Scope, 507.

II. Right to permit obstruction; general rules, 507.

III. Uses permitted to abutting owners.

a. Generally, 509.

b. For deposit of building material, 510.

c. For water, gas, and sewer connections, 512.

d. For construction of sidewalks, 515.

e. For area ways, hatch ways, coal holes, etc., 516.

f. Signs and other objects overhanging or liable to fall, 517.

IV. Use permitted for business and general purposes, 519.

V. Use by street railway, 521.

VI. Permitting acts in street which obstruct traffic, 523.

VII. Knowledge or notice of obstruction, 523.

VIII. Effect of contributory negligence, 525.

IX. Conclusion. 525.

I. Scope.

This note assumes the existence of duly established streets and sidewalks and the proper application of the general rule that it is the duty of a municipal corporation to use ordinary and reasonable care to keep its streets and sidewalks free from obstruction and in a reasonably safe condition so that persons can pass along them in the ordinary methods of travel in safety, leaving questions as to obstructions in streets generally, and as to the construction and application of the rule of liability, and as to what streets are so established as to be a subject of municipal liability, for consideration in other and more general notes in course of preparation. And it is confined to questions of liability for obstructions placed in the streets, not by the municipal corporation itself, but by its license or consent, either expressly or tacitly given. And it is intended to cover 19 L.R.A. (N.S.)

only obstructions for the benefit of third persons. Cases concerning obstructions placed in streets for the benefit of the traveling public which are incidental to the use of the streets as such, such as curbstones, horse blocks, and hitching posts are not included. And the obstructions here considered are things that are foreign to the street, and which are brought, or left, or made in it, and which are patent and visible and stand up in the way so that one might collide with or fall into them, as distinguished from mere defects in construction, or want of repair.

II. Right to permit obstruction; general rules.

While streets and sidewalks are intended for travelers and pedestrians, in order to transact business, and to build houses and reconstruct streets, and to build public improvements or public utilities in the streets, and perhaps for other purposes, the streets and sidewalks must of necessity at times be partly occupied by goods and materials to be used for such purposes; and such temporary use of a street for such purposes, and for a reasonable time, is a lawful use, and not an obstruction for which the city can be held liable. *Hesselbach v. St. Louis*, 179 Mo. 505, 78 S. W. 1009; *Stephens v. Macon*, 83 Mo. 345; *Ladoga v. Linn*, 9 Ind. App. 15, 36 N. E. 159; *Kansas City v. McDonald*, 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123; *Frost v. Portland*, 11 Me. 271; *Sinclair v. Baltimore*, 59 Md. 592; *Grant v. Stillwater*, 35 Minn. 242, 28 N. W. 660; *State ex rel. Beatty v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108, 15 N. W. 210.

And, where a municipal corporation gives a license authorizing work in its streets for a purpose which is proper and lawful, the blame for a resulting injury must attach to the person who misuses or abuses the license, and not to the borough or municipality. *Susquehanna Depot v. Simmons*, 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434; *Warsaw v. Dunlap*, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568.

And a municipal corporation is not liable

Seranton v. Catterson, 94 Pa. 202; Lamb v. Pike Twp. 215 Pa. 516, 64 Atl. 671; Northern C. R. Co. v. Com. 90 Pa. 300; Com. v. Northern C. R. Co. 7 Pa. Super. Ct. 234.

The city was liable.

Merriman v. Phillipsburg, 158 Pa. 78, 28 Atl. 122; Davis v. Corry City, 154 Pa. 602, 26 Atl. 621; Bloomsburg Steam Co. v. Gardner, 126 Pa. 80, 17 Atl. 521; Nudd v. Lansdowne, 190 Pa. 89, 42 Atl. 474; Siegler v. Mellinger, 203 Pa. 256, 93 Am. St. Rep. 768, 52 Atl. 175; Wall v. Pittsburg, 205 Pa. 48, 54 Atl. 497.

The city is under an affirmative duty to keep the streets safe for the ordinary purposes of travel, by night and by day.

Smedley v. Erwin, 51 Pa. 449; Phila-

delphia v. Wright, 100 Pa. 235; Musselman v. Hatfield, 202 Pa. 489, 52 Atl. 15; Seranton v. Catterson, *supra*.

Messrs. Thomas Raeburn White and John L. Kinsey, for appellee:

The pole being a lawful structure, this action cannot be maintained.

Livingston v. Wolf, 136 Pa. 519, 20 Am. St. Rep. 936, 20 Atl. 551; Cushing v. Boston, 128 Mass. 330, 35 Am. Rep. 383; Stackhouse v. Vendig, 166 Pa. 582, 31 Atl. 349; Com. ex rel. Atty. Gen. v. Beaver, 171 Pa. 542, 33 Atl. 112; Dill. Mun. Corp. § 657; Abbott. Mun. Corp. § 829.

Trolley systems authorized by law and consented to by councils are not nuisances.

Rafferty v. Central Traction Co. 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884;

to a person injured by reason of the misuse or abuse of the license, whether the misuse or abuse is by a independent contractor for the work from the licensee, or by the licensee himself. *Susquehanna Depot v. Simmons, supra*.

Unless the thing authorized is intrinsically dangerous, or the municipal authorities have notice of the negligence of the licensees. *Warsaw v. Dunlap, supra*.

The duty, with respect both to the general public and the occupants of premises along the streets of a city, of keeping the streets free from permanent or long-continued nuisances, however, rests primarily with the municipal government. *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013.

And a municipal corporation may not knowingly and unnecessarily permit or authorize a nuisance or dangerous obstruction to be placed in one of its streets without being answerable for damages occasioned thereby. *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435.

This is the rule in *McKIM v. PHILADELPHIA*.

If a work in a street, amounting to a nuisance, is, for any reason, tolerated by the city authorities, it is their duty to exercise supervision over its construction and condition; and it is negligence and a breach of duty in them to omit the exercise of such supervision. *Wendell v. Troy*, 39 Barb. 329, affirmed in 4 Abb. App. Dec. 563.

A city has no power, in the absence of statutory authority, to grant to an individual any right in a street which will interfere in any degree with its use by the public. *Mansfield v. New York*, 119 App. Div. 199, 104 N. Y. Supp. 386; *Cohen v. New York*, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700; *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345; *McCoull v. Manchester*, 85 Va. 579, 2 L.R.A. 691, 8 S. E. 379.

And the fact that such a right was granted in no way affects the right of a person receiving an injury therefrom to recover therefor against the city. *Richmond v. Smith and McCoull v. Manchester, supra*.

And where a city, without pretense of au-

thority and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway while in the transaction of his private business, and, for such privilege, takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license; and it is liable for all damages which may naturally result to a third person who is injured by reason or in consequence of the placing of such obstruction in the highway. *Cohen v. New York, supra*; *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 46 S. W. 288.

So, where a city grants a license to an individual to place an obstruction in a street, and an injury results to a third person from the negligent mode in which the licensee exercises the privilege granted to him, the question of negligence upon the part of the city in permitting the use, or acquiescing in the use, of the mode, after notice or knowledge thereof, is one of fact for the jury in an action against the city for the injury. *Cohen v. New York*, 33 Hun, 404.

But there must be some proof of negligence, showing permission to use, or acquiescence in the use of, the mode, after notice or knowledge on the part of the city. *Ibid*.

While a city has the right temporarily to allow obstructions on the streets and sidewalks for any lawful purpose, so long as they remain there the traveling public should have notice and warning thereof; and, if a city permits a dangerous obstruction in a street, it can justify its action only by showing that it took proper steps to protect the public. *Arthur v. Charleston*, 51 W. Va. 132, 41 S. E. 171.

And a city which permits an individual to make an excavation in a street for any proper purpose is under duty to see that proper barricades are placed about the excavation to prevent injury to passers-by; and, if it fails to do so, and injury results to a person in the exercise of due care on his part, it is liable for the injury. *Cov-*

Reeves v. Philadelphia Traction Co. 152 Pa. 153, 25 Atl. 516; Lockhart v. Craig Street R. Co. 139 Pa. 419, 21 Atl. 26.

Mestrezat, J., delivered the opinion of the court:

Eleventh street, in the city of Philadelphia, extends north and south, and crosses Federal street nearly at a right angle. At the place of this accident it is 100 feet wide and 70 feet from curb to curb, and in the middle has a single-track electric railway line, on which cars run north. The supply wires of the trolley system are supported by metal poles, placed alternately on the right and left, and near the track, instead of at the curb. One of these poles stood near the west rail, and about 10 feet

north of the north house line of Federal street. It was of iron, about 9 or 10 inches in diameter and supported by a conical-shaped base, which was about 2½ feet in diameter at the street level and 15 or 18 inches in height. John McKim, a milk dealer and the plaintiff's husband, drove a one-horse milk wagon east on Federal street about 5:45 o'clock in the morning of January 24, 1903. He entered Eleventh street, and, turning to go north, his wagon struck the base of the trolley pole, was upset, and he was thrown to the ground and received severe injuries, from which he died a few hours later. The morning was very dark, and there was no artificial light on the pole nor in the vicinity of the pole. There is an electric street light located at the southeast

ington v. Bryant, 7 Bush, 248; Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113.

And in such a case the individual and the city can be held jointly liable in the same action. Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683.

But, where a city permits a person to make an excavation in a street for temporary purposes of building and the like, it is sufficient to relieve it from liability for resulting injuries that proper signals and safeguards were placed about the excavation on quitting work; and neither the corporation nor the contractor is liable if a wrongdoer removes the signals or barricade during the night. Ball v. Independence, 41 Mo. App. 469; Theissen v. Belle Plaine, 81 Iowa, 118, 46 N. W. 854; Minns v. Omamee, 2 Ont. L. Rep. 579.

Unless the city had notice, or such time had elapsed that it may be presumed to have known, of the removal. Theissen v. Belle Plaine, *supra*.

Nor has a municipal corporation any authority to authorize or permit private persons or corporations to erect or maintain permanent obstructions in its streets for partly private purposes. Savage v. Salem, 23 Or. 381, 24 L.R.A. 787, 37 Am. St. Rep. 688, 31 Pac. 832.

But the right of a municipal corporation to authorize the erection of structures in a street by private persons or corporations for the purpose of serving the public is not destroyed or affected by the fact that the service of the public is to be for private gain. *Ibid*.

And a city which has granted a privilege to erect a nuisance in a street cannot escape liability for an injury resulting therefrom on the ground that, being without authority to grant the permit, its act was *ultra vires*. Richmond v. Smith, *supra*.

So, a municipal corporation permitting an obstruction in a street is not relieved from liability for failure in the performance of its duty to have such safeguards and lights as will protect travelers from accident and injury thereby, by the fact that the work is in the hands of contractors who are liable for the injury. Bauer v. Roches- 19 L.R.A. (N.S.)

ter, 35 N. Y. S. R. 959, 12 N. Y. Supp. 418; Brusso v. Buffalo, 90 N. Y. 679; Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 437; Godfrey v. New York, 104 App. Div. 357, 93 N. Y. Supp. 899; McAllister v. Albany, 18 Or. 426, 23 Pac. 845; Drake v. Seattle, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231.

Or because it omitted to remove it for the reason that a third person had previously assumed to give warning thereof. Tiers v. New York, 74 Hun, 452, 26 N. Y. Supp. 688.

The subject of obstruction of street or sidewalk for business or building purposes is considered in note to Flynn v. Taylor, 14 L.R.A. 556.

III. Uses permitted to abutting owners.

a. Generally.

The owner of the soil over which a highway passes may rightfully dig and excavate therein and use the same in any manner for his own benefit, provided he does not interfere with the public easement. Birmingham v. Dorer, 3 Brewst. (Pa.) 69.

And permission given by the authorities to the owner of an apartment house to fence in an adjacent portion of the sidewalk in a manner consistent with the general parking system of the city, which is valid and proper, and the fencing in thereof in accordance with such permission, does not create a nuisance for which the city is liable, in the absence of anything to show that the owner converted the inclosure to uses of his own inconsistent with the parking system. Domer v. District of Columbia, 21 App. D. C. 284.

But a municipal corporation is liable for damages resulting from the digging by a private owner or individual of any trench or other excavation in one of its public streets for a private purpose or benefit, and his neglecting properly to guard the same and keep it in repair, if the corporation had either actual or constructive notice of the dangerous condition of the street for a length of time reasonably sufficient to guard the public safety before the injury in question was sustained. Birmingham v.

corner of Eleventh and Federal streets, but it had not been lighted for at least a week prior to the accident. McKim's wagon carried a light, as required by city ordinance. This action was brought by the widow of McKim to recover damages for his death, which she alleges was caused by the negligent and improper conduct of the city in not keeping its street, at the place of the accident, in a reasonably safe condition for persons who had occasion to use it. She avers in her statement that the city permitted the pole with its large projecting base to remain in the street for more than two years, without providing "means whereby such structural obstruction should be exposed or made conspicuous by proper light," and during the night of

January 23, 1903, "without fixing or placing any light or signal near such obstruction to denote its position." The defense is that the trolley pole was located by authority of law, was a lawful structure, and was therefore not a nuisance, and that it was not an omission of duty on the part of the city to permit it to be constructed or remain on the location where it was placed without providing the necessary means to protect the public, using the street at night, against danger incident to a collision with it. On the trial below, the court directed a verdict for the defendant, and the plaintiff has taken this appeal.

It is conceded by the appellant that the trolley company was authorized by legislative and municipal action to locate and

Dorer, *supra*; Sproul v. Seattle, 17 Wash. 256, 45 Pac. 489.

And the duty of a city to keep its streets and sidewalks free from defects, and its liability for injuries occasioned by such defects, are not affected by the fact that individuals, as owners of the fee, are permitted to use the premises above or below the sidewalk, or street, for private purposes not inconsistent with the rights of the public. Bacon v. Boston, 3 Cush. 174.

So, a city is liable for injuries resulting from a depression or obstruction in a street or sidewalk caused by operations of an abutting owner, if it has actual or constructive notice of the defect, though the owner is also liable. Philadelphia v. Smith, 1 Monaghan (Pa.) 147, 16 Atl. 493; Covington v. Johnson, 24 Ky. L. Rep. 602, 69 S. W. 703.

And it is the duty of a municipal corporation to cover and keep in repair any covering over an excavation made by a private owner of the soil over which a street passes, for his private benefit. Birmingham v. Dorer, *supra*.

The question of reasonable necessity and use of a margin of a highway by an abutting owner is ordinarily one for the jury, and usually arises where a larger portion is occupied than is deemed fairly necessary for the purpose, or its use is claimed to have been unreasonably prolonged. Loberg v. Amherst, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048.

b. For deposit of building material.

The temporary use of a part of a street in which to deposit building materials for buildings being erected on abutting property is a lawful use where there is ample room left for the passage of vehicles, and notice is given of the obstruction by a light or otherwise to avoid the danger. Shallcross v. Philadelphia, 187 Pa. 143, 40 Atl. 818; Ladoga v. Linn, 9 Ind. App. 15, 36 N. E. 159; Kansas City v. McDonald, 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298.

And all that can be done to prevent accident is the deposit of material in a rea-

sonable place, and the placing of guards, or the giving of reasonably precautionary signals to warn the public. Sinclair v. Baltimore, 59 Md. 592.

The right of an abutting owner to place building materials in the street belongs to him simply as an abutter, and not as an owner of the fee of any part of the street, and is founded on and limited by the reasonable necessity, to be determined by the facts of the case in the absence of any regulations on the subject, and may extend to more than one half of the width of the street. Raymond v. Keesberg, 84 Wis. 302, 19 L.R.A. 643, 54 N. W. 612; Senhenn v. Evansville, 140 Ind. 675, 40 N. E. 69; State ex rel. Beatty v. Omaha, 14 Neb. 265, 45 Am. Rep. 108, 15 N. W. 210.

And that a pile of lumber was left by an abutting owner between the traveled part of the street and the sidewalk, against which a person drove his horse and was injured, does not constitute a violation of a statutory requirement that municipalities shall keep their streets in good repair, and in condition reasonably safe and fit for travel, where the street was of ordinary width and sufficient space was left for ordinary travel. McArthur v. Saginaw, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313.

So, an owner of property abutting on a public street or highway has the right to use temporarily a reasonable portion thereof for the deposit of mortar boxes, etc., while necessarily used in plastering his house, and, although he might be able to use his yard or garden for the purpose, he is not bound to do so at the peril of injuring his shrubbery or plants, and may insist upon his rights as an abutting owner. Loberg v. Amherst, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048.

And where, under conceded facts, no more space in a street was used by an abutting owner than was actually occupied by two mortar boxes of ordinary size, a barrel of lime, and some sand, and there is no claim that the use was prolonged for an unreasonable time, the question of reasonable necessity and use of the margin of the high-

operate its railway on Eleventh street, and to place the poles, carrying the wires which supply electricity, along and near its track in the center of Eleventh street; but the line was required to be constructed and maintained subject to municipal regulations and approval, as the city ordinance of August 5, 1886, provides that "the laying, construction, and maintenance of all wires, . . . poles, or cables shall be under the supervision of the chief of the electrical bureau and subject to his approval; and the same shall be laid under the rules and regulations of the board of highway supervisors." There is no doubt of the authority of the legislature to authorize an electric railway company to lay its tracks and operate its lines on the streets of a city or of

any other municipality; and it may do so directly or by authorizing its agent, the municipality, to grant the authority; and it may empower the municipality to accompany the grant with such restrictions and limitations as may seem proper to protect the public in the use of the highways of the city. In 2 Abbott on Municipal Corporations, § 829, it is said: "The legislature, or one of its properly delegated agencies, may, by its action, authorize the use of a street in such a manner as will cause an obstruction, and which, without such authority, would be regarded as illegal and a nuisance. The discretionary power is often given municipal bodies to authorize these encroachments or obstructions, and, where an abuse of discretion is not shown, their

way is one for the court, and the case ought not to be submitted to the jury. *Ibid.*

And, where a person was thrown from a bicycle and injured while riding along a street in a city, by an obstruction consisting of a pile of mortar placed there by a mason in moderate quantities for completing the work in which he was engaged, and of old material to be removed, and the heap was not large, being probably about the same in size as those usually kept for that purpose, but being such that it ought to have been guarded by a light, the act of the mason in leaving the heap unguarded on the night in question was not sufficient to charge the city with negligence. *Johnson v. Poughkeepsie*, 29 App. Div. 16, 51 N. Y. Supp. 190.

Nor is a city liable to a person injured by a pile of building material in front of a lot upon which a building was in course of erection, having no guard or light to give warning of its presence, by driving upon the same, where it had passed an ordinance requiring a lighted lamp or lantern to be placed upon such obstructions, which ordinance had not been observed, it being a mere police ordinance intended to protect the streets against obstruction, the city having no police agency of its own and not being allowed the direction and control of the police officers within its limits, it having therefore no means at its command to enforce the ordinance. *Sinclair v. Baltimore*, supra.

A city cannot escape the duty resting upon it to keep its streets in a condition reasonably safe for public travel, or the responsibility which this duty imposes, however, by permitting a private builder to leave a pile of material in a dangerous condition in a street. *Magee v. Troy*, 48 Hun, 383, 1 N. Y. Supp. 24.

And the fact that a city council grants a license to use a street for the deposit of building material neither suspends nor abrogates the duty of the city to use reasonable care to keep the streets in a safe condition. *Grant v. Stillwater*, 35 Minn. 242, 28 N. W. 660; *Indianapolis v. Doherty*, 71 Ind. 5; *Laporte v. Henry*, 41 Ind. App. 197, 83 N. E. 655.

The use, by persons constructing buildings

abutting on a street, of a portion of the same for the deposit of necessary building materials, being exceptional and foreign to the purposes for which the thoroughfare was laid out and maintained, the city must exercise vigilance to the end that no traveler be harmed by such encroachment. *Kansas City v. McDonald*, 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123; *Lewis v. Atlanta*, 77 Ga. 756, 4 Am. St. Rep. 108; *Indianapolis v. Doherty*, supra; *Parks v. New York*, 111 App. Div. 836, 98 N. Y. Supp. 94, affirmed in 187 N. Y. 555, 80 N. E. 1115.

And all these encroachments must be reasonable as to both their extent and duration, must be guarded and so protected as to secure passers-by from danger; and, if they are not so guarded and protected, they remain nuisances, and for damages resulting in consequence the corporation is responsible if it had notice of their existence. *Herfurth v. Washington*, 6 D. C. 289; *Grant v. Stillwater*, supra; *Foy v. Winston*, 126 N. C. 381, 35 S. E. 609.

The exercise of the authority to use the street for this purpose will not justify leaving it in an unsafe or dangerous condition. *Grant v. Stillwater*, supra.

And, while the city may lawfully permit the obstruction of a street opposite a house that is being built, for the purpose of facilitating the mechanics, the obstruction must not be obviously dangerous; if it is so obviously dangerous that men of ordinary prudence would condemn its use, permission for its use should be absolutely refused by the city authorities, but, if not so obviously dangerous when used with ordinary care, the city ought not to be held liable for an injury resulting from its presence in the highway. *Winters v. New York*, 15 Daly, 102, 2 N. Y. Supp. 695.

And, where a city permits a person to make an excavation in a public highway for the temporary purpose of building and the like, and danger therefrom can be averted only by special precautions, such as placing guards or the lighting of the street, the city, which has authorized the work, is plainly bound to take such precautions. *Ball v. Independence*, 41 Mo. App. 469.

action will be sustained if coming within the general principles in respect to the creation and use of a highway." What, therefore, would otherwise be a nuisance if placed in a street may be legalized and relieved of this fault by legislative or municipal action.

.Conceding the right of the electric company to place its poles in the center of the street, and that, by reason of municipal permission, they do not create a nuisance by being located there, yet there was a duty imposed upon the electric company to exercise the power conferred by the municipality in such manner and way as not unnecessarily to obstruct the highway or interfere with the purpose for which it was primarily constructed. Unless the intention is manifest,

Nor does the fact that a city allows only a reasonable part of a street to be used for depositing building material thereon, and requires the builder to indicate the locality of such materials by proper lights, relieve the city from the duty to prevent the street from being so occupied as to endanger passers-by, or from the damages arising from a breach of such duty. *Cleveland v. King*, 132 U. S. 295, 33 L. ed. 334, 10 Sup. Ct. Rep. 90.

So, while the mere deposit and storage of materials in a street, where a builder has a license from a city, in a place covered by the license, is not a nuisance, a license to a builder will not relieve the builder and the city from the duty of so storing, or guarding, or lighting a pile of lumber as to leave the street reasonably safe for the traveler by night as well as by day; and whether this has been done in a particular case is a question for the jury. *Magee v. Troy*, supra.

And liability of a city for an injury resulting from building or other material deposited in a street and kept in such a condition as to render the street unsafe is the same whether the material was deposited in the street with or without a license from the city. *Grant v. Stillwater*, supra.

And neither the person erecting the building, nor the city itself, can escape liability simply upon the issuance of a permit to place building material upon the street. *Senhenn v. Evansville*, 140 Ind. 675, 40 N. E. 69; *State ex rel. Beatty v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108, 15 N. W. 210.

So, a municipal corporation having exclusive power over the streets has the right to determine by ordinances to what extent and under what circumstances they may be encumbered with building materials; but such regulations must be reasonable, and the obstruction must not be allowed to continue longer than necessary. *Sinclair v. Baltimore*, 59 Md. 592; *Reinhard v. New York*, 2 Daly, 243.

And an agreement between a contractor who placed building material in a street and an adjoining owner for whom the material was to be used, showing him to be an in-
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it will not be presumed that the legislature or its agent, the municipality, intended, when granting the right of the company to locate its poles in the middle of the street, to deprive the public of the right to use the street without danger and with safety to themselves. This is made more apparent by the fact that the city ordinance requires the poles to be located under the supervision and subject to the approval of the municipal officers. When an electric company invokes municipal action for its protection in occupying the streets of a city, it must appear that the company acted strictly in accordance with the authority conferred. In stating the English rule on the subject, Chief Justice Cockburn, in *Vaughan v. Taff Vale R. Co.* 5 Hurlst. & N. 679, 685, says:

dependent contractor, is inadmissible in evidence in an action against the city to recover damages for personal injuries caused by obstructions in the street. *Koch v. Williamsport*, 195 Pa. 488, 46 Atl. 67.

And an action for damages lies directly against the municipal corporation in which a street is situated, for injuries sustained by building materials encumbering the street, irrespective of the negligence of the contractors. *Humphries v. Montreal*, 9 Lower Can. Jur. 75.

Nor is the liability of a city which granted an abutting property owner a permit to obstruct a street by placing building material thereon, for an injury to a person at night because he was not warned of the obstruction, affected by the fact that the original building material constituting the obstruction was removed from time to time and replaced with other material. *Apker v. Hoquiam* (Wash.) 99 Pac. 746.

And evidence of one's occupation and use of premises in front of which he has placed building materials is presumptive evidence of his ownership of the premises, so as to make him an abutter on the highway with the rights of an abutting owner. *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048.

In Michigan the unauthorized or excessive use by abutters upon a street of the privilege of occupying portions of the street with lumber and materials for building purposes is an abuse to be rectified under the police powers of the public, and does not belong to making or repairing of ways when what is done does not create what is properly a defective way. *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313.

c. For water, gas, and sewer connections.

Municipal corporations have the right to have gas and water pipes sunk in their streets, and to give permission for the sinking thereof, and the making of excavations therefor; and the city is required to use only ordinary care in notifying the public traveling on such streets of the condition

"When the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that, if damage results from the use of such thing independently of negligence, the party using it is not responsible." That rule, of course, is limited in this country by the constitutional provision that prohibits the legislature from taking private property for public use without just compensation. But, aside from this limitation, the rule as stated by the learned chief justice is certainly sound in principle, and clearly indicates that the beneficiary of the authority granted is required to exer-

cise the legislative grant without negligence and with the necessary precaution to prevent injury to another. In a recent work on Nuisances it is said that the rule may be stated to be that, where one has the sanction of the state for what he does, unless he commits a fault in the manner of doing it, he is completely justified, provided the legislature has the constitutional power to act. Joyce, Nuisances, § 69. And in § 73 of the same work, citing authorities to support the text, it is said: "So, though a corporation may be authorized by law to do a certain act, it must so use its powers as not to injure another. The fact that a work is a lawful and beneficial one will not relieve the party constructing it from liability to another who is injured by its improper and

thereof; and, if the public knows of such condition, or by the exercise of ordinary care could know of it, the city is excusable for failure to give notice. *Peoria v. Walker*, 47 Ill. App. 182.

And a municipal corporation is not liable for damages resulting from the digging of a trench in one of its public streets by a private individual under a license from the corporate authorities for the purpose of making connection with the main conduit pipes for distributing water to the inhabitants, and neglecting properly to fill the same, since excavations made for this purpose are for private benefit, done at private expense, and usually without any direct superintendence of the public; and only the persons who make them, or cause them to be made, are answerable for any injury they occasion to the right of travel. *West Chester v. Apple*, 35 Pa. 284, 78 Am. Dec. 336.

And a city, by granting an owner of property abutting on a street a franchise which authorized him to excavate in the street for the purpose of putting in a waterworks plant, does not thereby become a party to such person's failure to comply with an ordinance prohibiting unguarded excavations in the street; and, if the city is liable at all for an injury caused by such excavation, it must rest upon the theory that the landowner failed properly to guard the excavation, and, after due notice, the city failed to exercise reasonable diligence to accomplish that purpose itself. *Browne v. Bachman*, 31 Tex. Civ. App. 430, 72 S. W. 622.

Nor do the granting of a license by the officers of a municipal corporation to a plumber to make and connect surface pipes for conducting water from the distributing pipes of the city to private houses, and the giving of a special permit to him to connect with a city sewer under the direction of the city inspectors, make the plumber an officer or servant of the city when employed by and working for private parties; and the city is not responsible for the damages occasioned by his negligence in not guarding an excavation made by him in the street, and leaving a pile of earth thereon. *Dorlon v. Brooklyn*, 46 Barb. 604.

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A city is not relieved from its obligation under its charter to keep the public highway free from nuisances and in a condition to be safely traveled, so as to relieve it from liability for an injury resulting from a trench in a street, however, by the fact that the trench was dug by the owner of adjoining property for the purpose of conducting water to his premises from the pipes of the city, and that, by the city ordinances, the necessary excavation, filling up, and paving were to be done by such owner. *Baltimore v. Pendleton*, 15 Md. 12.

A permit from village authorities to lay a drain does not authorize the person receiving it to open or dig in a street; and, where an opening is made in a street in pursuance of such a permit, the person making it is a trespasser; and, if his work renders the street unsafe for ordinary travel, it is the duty of the village authorities having actual or constructive notice of the dangerous condition created by him to take proper measures to protect the public against it. *Boyle v. Hazleton*, 171 Pa. 167, 33 Atl. 142.

Since the excavation of openings in streets and sidewalks for the purpose of laying a private drain from a house to the public main in the street would be a public nuisance if done without permission, it is the duty of a municipal corporation giving such permission to see to the work the same as if it were being done by its own agents, in order that it may be done diligently and properly, and not negligently to the risk or detriment of individuals. *Anderson v. Wilmington*, 8 Houst. (Del.) 516, 19 Atl. 509; *Savannah v. Donnelly*, 71 Ga. 258.

And a city which impliedly consents to the temporary digging of a ditch in its streets by private persons is liable for injury resulting from their negligence in failing to put out danger signals or barriers to guard it at night. *Corsicana v. Tobin*, 23 Tex. Civ. App. 492, 57 S. W. 319.

Nor is a city which permits a gas company to make excavations in its streets for the purpose of laying gas pipes relieved from liability to a person injured by falling into an excavation unnecessarily left open in a

unskilful construction. The grant of a franchise by the state to a person does not confer upon him the right to inflict damage upon another which, by reasonable caution, could have been prevented." Mr. Smith, in his *Modern Law of Municipal Corporations* (§ 1097), after announcing the doctrine that the legislature may authorize a person or corporation to do an injurious act which would otherwise be a nuisance, proceeds to say: "And, if the power may be exercised in a way not to seriously injure the public, but is exercised in a way regardless of the public interest, there will be no legislative protection. The grant of power is in all cases to be exercised in such manner as to least interfere with public rights and interests, and by construction the grant

or license is construed in favor of the public. Besides, there is a high degree of care to be exercised in carrying out the grant of power in such cases." The rule is well stated by Mitchell, J., in *Pine City v. Munch*, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197, where he says: "If the legislature expressly authorizes an act which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized; but, if they authorize an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is no defense. In order to justify a nuisance by legislative authority, it must be the natural and probable result of the act authorized, so that it may fairly be

street, by the fact that it has obtained from the gas company an agreement for securing the safety of the streets. *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325.

And, where workmen are impliedly permitted by a municipal corporation to dig a ditch across a sidewalk to connect pipes with the city waterworks for private individuals, it is for the jury, in an action against the city for an injury resulting from the ditch, to say whether sufficient precautions were taken to enable a person of ordinary prudence, with the exercise of ordinary care, to have passed along the sidewalk in safety. *Foy v. Winston*, 126 N. C. 381, 35 S. E. 609.

So, while a municipal corporation may license parties not in its employ to open the public streets and sidewalks with trenches to connect house drains, water or gas pipes, with the public main in the street for private advantage alone, it has the same responsibility in the work as if it were done by its own agents; and it is liable for damage to persons who were injured in consequence of the negligent work of a plumber or other person acting under its license. *Anderson v. Wilmington*, supra; *Rock v. American Constr. Co.* 120 La. 831, 14 L.R.A. (N.S.) 653, 45 So. 741; *Godfrey v. New York*, 104 App. Div. 357, 93 N. Y. Supp. 899; *Reinhard v. New York*, 2 Daly. 243; *Hewitt v. Cleveland*, 21 Ohio C. C. 505.

The city must respond in damages to one who is injured by reason of an unprotected excavation, regardless of whether it had any actual knowledge of such condition. *Hewitt v. Cleveland* and *Rock v. American Constr. Co.* supra.

And, where a city permitted plumbers to dig a ditch across a sidewalk to connect pipes with the city waterworks for private individuals without special application and permit, its liability for an injury resulting to a traveler from the ditch is not affected by the fact that the work was not done by the city or its employees, and that the city had no knowledge that the ditch was being cut and had been left unguarded. *Foy v. Winston*, supra.

And whether the plumber or the city was responsible for the acts of laborers in leaving 19 L.R.A. (N.S.)

unguarded an excavation made in a street to connect private property with the city water mains, where the city ordinance prohibited any person, without the consent of the water board, from tapping or making any connection with a distributing pipe, which had been interpreted to include the making of the excavation by the board, whose custom had been to furnish men for that purpose; and the plumber employed by the landowner had, in accordance with such custom, applied for and received the men, who were to be paid by the city, which was to be reimbursed by the plumber,—is a question for the jury to determine. *Wilson v. Troy*, 135 N. Y. 96, 18 L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44.

So, the negligence of the city employees in leaving uncovered an excavation in a street, made by them under direction of the superintendent of the city waterworks, for the purpose of connecting a private house with a street main, makes the city liable although the work was done at the request of a private contractor who had agreed with the owner of the house to do the work. *Ibid.*

And the city is liable though there was a condition that the work should be done with care and due regard for the safety of all who might have occasion to pass that way; such a condition not absolving the city from its duty to keep the streets in proper condition. *Springfield v. Scheevers*, 21 Ill. App. 203.

And a village charged with the duty of exercising ordinary care to keep its streets in a reasonably safe condition for persons making lawful use thereof, which licenses the construction of a drain in one of its most important streets, is bound to exercise ordinary care not only as to the construction of the drain, but also as to its use within the street. *Svendens v. Alden*, 101 Minn. 158, 112 N. W. 10.

So, where a person in the nighttime fell over a hydrant maintained within the limits of a sidewalk of a city by a private company with the consent of the city, the city is liable for the injury caused thereby, where it had knowledge of the existence thereof, and had permitted it to remain in a dangerous

said to be covered by the legislation conferring the power. *Wood, Nuisances*, 853-861." In *Babbage v. Powers*, 130 N. Y. 281, 14 L.R.A. 398, 29 N. E. 132, the defendant sought to excuse himself for maintaining a nuisance by having procured municipal permission for his act. It was held that he was not liable, in the absence of negligence; but Vann, J., delivering the opinion, says: "The person receiving the license is held to impliedly agree to perform the act permitted with due care for the safety of the public, and is made liable for any violation of duty in this regard." And in a more recent case in New York (*Morton v. New York*, 140 N. Y. 207, 22 L.R.A. 241, 35 N. E. 490), it is held, as stated in the syllabus, that the legislative authority which will shelter an

actual nuisance must be express, or a clear and unquestionable implication from powers conferred, certain and unambiguous, and such as to show that the legislature must have intended and contemplated the doing of the very act in question. "Lawful acts may be performed in such a manner, so carelessly, negligently, and with so little regard to the rights of others," says Agnew, J., in *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98, "that he who, in performing them, injures another, must be responsible for the damage."

Applying these principles to the case in hand, we think the learned court below erred in withdrawing the case from the jury and directing a verdict for the defendant city. In this state, as all our cases on the

condition for a long time. *King v. Oshkosh*, 75 Wis. 517, 44 N. W. 745.

And the fact that a hydrant was erected by a water company under a license from the city for that purpose does not relieve the city from liability for an injury caused by it after it had notice that the street was rendered unsafe thereby. *Burnes v. St. Joseph*, 91 Mo. App. 489.

d. For construction of sidewalks.

The act of a property owner who improves a sidewalk under an ordinance of a town cannot be deemed the act of the town in such sense as to charge the town with his negligence; in order to charge the corporation, evidence of the negligence of the property owner must be supplemented by evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous. *Dooley v. Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566.

And an ordinance requiring the work of building sidewalks to be done under the supervision of the city engineer, and obligating the city to pay one third of the cost, does not make the city responsible for the negligence of a person building a sidewalk under a contract with the owner of adjacent land, where the charter makes it the duty of the owner of land to build the sidewalk. *Thompson v. West Bay City*, 137 Mich. 94, 100 N. W. 280.

So, where an excavation is made by a lot owner pursuant to an ordinance requiring him to improve the sidewalk, only ordinary care is required of the municipal corporation, its agents and contractors, and ordinary care does not require that a watch be kept during the night over the excavation, unless there are circumstances peculiar to the particular case making it necessary; as a general rule it is sufficient that proper signals or guards were placed about the excavation on quitting work, and neither the corporation nor its contractor is liable if a wrongdoer removes the signals during the night. *Dooley v. Sullivan*, *supra*.

But, where it is the duty of a city, when 19 L.R.A. (N.S.)

ever the public convenience or interests require it, to put the sidewalks of its streets in a reasonably safe condition, and instead of performing this duty, it permits the proprietors of adjoining property to construct sidewalks of their own, it is liable for all damages resulting from their unsafe condition. *Oliver v. Kansas City*, 69 Mo. 79; *Boucher v. New Haven*, 40 Conn. 456; *Plattsmouth v. Mitchell*, 20 Neb. 228, 29 N. W. 593; *Hiller v. Sharon Springs*, 28 Hun. 344; *Hill v. Fond du Lac*, 56 Wis. 242, 14 N. W. 25.

And, where the work ordered necessarily causes an obstruction or defect in the street, which renders it dangerous, and the proprietor neglects to use proper safeguards to prevent accidents, and an accident results, the city is liable therefor. *Boucher v. New Haven*, *supra*.

So, where a municipal corporation licenses a lot owner to build a sidewalk in front of his lot, which walk it is the duty of the corporation to build and maintain, and in the performance of such work the lot owner negligently leaves an obstruction in the street which causes an injury, the city is liable therefor. *Davis v. Omaha*, 47 Neb. 836, 66 N. W. 859.

A license given by a municipal corporation to an individual to construct a sidewalk, under which he acted, raises no presumption of license to leave an area open and unguarded, to the injury of others. *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427.

And a person building a sidewalk under license from a municipal corporation, who leaves an area open and unguarded which causes an injury for which the municipal corporation is called upon to pay, cannot defeat the just claim of the corporation or of the injured party by proving that the work which constituted the obstruction or defect was done by an independent contractor. *Ibid*; *Davis v. Adrian*, 147 Mich. 300, 110 N. W. 1084.

So, a city is liable for an accident caused by a defective sidewalk, although the walk was constructed by a private person without its order, where the defect was known to the

subject declare, the highways are primarily for the passage of persons on foot and in vehicles. It is the duty of the municipal authorities having control of the highways to keep that fact in view, and, while permitting them to be used for other purposes, it should not be done in a manner which would prevent their use by the public or would render them unsafe and dangerous. Seventy years ago the legislature of this state declared that the public highways should be constantly kept in repair and kept clear of all impediments to easy and convenient passing and traveling. This is the law of the commonwealth to-day, and includes the cities as well as the rural districts. The electric company was authorized by the ordinance to locate and operate

its railway on Eleventh street, but there is nothing in the ordinance from which even an inference can be drawn that the use of Eleventh street by the company should exclude the public from it, or that the company was authorized to construct or operate its railway in a manner which would render the street unnecessarily dangerous. As it was the duty of the city to keep its streets clear of unnecessary impediments or obstructions and reasonably safe for public use, we cannot assume or infer that the councils intended to hand over Eleventh street to the electric company with permission to erect and maintain obstructions on it in total disregard of the rights of the public. In view of this duty of the city and of the unquestioned duty of the elec

proper officers of the city, or might have been known by the exercise of ordinary care, in time to have repaired it before the accident. *Barnes v. Newton*, 46 Iowa, 567.

And the liability of a municipal corporation to a person who fell through a defective grating in a public sidewalk is not affected by the fact that, if its ordinances had been complied with by the owner of the property fronting on the sidewalk, the injury would not have occurred. *Reinhard v. New York*, 2 Daly, 243.

And property owners who, by direction of the borough authorities and in obedience to the requirement of an ordinance for that purpose, are engaged in paving and curbing the sidewalk in front of their respective properties, are not in any proper sense contractors exercising an independent employment over which the authorities have no control, so as to relieve the borough authorities from the duty of seeing that the street or streets on which the work is being done are kept in a condition that is reasonably safe for public travel. *Trego v. Honeybrook*, 160 Pa. 76, 28 Atl. 639.

So, where a city improved the roadway of a street and one sidewalk, but not the opposite one, and a lot owner on the unimproved side made a sidewalk in front of his property under the direction as to the grade thereof of the civil engineer of the city, it being a continuation of a sidewalk which had been used by the public for several years, and the sidewalk so constructed terminated in an abrupt descent, over which a foot passenger fell in the night and injured himself, the city, having notice of the dangerous character of the sidewalk, is liable for the injury in the absence of negligence on the part of the person injured, notwithstanding the fact that the sidewalk had been constructed without authority from it. *Higert v. Greencastle*, 43 Ind. 574.

But, where the duty to build sidewalks rests upon the owner or occupant of abutting premises, and the performance of it is in no sense the act of the city, the city cannot be held liable for injuries resulting from the plan of constructing the walk, as when a

step was left at one end of it. *Marquette v. Cleary*, 37 Mich. 296.

And a city is not liable for an injury due to the negligence of a contractor in improperly constructing a barrier to prevent people from walking on a new cement sidewalk, where the duty of building the sidewalk was not imposed by law upon the city. *Thompson v. West Bay City*, 137 Mich. 94, 100 N. W. 280.

Nor can a city be held liable for a defective or obstructed condition of a sidewalk built by an adjoining landowner outside of the line of the street, where the city had never assumed control over it, and had no legal right to go upon the land. *Jewhurst v. Syracuse*, 108 N. Y. 303, 15 N. E. 409.

e. For area ways, hatch ways, coal holes, etc.

If it is necessary to occupy a sidewalk and dig an area in it in order to make a better building, and the sidewalk can be occupied and the area dug and secured without danger to the public, this encroachment made on the street is reasonable and the work lawful; but it is essential that every possible precaution should be used against danger, and, if the area is left open and it is dangerous, it is a nuisance which can be abated. *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298.

And where a hatch way is inserted in a sidewalk by an abutting owner with the knowledge and consent of the city authorities, and with their implied license, it is the duty of the city to see to it that it is so located and constructed as not to render the walk unnecessarily unsafe to persons passing along the same when the hatch way may be open. *McClure v. Sparta*, 84 Wis 269, 36 Am. St. Rep. 924, 54 N. W. 337.

And a city is liable for injuries received by a traveler who falls into a hatch way which a house owner has been allowed to locate and maintain in a dangerous condition, although the immediate cause of the accident was the negligence of such house owner in not guarding the opening. *Ibid*.

So, a city which issues a permit to the

tric company to construct this line so as to maintain the street in a reasonably safe condition for use by the public, the question arises in this case whether the electric company observed its duty in exercising the authority conferred by the city, or whether it negligently erected this pole or negligently maintained it so as to cause the accident which resulted in the death of the plaintiff's decedent. These were questions for the jury. If the pole, either in its original construction, or in the manner of its maintenance, was dangerous to the public in the use of the street by day or night, municipal consent would afford the company no protection. The city, likewise, would be culpable, and liable to any person injured by reason of its neglect to protect

him against the unlawful use of the street. In daylight, of course, the pole could be seen and avoided; but at night, and especially when it is very dark, as on this occasion, and could not be seen, a jury certainly would be justified in finding that it was a dangerous obstruction. If, in the construction of its railway, it had been necessary to leave a hole in the street of equal dimensions with the base of the pole, it could not reasonably be pretended that municipal consent to construct the railway on the street would authorize such action on the part of the company, unless the public was, by some means, warned by day and night of the existence and location of the hole. The hole, however, would not be more dangerous than the base of the pole which

owner of land abutting upon a street to excavate beneath the sidewalk, which necessitates the removal of the sidewalk itself and the erection of a temporary bridge in place thereof, is under an absolute duty to see to it that the portion of the street interfered with by reason of the permit is kept reasonably safe, or that a person using it is seasonably warned that he cannot rely on the presumption that it is safe for use. *Parks v. New York*, 111 App. Div. 836, 98 N. Y. Supp. 94, affirmed in 187 N. Y. 555, 80 N. E. 1115.

And a city which permitted a lot owner to make a dangerous cellar way in a sidewalk and street in front of his house, which he subsequently covered with a frail trap-door defective in construction, and around which no safeguards were placed, and through which a person traveling over the sidewalk about two months afterwards broke and was precipitated into the excavation below, causing personal injuries, cannot relieve itself from liability because the dangerous and unguarded opening was made and covered by the lot owner, since it was its duty to supervise the work of covering the excavation and to cause the use of suitable precautions to prevent accident. *Abilene v. Cowperthwait*, 52 Kan. 324, 34 Pac. 795.

Nor can a municipal corporation escape liability for failure to maintain a sidewalk in a reasonably safe condition by permitting a property owner to have a coal hole in his walk. *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079.

And a city which permits the construction of a vault in a sidewalk must use due care and diligence to see that the vault is properly constructed, and the opening thereto securely and safely covered; and, where it has exclusive control over the sidewalk, the court will infer, in the absence of any showing to the contrary, that it was constructed under a license from the city authorities. *Kenyon v. Indianapolis*, Wilson, Super. Ct. (Ind.) 129.

And, where an abutting owner on a street, who was erecting a building with the knowledge and consent of the city authorities, in order to reach the basement, made an exca-

vation under the sidewalk, which was kept covered by loose boards, except when access to the basement was necessary, when a portion of them were removed, and replaced when the necessity was past; and an unknown person removed the covering after 6 o'clock, and that night a person fell into the opening and was injured,—the question whether this covering of boards, which could be easily removed, afforded a sufficient security, is one for the jury in an action against the city for the injury. *Sterling v. Thomas*, 60 Ill. 264.

In Kansas no city has any power to confer upon any private person any right to use a street or any portion thereof for the purpose of a cellar way, or for any other purpose except for passing and repassing. *Smith v. Leavenworth*, 15 Kan. 81.

But, while the use of any portion of a street for a private cellar way is unauthorized by law, yet, if the cellar way was so guarded as to be perfectly safe under all ordinary circumstances for persons traveling upon the street, the city would not be so guilty of negligence as to be liable for some unforeseen injury resulting from some fortuitous circumstances which could not, in the ordinary course of events, be expected or anticipated as likely to occur. *Ibid.*

1. Signs and other objects overhanging or liable to fall.

Things hanging over a street with permission of the municipal corporation are obstructions for which it may be held responsible, where they make travel unsafe, as well as things upon the ground. *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414.

And, where an occupant of premises abutting on a city street suspended a business sign from an iron rod extending from the building so that it hung over the middle of the sidewalk and about 13 feet above it; and the city allowed the sign to remain in that position after receiving notice, or after it should have known, that the sign had become unsafe,—it is liable for personal injuries sustained by a pedestrian in consequence of the sign falling upon him. *Leary*

caused McKim's death, and both would manifestly be a dangerous obstruction in the middle of a city street of a very dark night with no signals or lights to indicate their location. The rule which requires the streets of a city to be kept clear of dangerous impediments applies to the nighttime, as well as to the daytime, and demands of the municipality action which will maintain the safety of the street during the whole of the twenty-four hours.

The fact that there was ample space between the pole and the curb for teams to pass and repass, as suggested by the appellee, does not alter the case. This pole stood nearly in the center of the street, where a traveler would presume there was safety, and where instinctively he would go of a dark night in order that he might have safe transit. This was a thickly populated community, and, notwithstanding the width of

the street, the city, as well as the electric company, should have expected the frequent use of every part of the street, both by night and day. Care, under the circumstances, therefore, required the company, and on its default, the city, to give notice of the presence of the pole to those who might be using the street at night. It was a question for the company, subject to the approval of the city, to determine what was necessary for this purpose. The only obligation resting upon either of them was that they took reasonable precaution to accomplish the purpose intended. This might have been done by a light on the pole itself, or by lights in the immediate vicinity of the pole, or in other ways that could be suggested. The failure, however, to observe any precaution to protect people using the street during the night became a question

v. *Yonkers*, 95 App. Div. 126, 88 N. Y. Supp. 829.

So, an improperly constructed billboard standing wholly in a street between the sidewalk and the abutting property is a defect in the sidewalk, within the meaning of a statutory provision that no action shall be brought against a municipal corporation on account of injuries resulting from defective streets or sidewalks after six months from the date of the injury, unless written notice of such injury be served on the corporation within ninety days after its occurrence. *Bliven v. Sioux City*, 85 Iowa, 346, 52 N. W. 246.

And evidence tending to show that a billboard which a city had permitted to be erected and maintained close to or upon a sidewalk, and which blew over and injured a traveler, was not securely braced at the time; and that such condition had existed for about a year prior thereto,—is admissible in an action against the city for the injury. *Bemis v. Omaha* (Neb.) 116 N. W. 31.

But, where a billboard was placed in a portion of a street not generally used by the public; and the board was not an obstruction and did not interfere with the ordinary use of the street or sidewalk near it; and it was constructed in a substantial manner so as to be safe under ordinary circumstances; and it was blown over by an extraordinary and unprecedented wind, and a person was injured thereby,—the city cannot be held responsible for the injury. *Oak Harbor v. Kallagher*, 52 Ohio St. 183, 39 N. E. 144.

And, where a billboard erected near or upon a street by permission of the city was blown over, and it injured a traveler, and the witnesses in behalf of the plaintiff, in an action for the injury, testified that the character of the storm which blew the billboard over was extraordinary and unprecedented, and others, in behalf of the defendant, testified that the storm was not worse than had occurred through various years, and that in 19 L.R.A. (N.S.)

preceding years the winds had been as high and variable as the one that overturned the billboard, the court will not say, as matter of law, that reasonable men might not differ as to whether or not the windstorm was of such a character that the city, in the exercise of ordinary care, would not be bound to anticipate and guard against it. This should be left to the jury. *Bemis v. Omaha*, supra.

So, a municipal corporation which permits the stringing of a wire across a public street for the giving of an acrobatic performance is liable to a pedestrian on the street for injuries caused by being struck by a performer who falls from the wire while engaged in his performance, where the duty is imposed upon the municipality by statute of keeping its streets free from nuisances. *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057.

And, where an electric light company licensed to use a street erected a pole therein, and, to keep it in position, attached a wire from the top thereof extending across the street, which was fastened to a decayed and unsafe tree outside and beyond the street, the city, having actual notice or knowledge of the negligence and carelessness of the company in so fastening the wire, was under duty to exercise at least reasonable diligence in having the wire removed or safely secured; and, where the decayed tree fell, and the wire was thereby loosened so that it lay across the street about 8 inches above the sidewalk, and injuries were sustained by a person tripping upon it, the city may be held liable for the injury though it had no notice of the falling of the tree and the presence of the wire in its position after the fall. *Lafayette v. Ashby*, 8 Ind. App. 214, 34 N. E. 238, 35 N. E. 516.

But evidence in an action against a city for damages for personal injuries sustained by a collision with a pole overhanging the driveway of the street, that the pole was erected by a telephone company with the

of negligence which should have been submitted to the jury.

It is not necessary in this case to discuss or determine the duty of a city to light its streets. The broad question presented for decision here is whether the city, under the circumstances disclosed by the testimony, was guilty of negligence in permitting a dangerous obstruction on one of its streets which resulted in the death of the plaintiff's decedent. That is a question which, under a proper charge by the court, was for the jury.

We are not convinced that the trial court erred in refusing to admit the opinions of the plaintiff's witnesses as to the dangerous condition of the street. There was no difficulty here in the witnesses' describing the pole, its size, the manner of its structure, its location, and all of the conditions existing at the place of the accident. Whether, under all the circumstances, the pole either

in its original construction or in its maintenance was dangerous to public travel on that street, of a dark night, was as easily determinable by the jury as by the witnesses. Where mere descriptive language is inadequate to convey to the jury the precise facts, or their bearing on the issue, a witness may be allowed to supplement his description by his opinion, to put the jury in position to determine the facts in issue; but, when the circumstances are such that they can be fully and accurately described to the jury, and their bearing on the issue, estimated by persons without special knowledge or training, opinions of witnesses, expert or other, are inadmissible. *Graham v. Pennsylvania Co.* 139 Pa. 149, 12 L.R.A. 293, 21 Atl. 151.

The eleventh and twelfth assignments are sustained, the judgment is reversed, and a *venire facias* is awarded.

sanction of the city, and that it was 8 inches inside of the curb line at its base, and that for more than a year it had been permitted from a point 7½ to 8 feet above the street to overhang the driveway. the construction of which was such as to render it proper for travelers to use all parts of the driveway up to the curb, is not sufficient to go to the jury on the question whether the position of the pole was such as to make the highway unsafe for public travel. *Fisher v. Mt. Vernon*, 41 App. Div. 293, 58 N. Y. Supp. 499.

So, a city which permitted an owner of property abutting on a street to maintain a platform extending out from the second story of his building over the sidewalk is not liable to a person passing by under the platform, who was struck by a bale of hay which was thrown out of the second story of the building by the occupant, where the injury was the result of carelessness and negligence of the occupant in throwing the bale of hay from the second story to the sidewalk, and the accident would have been just as likely to have happened in the absence of a platform as in its presence, the platform being a condition, and not the cause of the accident. *Parmenter v. Marion*, 113 Iowa, 297, 85 N. W. 90.

But, where a railroad trestle which passed over a public street in a city was always so low that it necessarily impaired the usefulness of the street, and the city permitted such trestle to be built and maintained, and an injury resulted from the insufficiency of the height of such trestle above the street, the whole question of the responsibility of the railroad company and of the city, and of their negligence in respect to the trestle and street, is properly left to the jury in an action for the injury. *Ft. Scott v. Peck*, 5 Kan. App. 593, 49 Pac. 111.

IV. Use permitted for business and general purposes.

An abutting owner upon a street, engaged in manufacturing goods, has the right to

make reasonable use of the street for the deposit of his manufactured goods for the purpose of loading and unloading them, though not directly authorized by an ordinance of the city; but he has no right to make a permanent use of the streets for storing his property, or to make such temporary use as will unreasonably interfere with travel, and the reasonableness of the use should be measured by the character of the articles to be handled. *Gerdes v. Christopher & S. Architectural Iron & F. Co.* 124 Mo. 347, 25 S. W. 557, 27 S. W. 615.

And, where a manufacturing company left large iron pillars in the street in front of its place, for a number of days, for the purpose of loading and unloading; and a traveler collided with them and was injured,—it is a question for the jury to say whether or not they were allowed to remain in the street an unreasonable length of time. *Ibid.*

So, fuel and other things may be placed in the street until they can be removed to the owner's premises. *Herfurth v. Washington*, 6 D. C. 289; *Ladoga v. Linn*, 9 Ind. App. 15, 36 N. E. 159.

It is the duty of a municipal corporation, however, to forbid and prevent the use of its highway margins as places of deposit for private property; and, if it negligently suffers such margins to become and remain unsafe by being thus encumbered, a person who, without fault on his part, meets with an accident on account thereof, may recover of the municipality. *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600.

Streets and highways are designed for the use of the public for the purpose of passage and travel, and their use by an individual simply for his own convenience and accommodation, unaccompanied with the public use, as for drains, sewers, vaults, or cesspools, is unauthorized and essentially a nuisance; and the municipal corporation is responsible for injuries thus occasioned, because it is illegal and improper and a breach of duty in it to allow a public

thoroughfare to be thus diverted to a mere private use. *Wendell v. Troy*, 39 Barb. 329, affirmed in 4 Abb. App. Dec. 563; *Curry v. Mannington*, 23 W. Va. 14.

And, where a person fell over a casting in a street which was much frequented by day and night, and there was evidence in an action against the city for the injury that castings or machinery were upon the sidewalk all the time and had been for months before the accident, but no witness could say positively that the same pieces were there for any considerable time, but several said that substantially the same obstruction was there, consisting of the product of a factory, it is a question for the jury to determine whether the constant repetition of the act of placing machinery and castings upon the sidewalk was such as to amount to substantial continuity of obstruction as distinguished from the lawful temporary use of the sidewalk. *Davis v. Corry*, 154 Pa. 598, 26 Atl. 621.

So, an adjoining owner has no right to appropriate a portion of the highway as a stable yard or storage place for his drays or wagons when they are not in use. *Ladoga v. Linn*, *supra*.

And, when a dangerous piece of machinery is placed in an alley by the owner of abutting lots, and is allowed to remain for years, both the individual and the municipal corporation are guilty of negligence, and both are liable for injuries sustained by a child who is hurt upon such machinery. *Osage City v. Larkin*, 40 Kan. 206, 2 L.R.A. 56, 10 Am. St. Rep. 186, 19 Pac. 658.

So, a building or other similar structure erected and maintained in a public street of a municipality by a third party for his private use is a nuisance, although sufficient space is left for the passage of vehicles and persons; and the municipality is guilty of negligence if, with notice thereof, it permits the street so to be obstructed. *McDowell v. Preston*, 104 Minn. 263, 18 L.R.A. (N.S.) 190, 116 N. W. 470; *Smith v. Davis*, 22 App. D. C. 298.

And, where a city granted a license to a person to move buildings in the streets subject to the supervision of the city marshal, the city is responsible for the condition in which the building was while in the street; and, where a person was injured by the upsetting of a buggy in which she was riding by reason of one of the wheels striking a timber projecting therefrom, evidence tending to show that the work of moving the building was negligently done is competent in an action against the city for the injury. *Hayes v. West Bay City*, 91 Mich. 418, 51 N. W. 1067.

And the city, in such case, cannot escape liability for the injury because of a contract with an electric light company to light the street, where it appears that this contract was not always performed. *Ibid*.

So, where a city suffers a market to be carried on in the street in violation of law and the rights of the public, though the city itself did not establish the market, the occupation of the street by it is a nuisance, 19 L.R.A. (N.S.)

which it is the duty of the city to abate, and for which, if anyone is injured thereby, it is liable to be held in damages. *O'Dwyer v. Northern Market Co.* 24 App. D. C. 81.

And the facts that sheds or stalls are erected and occupied as a market by permission of the commissioner of streets; and that fees for the use of such sheds and stalls as market stands at a fixed rate for a period of several months are collected of the market by its clerk, and by him paid to the controller of the city; and that the erection and occupation of such sheds prevented access to the houses fronting on such street and caused special damage to the owners thereof,—are sufficient *prima facie* to establish the liability of the city for such damage. *St. John v. New York*, 3 Bosw. 483.

And a charter provision of a city that the board of aldermen shall not have power to authorize the placing or continuing of any obstruction upon any sidewalk except the temporary occupation thereof during the erection or repair of a building on a lot opposite the same does not authorize such contractor to place a tool chest on a sidewalk while repairing a sewer on the opposite side of the street. *Warden v. New York*, 123 App. Div. 733, 108 N. Y. Supp. 305.

So, a municipal corporation does not, by merely permitting another to erect and operate an electric-light and power plant in the city streets, become charged with the duty of maintaining poles, wires, and lamps connected therewith in a safe condition, and of inspecting them from time to time; the rights of the public are sufficiently protected by imposing the duty of keeping watch over these appliances upon the corporation or person owning and operating them, and holding the municipal corporation liable only in cases wherein, after actual or constructive notice of the existence of the danger to the public in the use of the street, growing out of or caused by some defect in the appliances, the municipal corporation does not use diligence in obviating the danger thus created. *Denver v. Sherret*, 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. 226.

And the duty imposed upon a municipal corporation in regard to highways and streets, to keep them ordinarily safe for travel and in proper repair for that purpose, relates only to construction and repair, and does not apply to the condition of a scaffold erected by a party under a contract with the city to furnish and set off fireworks. *Herdenwag v. Philadelphia*, 3 Pa. Dist. R. 292, affirmed in 108 Pa. 72, 31 Atl. 1063.

So, where, by the terms of a written contract with a municipality to furnish a display of fireworks, a contractor undertook to purchase the fireworks and set them off and do the whole work for a designated sum for the entire services, he is an independent contractor; and the municipality is not liable for injuries caused to a traveler in the street by the contractor's negligence in the erection of a scaffold for the fireworks. *Hei-*

denwag v. Philadelphia, 168 Pa. 72, 31 Atl. 1063.

And, while a city has no legal right to grant a license to store or keep a wagon in the street, its liability for an injury resulting from keeping a wagon in the street is not established by the mere proof of the fact of granting the license. *Cohen v. New York*, 33 Hun, 404.

But a city which authorizes and sanctions and knowingly and carelessly allows one of its principal streets to be obstructed by an exhibition of wild animals therein, which exhibition is calculated to produce injury to persons lawfully traveling along the street, is liable for an injury caused by the animals frightening a team traveling on the street and rendering it unmanageable so that a passenger is injured. *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435.

V. Use by street railway.

A railroad cannot occupy a street with its tracks, even temporarily, unless the right is clearly conferred by its charter; and the common council of the city cannot confer such right; and the unauthorized occupation of a street by railway tracks is a nuisance *per se*, which equity will restrain upon information of the attorney general without a preliminary trial at law. *Atty. Gen. v. Lombard & S. Streets Pass. R. Co.* 10 Phila. 353.

And a complaint alleging that the defendant city directed the maintenance of a railroad in a public highway, which constituted a nuisance from which the plaintiff suffered special damage, is good as against a demurrer. *Redford v. Coggeshall*, 19 R. I. 313, 36 Atl. 89.

But the duty of a city to keep its streets and alleys open and free from all nuisances does not prevent the carrying out of specific authority to permit and authorize the laying of railway tracks in its streets, alleys, and public places. *Heath v. Des Moines & St. L. R. Co.* 61 Iowa, 11, 15 N. W. 573; *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *Lockport v. Licht*, 221 Ill. 35, 77 N. E. 581.

And the fact that an obstruction was placed in a street by a railroad company under a franchise authorizing it to build a railway track in a street does not exonerate the city from liability for an injury caused thereby if it had been there a sufficient length of time to arrest the attention of the city; in such case it was its duty to either require the railroad company to restore the street to a reasonably safe condition, or to make such restoration itself. *Bryne v. Syracuse*, 79 Hun, 555, 29 N. Y. Supp. 912; *Wilson v. Watertown*, 3 Hun, 508.

And the supposition and assumption upon the part of the authorities of a village which has granted to a railroad company the franchise to construct its railroad in streets of the village, that the company will do all that is essential in the way of precautionary measures for the safety of travel in the

streets does not excuse them from that reasonable care and vigilance in the management of the streets which their duty to the public imposes upon them. *Hoyer v. North Tonawanda*, 79 Hun, 39, 29 N. Y. Supp. 650.

And, where a complaint charges the defendant city with directing the maintenance of a railroad in a public highway, which constituted a nuisance, from which the plaintiff suffered special damage, a plea setting up a charter to construct and operate a street railway in such street as the defendant's city council should determine, and an ordinance of said council designating as one of such streets the highway in controversy, is sufficient. *Redford v. Coggeshall*, *supra*.

So, municipal corporations in the streets of which railway tracks are permitted are bound to see that the construction of railway tracks in their streets does not unnecessarily interfere with and endanger other uses of such streets. *Kennedy v. Lansing*, 99 Mich. 518, 58 N. W. 470; *Steubenville v. McGill*, 41 Ohio St. 235.

And a city whose duty it is to keep its streets in a reasonably safe condition is not absolved from its responsibility therefor by a contract whereby a street railway company occupies a street and undertakes to keep the street so occupied in order. *Aiken v. Philadelphia*, 9 Pa. Super. Ct. 502.

A municipal corporation is not relieved of care and responsibility for the condition of its street by permitting a railway company to lay out and operate its track upon and along it. *Cline v. Crescent City R. Co.* 41 La. Ann. 1031, 6 So. 851; *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320; *Hoyer v. North Tonawanda*, *supra*.

Or because the injury complained of was caused by misconduct or negligence in the construction or repair of a street railway. *Bailey v. Boston*, 116 Mass. 423, note.

And, if a railroad company acting under its charter creates an obstruction in a highway by which a traveler sustains damage, the municipal corporation is answerable as if the same acts had been done by an individual. *Sides v. Portsmouth*, 59 N. H. 24; *Cline v. Crescent City R. Co.* 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 So. 122.

And, where a village gives a railroad company permission to construct its railroad in its streets, and in doing so the railroad makes an excavation in a street, whether the village is chargeable with a want of reasonable diligence in not seeing to it that the excavation is provided with safeguards, and whether the injury of a person who falls into the excavation is attributable to the negligence of the village, are questions for the jury. *Hoyer v. North Tonawanda*, *supra*.

So, under a power authorizing railroad tracks to be laid in the streets, a city has no right to authorize railroad tracks to be laid upon a street so as to exclude the other public uses of the street so long as it shall remain a public street. *Ligare v. Chicago*,

139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934; *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619.

And a municipal corporation may be liable in the first instance for a defect or obstruction in its streets or highways caused by the negligence of a street railway corporation occupying an unjust and unnecessary portion of the way. *District of Columbia v. Sullivan*, 11 App. D. C. 533.

Thus, where a street is repaved by a city from the outer rail of a street-car track occupying it to the curb, and thrown open to the public; but the space between the rails of the street car company is left obstructed and in a dangerous condition, and the city receives notice that the street car company will not repave it,—it is under a duty to put that portion of the street in a reasonably safe condition, and is liable for an injury resulting from its failure to do so. *Peoria v. Gerber*, 108 Ill. 318, 48 N. E. 152, affirming 68 Ill. App. 255.

And, where the flagging composing a walk had been torn up by a railway company preparatory to laying a track, and, before it was completed, an injunction was obtained by an abutting owner restraining the company and all persons acting in aid or assistance of it from in any manner interfering with the streets in front of the abutting owner's premises, the injunction is not designed to interfere with the duty of the city in keeping its streets and sidewalks in a reasonably safe condition, and does not relieve it from liability for an injury caused by the removal of the walk. *Dale v. Syracuse*, 71 Hun, 449, 24 N. Y. Supp. 968.

And, where a railroad company, pursuant to authority from a city to build its road on certain streets of grades to be approved by the city authorities, dug a trench in a street, and, upon notice by the city authorities, suspended work until the city fixed the grade of the street and built a fence around the ditch; and these conditions remained for several months, awaiting the establishment of the grade, when an accident took place causing an injury,—it is a question for the jury, in an action against the city for the injury, whether the city authorities were negligent in suspending the work and allowing the street to remain in such a condition for such a length of time. *Lane v. Syracuse*, 12 App. Div. 118, 42 N. Y. Supp. 219.

So, where, in the separation of grades of a street and a railway crossing it under a statutory provision therefor, a general order was passed by the city council authorizing the mayor to designate in writing streets which it was necessary to close, and, acting under this order, the mayor authorized the railroad company, which was required to perform the work, to close a part of a particular street, and, while it was thus closed, a person was injured by falling into an unguarded trench in the highway, the city cannot escape responsibility therefor on the plea that, until the street was reopened for travel, it was relieved by the intervention of the railroad company of all liability for 19 L.R.A. (N.S.)

a defective way caused by the act of reconstruction; the way still remained a public way which the city was charged with the primary duty of keeping reasonably safe for the use of travelers. *Trophy v. Fall River*, 188 Mass. 310, 74 N. E. 465.

Nor is the liability of the city affected by the fact that the excavation in question was made by a contractor of the railroad company in taking up and relaying the tracks, where the work had not been abandoned, but was in full progress when the accident occurred. *Long v. Philadelphia*, 212 Pa. 125, 61 Atl. 810.

And, where a city authorized an excavation as a necessary part of the construction of a roadbed of a cable-railway line along and beneath the surface of a street, the intervention of no independent contractor for any part of the work essentially embraced within the general plan as authorized by the city can relieve the city from liability for its failure to enforce the taking of such precautions in the course of the work as would keep adjacent portions of the public thoroughfare reasonably safe for the purposes for which they were left open for use. *Haniford v. Kansas City*, 103 Mo. 172, 15 S. W. 753.

And, where a municipal corporation, by ordinance, permits a street railway company to perform work involving the tearing up of its streets, the ordinance providing that the operation is to be subject to inspection by the city, and that the streets, upon the conclusion of the work, are to be properly repaved with due diligence; and that, if this is not done, the city may do the work itself at the expense of the street railway company,—the city is liable to a person who is injured through the dangerous condition in which the street is left by the street railway on the completion of the work at the point of the accident, if such dangerous condition has existed long enough to charge the city with notice thereof. *Aiken v. Philadelphia*, *supra*.

So, if the authorities of a city suffer a railway company to erect a bridge at a street crossing and maintain it, together with the approaches thereto, in such manner as to render the same a public nuisance, the city is liable for the consequences, just as it would be if the improper work had been done by the city itself. *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013.

And the duty charged by law upon incorporated towns, of keeping their streets in proper condition for travel, extends to a bridge built in a street by a railroad company on its right of way as an approach to a crossing of its track; and, whatever obligation may rest upon the railroad company to keep such bridge in a safe condition, the town still remains liable for negligence in that regard. *Fowler v. Strawberry Hill*, 74 Iowa, 644, 38 N. W. 521; *Bentley v. Atlanta*, 92 Ga. 624, 18 S. E. 1013.

So, the right of way or franchise conceded by a city to a railroad company to

lay its tracks in a street does not deprive a traveler on the street of the right of using any part of the street or the track itself, and in so doing the traveler is not a trespasser. *Cline v. Crescent City R. Co.* supra.

And a town is liable for injuries resulting from defects in those portions of its streets which are within the location of railroads which cross them, of which it has or may have reasonable notice, if it can remedy them by reasonable care and diligence without interfering with the construction or operation of the railroads. *Noyes v. Gardner*, 147 Mass. 505, 1 L.R.A. 354, 18 N. E. 423.

And, where a street railway company is under contract with a city to construct and keep its railway in such manner and condition as not to prevent the crossing of streets by teams and wagons at any point with safety; and a person rightfully driving on the street or crossing the track of the railway, exercising due care, is injured by reason of the negligence of the railway company in the construction of its tracks, or in suffering them to become dangerous to travel, the city permitting the railway to be so constructed, or having notice or knowledge that it is out of repair and dangerous to travel,—both the railway company and the city are liable for the injury. *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012.

So, a city which sees fit to intrust to the servants of a railroad company which, with permission, has opened a trench for a sewer or drain, the duty of keeping the trench properly guarded, is responsible for their neglect, whether momentary or otherwise. *Blessington v. Boston*, 153 Mass. 409, 26 N. E. 1113.

And where, in such case, the city knew that the barriers would need to be frequently removed to accommodate passing cars, and that the street was much traveled, and that the railroad company had stationed two men for the purpose of moving and replacing the barriers; and it adopted no additional safeguards of its own,—the fact that an accident from falling into the trench was due to the momentary failure of the servants of the railroad company to replace the barriers would not relieve the city from liability therefor. *Ibid.*

But, while municipal corporations are bound to see that the construction of railway tracks in streets does not necessarily interfere with or endanger other uses of such streets, they are not insurers of street-car passengers against defects in the street-car system itself. *Kennedy v. Lansing*, 99 Mich. 518, 58 N. W. 470.

And a municipal corporation, permitting a street railroad company to occupy its streets, which did not fix or direct the location of the tracks, or of the trolley poles, or determine the width of the cars, is not liable to a person who, while riding on one of the street railway company's open cars, which were wider than ordinary cars, and while standing upon one of the side boards

used as steps came in contact with one of the trolley poles and was injured thereby. *Ibid.*

And, where a railroad company was authorized by law to construct a railway across a street, and, while the construction was proceeding lawfully and without negligence or undue delay, a person attempting to cross the railway track fell and was injured, no recovery can be had against the city for the injury. *Atkin v. Hamilton*, 24 Ont. App. Rep. 389.

So, where a railroad bridge over a street was destroyed by fire, and the railroad company built a temporary bridge supported by timbers and trestle work, which obstructed a part of the highway, the selectmen of the town have no right forcibly to remove the temporary bridge, but do their full duty by applying to the county commissioners for its removal. *Flanders v. Norwood*, 141 Mass. 17, 5 N. E. 256.

VI. Permitting acts in street which obstruct traffic.

This will be made the subject of a separate note.

VII. Knowledge or notice of obstruction.

Notice is not necessary to establish the liability of a municipal corporation for an obstruction in a street, where the obstruction was produced by acts done with the express sanction of the municipality. *Haniford v. Kansas City*, supra; *McDermott v. Kingston*, 19 Hun, 198.

And the act of a person making an excavation in a street by permission of the city is the act of the city; and no notice to the latter of such excavation is necessary to render it liable to a person sustaining an injury therefrom. *Stephens v. Macon*, 83 Mo. 345; *Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270; *South Omaha v. Burke*, 3 Neb. (Unof.) 309, 91 N. W. 562; *Hoyer v. North Tonawanda*, 79 Hun, 39, 29 N. Y. Supp. 650; *Hewitt v. Cleveland*, 21 Ohio C. C. 505.

And the issuance by a city of a permit to a telephone company to replace a telephone pole charges the city with knowledge of a depression occasioned by the sinking of the ground following the setting of the new pole. *Merritt v. Kinloch Teleph. Co.* (Mo.) 115 S. W. 19.

So, where an injury was caused by a cut in a street made for the purpose of putting in water pipes, it is not necessary for the person injured to prove express or implied notice to the city of the existence of the cut in order to recover for the injury. *Sevestre v. New York*, 15 Jones & S. 341.

And permits given by the superintendent of the city waterworks to make a connection of water pipes from an adjoining house to the water main in the street are admissible in evidence in an action against a city for an injury caused by an excavation in a street, on the question as to whether the city had notice of the trench, as facts

requiring the city to take notice of what was done under its authority likely to become dangerous. *Clute v. Albany*, 7 N. Y. Week. Dig. 565.

So, it is the duty of a municipal corporation, the common council of which has, by resolution, authorized a private citizen to construct a drain upon his premises beneath the street to connect with a public sewer, provided the same is done under the direction of a proper city officer, to send a competent person to oversee the work; and, if it neglects to do so, and the work is improperly done, and an injury results from such negligence to which the person injured did not contribute, the city is liable for the damages. *Wendell v. Troy*, 4 Keyes, 267.

And, where a gas company empowered by law to lay its gas pipes through the streets of a city with the consent of the city obtained such consent, agreeing to leave the streets in good condition, and not to allow the ditches which it might dig to be left open longer than should be necessary to lay or repair the pipes, and, in the prosecution of its work, it opened a ditch in one of the streets, which, for want of pipe, was left open for several days, and while so open a person passing at night fell in and was injured, the city, giving permission so to occupy the street, is liable for the injury without proof of notice, to the same extent as if the ditch had been opened by its own servants. *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325.

And, where a city council gave permission to an individual to remove a sidewalk on a street and make an excavation for a basement of a building he was about to erect, the fact that the permit was granted was notice to the authorities that the work was in progress, and they were charged with the duty of seeing that it was properly conducted, and it was incumbent upon them to see that the excavation was so guarded as to protect travelers upon the street from being injured by it. *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273.

So, where a section of a sidewalk was removed and an injury to a traveler resulted, the city may be held liable therefor when the removal of the sidewalk was with the assent of the authorities, on the theory that knowledge of the defect by the city can be presumed, or that a duty rested upon it to watch what was done by its assent, so that it should not be left unfinished and dangerous. *Higgins v. Salamanca*, 6 N. Y. S. R. 119.

And, where a city grants the right to place building material upon sidewalks or streets that may obstruct them, the city is at once charged with notice that the streets and sidewalks may be obstructed by the person to whom the privilege had been granted; and it is required to exercise ordinary care to prevent persons from being injured by such obstructions. *Blocher v. Dieco*, 30 Ky. L. Rep. 689, 99 S. W. 606.

And, where a city grants permission to

an owner of property abutting on a street to maintain a coal hole in the sidewalk, the duty immediately arises, upon the part of both the city and the property owner, to use ordinary care to see that it is safe for public use; and, if the construction is such that the cover is likely to be displaced, the city is liable to a pedestrian who falls into the hole, although it is without actual notice of the defect, since it has constructive notice from the beginning. *Drake v. Kansas City*, 190 Mo. 370, 109 Am. St. Rep. 759, 88 S. W. 689.

Where an injury results from the negligent mode in which a licensee of a city exercised the privilege granted to him, however, the city can be held liable for a resulting injury only on proof of knowledge or notice to the city, and subsequent acquiescence in the use. *Cohen v. New York*, 33 Hun. 404.

And the fact that the street commissioner or other authorities of a municipal corporation had knowledge that a license given by the municipality to lay a private water pipe in a street was being misused or abused by an independent contractor of the licensee, or by the licensee himself, in that the excavations for the water pipes in the streets were left in an unguarded and dangerous condition, will not render the municipality liable for damages resulting from such misuse or abuse of the license. *Susquehanna Depot v. Simmons*, 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434.

And the fact that a city, in giving permission to a company engaged in transporting passengers in cars drawn by horses to use a street, required the company to lay and maintain its tracks in a specified manner, does not make the city liable for an injury resulting from the construction of the company's tracks, although the company may not have conformed to the ordinance. *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518.

And a city which permitted an owner of land abutting upon the street to construct a coal vault under the sidewalk is not liable for an injury to a person who fell into the coal hole where the aperture had been open only three minutes before the accident occurred, and no city official had notice of its being uncovered. *Lafayette v. Blood*, 40 Ind. 62.

So, where a municipal corporation licensed a lot owner to build a sidewalk in front of his lot within a specified time, and the lot owner did nothing toward building the walk within the specified time, and afterwards, without the knowledge or permission of the municipal corporation, he proceeded to build the walk, and, for that purpose, deposited a number of flagstones in the street opposite his lot and left them there without barriers or signals, and the night following the evening of the deposit a traveler was injured by coming in contact with them, the corporation is not liable for the injury. *Davis v. Omaha*, 47 Neb. 836, 66 N. W. 859.

VIII. Effect of contributory negligence.

The subject of contributory negligence on the part of the person injured, as affecting the liability of a municipal corporation for an injury caused by a defect or obstruction in a street, is reserved for consideration in another note. And, inasmuch as the fact that an obstruction was permitted to be placed in a street by the municipality is of no effect on rules of law with reference to contributory negligence as affecting municipal liability in such cases, the reader is referred to that note, and nothing is left to be said here.

IX. Conclusion.

Where an obstruction in a street of a municipality results from some act or thing done by license or permission of the city, either express or implied, the municipal corporation is liable for an injury to a traveler, caused thereby, to the same extent as though it had been created without authority, unless it was one of the class of slight obstructions which are permissible. If the license was for a lawful and proper purpose, however, the municipal corporation is not liable for the results of an abuse of it by a licensee or a contractor, unless the thing authorized was intrinsically dangerous or the municipal authorities had notice of the negligence of the licensee. But a municipal corporation has no power, in the absence of statutory authority, to grant to an individual any right in a street which will interfere to any great extent with its use by the public. Streets may be partly occupied by goods for business purposes, and by material for building purposes, and by facilities in aid of traffic, and perhaps by other things designed for general utility, without imposing municipal liability. But the use must be limited to reasonable necessity both as to time and as to space. And if, for any reason, a work in a street amounting to a nuisance is tolerated by a municipal corporation, it is its duty to exercise supervision over its construction and condition, and to see that proper warning thereof is given to the public.

Within these rules, the owner of the soil over which a highway passes may use it in any manner for his own benefit so long as he does not interfere with the public easement, and the municipality is liable only when he creates a dangerous condition of which it has knowledge or notice. And the temporary use of a part of a street for the deposit of building materials for buildings being erected on abutting property is a lawful use where ample room is left for the passage of vehicles and proper notice is given of the obstruction. But such an obstruction must not be so obviously dangerous that men of ordinary prudence would condemn its use.

On the same principle, excavations for water, gas, and sewer connections between abutting buildings and mains and sewers in the streets may properly be made. But the rule making it the duty of the municipal

corporation to see that such excavations are properly guarded is especially applicable. And, where the work is for private advantage alone, the municipality has the same responsibility as though it were done by itself. And these rules apply, also, to excavations made and obstructions created by abutting owners, in constructing sidewalks along their property. And area ways, hatch ways, and coal holes permitted in sidewalks are governed by the same rules.

So, streets may be encumbered, within the rules and restrictions above expressed, to some extent by goods, the stock of a business, or the product of a manufacture, in the streets in the course of manufacture and transportation. But this, like other uses, must be reasonable, and a street cannot be used for the purpose of the storage of private property. And generally permission to occupy streets by erections for markets or other business purposes, or for public exhibitions, cannot be given, and the municipality is liable for resulting injuries.

Nor does the duty of a city to keep its streets free from nuisances or obstructions prevent it from permitting their occupation by street and other railway tracks. But the right to occupy streets with railroad tracks must be conferred by statute. And municipal corporations are bound to see that the construction of railway tracks in their streets does not unnecessarily interfere with and endanger other uses of such streets. And an undertaking on the part of the railway company occupying a street with its tracks to keep the street in proper condition does not relieve the municipality from its responsibility with reference thereto.

That which a municipal corporation licenses or permits is supposed to be within its knowledge. And notice is not necessary to establish its liability for an obstruction in a street where the obstruction was produced by acts done with its sanction. But, where an injury results from the negligent mode in which a licensee of a city exercised a privilege granted him, there must be some proof of negligence, showing permission to use, or acquiescence in the use of, the mode after notice or knowledge on the part of the municipal corporation.

F. H. B.

CALIFORNIA SUPREME COURT.

MELISSA J. STEVENSON, Trustee, etc., of
Thomas Boyd, Appt.,

v.

THOMAS M. BOYD

and

JOSEPHINE PORTER BOYD, Respnt.

(153 Cal. 630, 96 Pac. 284.)

Cotenant — outstanding title — purchase — laches.

1. A delay for four years before demand-

ing a right to share in a purchase of the property by a cotenant under an outstanding encumbrance, and until the property has more than doubled in value, is such laches that equity will refuse to enforce it as against one who purchased the property for value from the purchasing tenant.

Appeal — discretion — rights of cotenant.

2. The determination of the chancellor that, because of laches, a joint tenant should not be permitted to share in the benefit of a purchase by his cotenant under an outstanding encumbrance on the property, will not be interfered with on appeal, except in case of abuse of discretion.

(May 26, 1908.)

APPEAL by plaintiff from a judgment of the Superior Court for Fresno County in favor of one defendant in an action to secure a share in the benefit of a purchase of joint property under an outstanding encumbrance. Affirmed.

The facts are stated in the opinion.

Messrs. Frohman & Jacobs, for appellant:

One cotenant cannot deprive another cotenant of his interest in the common proper-

ty by purchasing an encumbrance or outstanding title.

Calkins v. Steinbach, 66 Cal. 117, 4 Pac. 1103; Titaworth v. Stout, 49 Ill. 78, 95 Am. Dec. 577; Leach v. Hall, 95 Iowa. 611, 64 N. W. 790; Koboliska v. Swehla, 107 Iowa, 124, 77 N. W. 576; Sears v. Sellew, 28 Iowa, 501; Dickinson v. Williams, 11 Cush. 258, 59 Am. Dec. 142; Curl v. Watson, 25 Iowa, 35, 95 Am. Dec. 766; Warner Bros. Co. v. Freud, 138 Cal. 651, 72 Pac. 345; Oliver v. Hedderly, 32 Minn. 455, 21 N. W. 478; Dray v. Dray, 21 Or. 59, 27 Pac. 223; Mandeville v. Solomon, 33 Cal. 38; Flagg v. Mann, 2 Sumn. 520, Fed. Cas. No. 4,847; Lee v. Fox, 6 Dana, 176; Van Horne v. Fonda, 5 Johns. Ch. 388; 1 Washb. Real Prop. p. 588; Olney v. Sawyer, 54 Cal. 379; Weaver v. Wible, 25 Pa. 270, 64 Am. Dec. 696; McPheeters v. Wright, 124 Ind. 560, 9 L.R.A. 176, 24 N. E. 734; Venable v. Beauchamp, 3 Dana, 321, 28 Am. Dec. 74; Boskowitz v. Davis, 12 Nev. 446; Bracken v. Cooper, 80 Ill. 221; Montague v. Selb, 106 Ill. 49; Knolls v. Barnhart, 71 N. Y. 474; Carpenter v. Carpenter, 131 N. Y. 107, 27 Am. St. Rep. 569, 29 N. E. 1013; Hinters v. Hinters, 114 Mo. 26, 21 S. W. 456; Lloyd v.

Case Note — Laches as affecting the right of one cotenant to benefit of purchase of outstanding title by another.

The doctrine of *STEVENSON v. BOYD*, that a cotenant may, by delay, lose the right to benefit by the purchase of an outstanding title by his fellow owner, is well established. Thus, in *Savage v. Bradley*, 149 Ala. 169, 123 Am. St. Rep. 30, 43 So. 20, it was held that, under ordinary circumstances, two years was a reasonable time within which a cotenant might elect to contribute to the purchase of an outstanding title made by another cotenant, and that therefore, where a cotenant did not attempt to exercise this right for nearly ten years after the redemption of the property from a mortgage sale by another cotenant, such laches lost him the right to benefit by such purchase.

And in *Mandeville v. Solomon*, 39 Cal. 125, it was held that, while equity would not permit a cotenant to acquire an outstanding or adverse claim to the common property solely for his own benefit, or to the exclusion of his cotenant, it at the same time exacted of the latter the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition, and having, upon principles of fair dealing, compelled the purchasing tenant to allow his cotenant this opportunity, the latter would not be permitted to equivocate or trifle with the opportunity thus afforded him, or to make it a means of speculation for himself by delaying until some event in the future, such as an increase in the value of the land should determine his course.

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And in *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 932, and in *Ryason v. Dunten*, 164 Ind. 85, 73 N. E. 74, the court quoted with approval the following language of *Freeman on Cotenancy & Partition*, § 156: "The right of a cotenant to share in the benefit of a purchase of an outstanding claim is always dependent on his having, within a reasonable time, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim. A most natural and material inquiry, then, is, What is a reasonable time? To this inquiry no positive answer can be given. In this, as in all other questions in regard to reasonable time, no doubt each case must necessarily be determined upon its own peculiar circumstances. The cotenant, asking a court of equity to award him the benefit of a purchase, must show reasonable diligence in making his election. Whatever delay he may have occasioned must be entirely consistent with perfect fair dealing on his part, and in no wise attributable to an effort to retain the advantages while he shirks the responsibilities of the new acquisition."

And in *Craven v. Craven*, 68 Neb. 459, 94 N. W. 604, it was held that the right of joint tenants to participate in the benefit of a superior claim purchased by one of them in possession was dependent upon a timely offer to contribute their rightful proportion of the money expended by the tenant in possession in procuring such superior claim; and that, where such purchasing tenant and his heirs were allowed to remain in open and notorious possession of the common property for more than ten

Lynch, 28 Pa. 419, 70 Am. Dec. 137; Keller v. Auble, 58 Pa. 410, 98 Am. Dec. 297; House v. Fuller, 13 Vt. 165, 37 Am. Dec. 588; Franklin Min. Co. v. O'Brien, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016; Cedar Canyon Consol. Min. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 740; Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Dubois v. Campau, 24 Mich. 360; Page v. Webster, 8 Mich. 263, 77 Am. Dec. 446; Rothwell v. Dewees, 2 Black, 613, 17 L. ed. 309; Delashmutt v. Parrent, 39 Kan. 548, 18 Pac. 712; Johns v. Johns, 93 Ala. 239, 9 So. 419; Field v. Farmers' & D. Bank, 110 Ky. 256, 61 S. W. 258; Perkins v. Smith, 18 Ky. L. Rep. 509, 37 S. W. 72; Robinson v. Lewis, 68 Miss. 69, 10 L.R.A. 101, 24 Am. St. Rep. 254, 8 So. 258.

The doctrine of laches is not available under the facts of this case.

Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Beal v. Chase, 31 Mich. 490; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. 28 App. Div. 411, 50 N. Y. Supp. 1093; Ulman v. Clark, 75 Fed.

868; Oliver v. Piatt, 3 How. 333, 11 L. ed. 622; Galway v. Metropolitan Elev. R. Co. 128 N. Y. 132, 13 L.R.A. 788, 28 N. E. 479; Rigney v. Tacoma Light & Water Co. 9 Wash. 576, 26 L.R.A. 425, 38 Pac. 147; Mason v. Crosby, 2 Ware, 306, Fed. Cas. No. 9,235; Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077; Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Kline v. Cutter, 34 N. J. Eq. 320; Story, Eq. Jur. § 1520d; Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108; Wright v. Wright, 37 Mich. 55; Townsend v. Vanderwerker, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258; Paschall v. Hinderer, 28 Ohio St. 568; Boskowitz v. Davis and Cedar Canyon Consol. Min. Co. v. Yarwood, supra; Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; Cook v. Ceas, 147 Cal. 617, 82 Pac. 370; Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267, 11 A. & E. Ann. Cas. 520.

That one cotenant may buy the interest of another at forced sale is by no means beyond dispute.

Bracken v. Cooper and Montague v. Selb, supra; 17 Am. & Eng. Enc. Law, p. 674.

The rule that one cotenant cannot obtain the title to the whole property by buying in

years, without any assertion of right on the part of his cotenants, such delay would defeat their right to any benefit in the purchase.

And in Buchanan v. King, 22 Gratt. 414, it was held that while, as a general rule, a joint tenant or tenant in common was not permitted to purchase an outstanding title for his own benefit, the cotenant must, within a reasonable time, make his election to claim the benefit and to contribute to the expense incurred in procuring such title; and that, if he unreasonably delayed in this until there was a change in the condition of the property or in the circumstances of the parties, he would be held to have abandoned all benefit arising from the new acquisition.

And the foregoing case was cited and followed in Pillow v. Southwest Virginia Improv. Co. 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804, and Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216; and its language was quoted with approval in Morris v. Roseberry, 46 W. Va. 24, 32 S. E. 1019.

And this doctrine of laches was recognized, also, in Barnes v. Boardman, 152 Mass. 391, 9 L.R.A. 571, 25 N. E. 623, and in Holterhoff v. Mead, 36 Minn. 42, 29 N. W. 675, though the courts in those cases held that no laches was shown; and in the following cases, in which the cotenant seeking to share in the benefit of the purchase by his cotenant was held to have lost his right thereto by a failure to assert it until after the lapse of the time parenthetically shown: Francis v. Million, 26 Ky. L. Rep. 42, 80 S. W. 486 (thirteen years); Smith v. Washington, 11 Mo. App. 519 (three and one-half years); Koke v. Balcken, 73 Hun, 145, 25 N. Y. Supp. 1038, af- 19 L.R.A. (N.S.)

firmed without opinion in 148 N. Y. 732, 42 N. E. 724 (twelve years).

The doctrine was also recognized in Oliver v. Hedderly, 32 Minn. 455, 21 N. W. 478, where it was held that, if one cotenant bought in an encumbrance upon, or adverse title to, the common property, his fellow cotenants were entitled to share in the benefit of his purchase, unless they unreasonably neglected in some manner to assert their right in that behalf.

So, in the following cases the rule was laid down that the cotenant seeking to share in the benefit of a purchase of an outstanding title by his cotenant must assert such right within a "reasonable time." Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497; Goralski v. Kostuski, 179 Ill. 177, 70 Am. St. Rep. 98, 53 N. E. 720; Lee v. Fox, 6 Dana, 172; Reed v. Reed, 122 Mich. 77, 80 Am. St. Rep. 541, 80 N. W. 996; Nalle v. Parks, 173 Mo. 616, 73 S. W. 596; Boskowitz v. Davis, 12 Nev. 446; Roberts v. Thorn, 25 Tex. 728, 78 Am. Dec. 552; Rippetoe v. Dwyer, 49 Tex. 408; McFarlin v. Leaman (Tex. Civ. App.) 29 S. W. 44; Cedar Canyon Consol. Min. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749. See also 17 Am. & Eng. Enc. Law, p. 679.

In Burr v. Mueller, 65 Ill. 258, it was held that the right of a cotenant to elect, within a reasonable time after purchase by his fellow tenant of an outstanding encumbrance, to avail himself of the purchase by offering to contribute his due proportion of the sum expended therein, was a personal right, and did not attach to the estate so as to permit the mortgagee of such cotenant to exercise the same.

an outstanding title or encumbrance is not limited to cases where both cotenants hold under the same instrument.

Note to *Venable v. Beauchamp*, 28 Am. Dec. 84; *Bracken v. Cooper*, 80 Ill. 229; *Montague v. Selb*, supra; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 222; *Hoyt v. Lightbody*, 98 Minn. 189, 116 Am. St. Rep. 358, 108 N. W. 843, 8 A. & E. Ann. Cas. 984; *McPheeters v. Wright*, supra; *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. Rep. 169, 61 N. E. 782; *Olney v. Sawyer and Emeric v. Alvarado*, supra; *Calkins v. Steinbach*, 66 Cal. 117, 4 'Pac. 1103; *Warner Bros. Co. v. Freud*; *Rothwell v. Dewees*; and *Field v. Farmers' & D. Bank*,—supra; *Gilchrist v. Beswick*, 33 W. Va. 168, 10 S. E. 371; *Conn v. Conn*, 58 Iowa, 747, 13 N. W. 51; *McChesney v. White*, 140 Ill. 330, 29 N. E. 709; *Richards v. Richards*, 75 Mich. 408, 42 N. W. 954; *Robinson v. Lewis and Perkins v. Smith*, supra.

Mr. M. K. Harris, for respondent Boyd:

A plaintiff must come into a court of equity with clean hands.

1 Pom. Eq. Jur. §§ 397-404; *Freeman. Cotenancy & Partition*, § 165; *Gunter v. Laffan*, 7 Cal. 593; *Bradbury v. Barnes*, 19 Cal. 120; *Baird v. Baird*, 21 N. C. (1 Dev. & B. Eq.) 524, 31 Am. Dec. 399.

The rule prohibiting a cotenant from buying in an outstanding title or encumbrance applies to cases only when both cotenants hold under the same instrument.

Roberts v. Thorn, 25 Tex. 728, 78 Am. Dec. 554; *Freeman, Cotenancy & Partition*, § 155; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 511; *Boynton v. Veldman*, 131 Mich. 555, 91 N. W. 1023; *Fielding v. White* (Tex. Civ. App.) 32 S. W. 1054; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 429, 41 N. E. 931; *Bennet v. North Colorado Springs Land & Improv. Co.* 23 Colo. 470, 58 Am. St. Rep. 283, 48 Pac. 812; *Elston v. Piggott*, 94 Ind. 14; *Myers v. Reed*, 9 Sawy. 132, 17 Fed. 401.

Plaintiff has been guilty of laches in bringing suit.

Freeman, Cotenancy & Partition, § 157; *Mandeville v. Solomon*, 39 Cal. 133; *Potter v. Herring*, 57 Mo. 184; 6 Am. & Eng. Enc. Law, p. 58; *Murphy v. Paynter*, 1 Dill. 333, Fed. Cas. No. 9,952; *Doolittle v. McCullough*, 7 Ohio St. 299; *Lyon v. Waldo*, 36 Mich. 345; *Ramberg v. Wahlstrom*, 140 Ill. 182, 33 Am. St. Rep. 227, 29 N. E. 727; 1 Pom. Eq. Jur. § 419; *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896; *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380; *Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409.

A tenant in common out of possession cannot recover from the other for the rents and 19 L.R.A. (N.S.)

profits of the estate when he has not been excluded from possession.

Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550; *Creed v. People*, 81 Ill. 565; *Kennon v. Wright*, 70 Ala. 434; *Le Barron v. Babcock*, 122 N. Y. 153, 9 L.R.A. 625, 19 Am. St. Rep. 488, 25 N. E. 253; *Freeman, Cotenancy & Partition*, § 258; *McCord v. Oakland Quick-silver Min. Co.* 64 Cal. 139, 49 Am. Rep. 686, 27 Pac. 863; *Plass v. Plass*, 122 Cal. 11, 54 Pac. 372; *Hamby v. Wall*, 48 Ark. 137, 3 Am. St. Rep. 219, 2 S. W. 705; *Humphries v. Davis*, 100 Ind. 371; *Kean v. Connelly*, 25 Minn. 226, 33 Am. Rep. 461; *Chambers v. Chambers*, 10 N. C. (3 Hawks) 232, 14 Am. Dec. 585; *Early v. Friend*, 78 Am. Dec. 666, note; 11 Am. & Eng. Enc. Law, p. 1107; *O'Connor v. Delaney*, 53 Minn. 247, 39 Am. St. Rep. 602, 54 N. W. 1108; *Ward v. Ward*, 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 913, 21 S. E. 746.

Messrs. F. H. Short and F. E. Cook for defendant Boyd.

Sloss, J., delivered the opinion of the court:

Thomas Boyd, now deceased, was the father of Melissa J. Stevenson, the plaintiff, Thomas M. Boyd, one of the defendants, George Culberson Boyd, and Mary Alice Zinns. In December, 1892, Thomas Boyd and his son, the defendant Thomas M. Boyd, each then owning an undivided one half of an 80-acre tract of land situated in Fresno county, executed a deed of trust of said real property to E. R. Hamilton and W. P. Coleman, as security for the payment of their promissory note for \$3,200, payable two years after date to the Sacramento Bank. In October, 1897, Thomas Boyd, the father, conveyed his undivided one-half interest to the plaintiff in trust, to receive the rents and profits, and to pay them to the use of the grantor, Thomas Boyd, during his life, and, in case George Culberson Boyd should survive his father, to apply such rents and profits for his support and maintenance during his life. The deed of trust gave plaintiff power to sell, mortgage, or lease said real estate, and provided that, if the property was not sold by plaintiff, in pursuance of said deed of trust, it should, upon the death of Thomas Boyd and George Culberson Boyd, be vested in the plaintiff and Mary Alice Zinns, share and share alike. In July, 1897, Thomas M. Boyd married his codefendant, Josephine Porter Boyd. Some months thereafter the Sacramento Bank, the holder of the note secured by the deed of trust to Hamilton & Coleman, requested payment of the note. Some attempt was made to raise the money, but it was not paid, and the bank finally directed the trustees to sell. The

sale was originally advertised to take place in March, 1898, but Mrs. Stevenson, the plaintiff, secured from the bank a postponement for six months. In August, 1898, the defendant Thomas M. Boyd made arrangements with the Bank of Selma to pay off the loan of the Sacramento Bank, which at that time amounted to about \$3,400. Of this amount, some \$1,800 was furnished by the defendant Josephine Porter Boyd, and the balance by the Bank of Selma. The note was assigned by the Sacramento Bank to the Bank of Selma, and the latter directed the trustees, Hamilton & Coleman, to make a sale. On October 15, 1898, the trustees did sell the property for \$3,500,—a little more than the amount due on the note. The purchaser at the sale was the Bank of Selma, which immediately conveyed to T. M. Boyd and Josephine Porter Boyd, the defendants. On February 21, 1901, Thomas M. Boyd conveyed to his codefendant, Josephine Porter Boyd, an undivided one-half interest in the ranch for \$7,500, of which \$500 was paid in cash and the balance in instalments, evidenced by notes. Some of these notes were paid by Mrs. Boyd to her husband.

On October 13, 1902, two days less than four years after the sale by the trustees to Thomas M. & Josephine Porter Boyd, and over nineteen months after the conveyance from Thomas M. Boyd to Josephine Porter Boyd, this action was brought by the plaintiff. The complaint alleged that, prior to the trustees' sale, the defendants, in pursuance of a conspiracy to that end, did, by threats of violence and otherwise, prevent the plaintiff from raising the money necessary to pay off her one half of the indebtedness to the Sacramento Bank, and that they procured the Bank of Selma to take an assignment of the note, and to direct a sale of the property by the trustees, Hamilton & Coleman, for the purpose of destroying the rights of plaintiff under the deed from Thomas Boyd. It is alleged that the Bank of Selma, in taking the assignment of the note from the Sacramento Bank, was acting as agent for the defendants, and not in its own interests. In the complaint plaintiff offers to pay to the defendants such portion of the indebtedness paid to the Sacramento Bank, and to make such allowance to the defendants, for the cultivation of the property since the sale, as the court may deem equitable. She asks for an accounting of the profits, and prays judgment that it be decreed that she is the owner, as trustee, of an undivided one-half interest in said real property, and that defendants be compelled to convey to her such interest free of encumbrance, except for her just share of the indebtedness to the Sacramento Bank. Thomas M. Boyd and his wife,

Josephine Porter Boyd, answered separately. Each of the answers denies that the defendants had conspired or contrived to defeat the deed of trust under which plaintiff claims, or to deprive the plaintiff, as trustee, of her interest in the property, or that plaintiff was prevented by any act of the defendants, or either of them, from raising the money necessary to pay her share of the indebtedness. The defendant Josephine Porter Boyd set up a special defense of laches, alleging that, at the time the land was sold by the trustees to the Bank of Selma, and by the Bank of Selma to the defendants, its value did not exceed \$5,000; that, on February 21, 1901, Thomas M. Boyd sold his interest in the land to Josephine Porter Boyd for the sum of \$7,000, more than \$3,000 of which has been paid in cash and the balance in notes secured by mortgage; that since said sale by the trustees to the Bank of Selma, and by the Bank of Selma to the defendants, the land has greatly increased in value, and is now of the value of about \$15,000; that the defendant bought the interest of her codefendant in good faith, and paid and obligated herself to pay the full increased value thereof to said codefendant Thomas M. Boyd; that plaintiff made no claim to any interest as trustee or otherwise in or to said property, and took no steps and made no effort to subject said property to any claim until it had greatly increased in value. The defendant further alleges, on information and belief, that the plaintiff would not have made any such claim had the property not increased in value, and that at the time the defendant Josephine Porter Boyd bought the said property the same was of little value, and yielded very little income, and that, in buying the same, the defendants ran the risk of losing the money paid upon the purchase price thereof. It is further alleged that ever since the sale the defendants have cultivated the land, and been in charge thereof, and have improved and increased the value of said property. The answer of Thomas M. Boyd, in addition to its denials of many of the allegations of the complaint, sets up a claim, as against his wife, the codefendant Josephine Porter Boyd, his contention being that the \$1,800 belonging to Josephine Porter Boyd, which went into the purchase of the property at the time of the trustees' sale, was a loan to him, and that the conveyance of the undivided one-half interest to said Josephine Porter Boyd was made as security for such loan. The trial resulted in findings and judgment in favor of the defendant Josephine Porter Boyd. The court found against the allegations of the complaint regarding a conspiracy between the defendants, found against the allegation that the sum of \$1,800 paid by Josephine Porter

Boyd was a loan to her codefendant, and found that the conveyance of October 19, 1898, from the Bank of Selma to Thomas M. Boyd and Josephine Porter Boyd, conveyed to each of said defendants an equal undivided one-half interest in and to said property, and that the defendant Josephine Porter Boyd in consideration of said conveyance, paid, as a part of the purchase price for said land, the sum of \$1,800. It was found that Josephine Porter Boyd did not take the title of such one-half interest as security for any loan to her codefendant Thomas M. Boyd. The allegations of the answer of Josephine Porter Boyd, with reference to the defense of laches, are all found to be true, except that the court finds that the value of the property at the time of the conveyance to the defendants was \$6,000, instead of \$5,000, as alleged in the answer. As conclusions of law, the court found that the plaintiff should take nothing against Josephine Porter Boyd, and said Josephine Porter Boyd should have judgment against plaintiff and her codefendant for her costs. Judgment was entered accordingly. The plaintiff appeals from the judgment.

Thomas M. Boyd has not appealed; and, so far as concerns the issues raised by the pleadings between himself and his codefendant, the finding that the payment of \$1,800 by the respondent, Josephine Porter Boyd, was not made as a loan to her husband, stands unquestioned.

The appellant's position is that, inasmuch as she and defendant Thomas M. Boyd were cotenants in the property, the latter could not purchase for himself alone the outstanding interest vested in the trustees Hamilton & Coleman, but was bound to hold any title, acquired on such purchase, for the equal benefit of himself and his cotenant, upon condition that the latter should contribute, or offer to contribute, her portion of the purchase money. This is undoubtedly the general rule as to cotenants. "A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance, and asserting it against his companions in interest. The purchase is, notwithstanding his designs to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase by contributing or offering to contribute their proportion of the purchase money." Freeman on Cotenancy & Partition, 2d ed. § 154. The respondent contends that this principle applies only where the cotenants hold under the same instrument. Whether or not the rule is subject to this qualification is a question which has given rise to a considerable conflict of 19 L.R.A. (N.S.)

authority. It need not, however, be here decided. Assuming that the plaintiff (regardless of her allegations that the defendants prevented her from paying off her share of the debt to the Sacramento Bank) was entitled, as against her cotenant and his wife, to claim the benefit of the purchase by them of the interest sold by the trustees, she must still fail, for the reason that the court below found that her cause of action was barred by laches. This finding is fully sustained by the proofs offered and the principles of law applicable.

The plaintiff's delay in seeking relief in the courts had not lasted for such a period as to make the statute of limitations available as a bar to the suit. Undoubtedly mere delay to commence the suit for a period less than that of the statute of limitations is not a sufficient reason for dismissing the proceeding. *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674. It is well settled, however, that courts of equity will often refuse relief, even where the statutory time of limitation has not run. "There must be something more than a mere passive neglect. There must be, in addition, a showing of facts amounting to acquiescence in the acts complained of, or of other circumstances which, coupled with the delay, will render the granting of the relief inequitable." *Lux v. Haggin*, supra. In *Chapman v. Bank of California*, 97 Cal. 155, 159, 31 Pac. 896, the court says: "Regardless of the question as to whether there has been a plea of the statute of limitations, a court of equity will refuse to entertain a suit brought after unreasonable delay. *Harris v. Hillegass*, 66 Cal. 79, 4 Pac. 987; *Bell v. Hudson*, 73 Cal. 287, 2 Am. St. Rep. 791, 14 Pac. 791. The refusal to grant relief is not put upon the presumption of payment or analogy to the statute of limitations, but upon considerations of public policy, and the difficulty of doing entire justice between the parties in consequence of the unreasonable delay. The principal factors in determining whether the plaintiff had been guilty of laches are acquiescence and lapse of time; but other circumstances are also material, such as, that a change in the value or character of the property has taken place. The matter is one which is left to the sound discretion of the chancellor in each case."

These principles have been applied with, perhaps, more than ordinary strictness to the case of a cotenant demanding the benefit of a purchase by the other cotenants. "The right of a cotenant to share in the benefit of a purchase of an outstanding claim is always dependent on his having, within a reasonable time, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim. . . . The cotenant asking a court of equity to award

him the benefit of a purchase must show reasonable diligence in making his election. Whatever delay he may have occasioned must be entirely consistent with perfect fair dealing on his part, and in no wise attributable to an effort to retain the advantages while he shirks the responsibilities of the new acquisition." *Freeman, Cotenancy & Partition*, 2d ed. § 156. In *Mandeville v. Solomon*, 39 Cal. 125, this court said: "Equity does not deny to a tenant in common the right to purchase in an outstanding or adverse claim to the common property. It, however, deals with the tenants after such a purchase is made. While it will not permit one of them to acquire such a title solely for his own benefit, or to the absolute exclusion of the other, it, at the same time, exacts of that other the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition; and having, upon its own principles of fair dealing, compelled the purchasing tenant to allow his cotenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself, by delaying, until the rise of the land or some event, yet in the future, shall determine his course. Unless he make his election to participate within a reasonable time, and contribute, or offer to contribute, his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction, and abandoned its benefits." See also 17 Am. & Eng. Enc. Law, 2d ed. p. 679; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, 91 N. E. 931; *Reed v. Reed*, 122 Mich. 77, 80 Am. St. Rep. 541, 80 N. W. 996; *Buchanan v. King*, 22 Gratt. 414; *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019; *McFarlin v. Leaman* (Tex. Civ. App.) 29 S. W. 44.

We think the facts shown in the case at bar are clearly sufficient to justify the conclusion of the court that, so far as the defendant Josephine Porter Boyd is concerned, the delay of the plaintiff was so great as to deprive her of the right to seek the relief here demanded. It is not disputed that the plaintiff knew of the trustees' sale and of the conveyance by the Bank of Selma to the defendants at the time these transactions took place. In the meanwhile the respondent has purchased the interest of her cotenant, has cultivated and cared for the land, has made some improvements upon it, and taken the risks of declining values and failure of crops. It is in evidence, and it is found by the court, that property of this character was in little demand at the time of the sale. Since such sale it has increased greatly in value, until, at the time of the trial, it had more than doubled in value. We cannot doubt that the court below was

fully justified in finding that a delay of almost four years was unreasonable under these circumstances. To permit the plaintiff now to reinstate herself as the owner of an undivided one-half interest in the land, upon payment of one half of the amount paid at the trustees' sale, thereby securing to herself the full benefit of the increase in the value of the land, without having undergone any of the risks connected with its holding and cultivation, would manifestly be inequitable. The appellant points out certain facts which, it is alleged, should have been held to have excused the delay in seeking relief. But whether or not, under all the circumstances, the delay has been such as to render it inequitable to grant the relief is, in the first instance, a question for the trial court, the determination of which is left, as is said in *Chapman v. Bank*, supra, "to the sound discretion of the chancellor in each case." The matters relied on by appellant as explaining her delay were proper to be considered by the court below; but, without stating them at length, we are compelled to say that, giving due effect to all of them, they were not of such character as to require that court to conclude that, at least as against the respondent Josephine Porter Boyd, the plaintiff had not slept on her rights to such an extent as to require the denial of relief.

Our views on this point make it unnecessary to consider any of the other contentions urged by counsel.

The judgment is affirmed.

We concur: Angellotti, J.; Shaw, J.

Petition for rehearing denied June 25, 1908.

FLORIDA SUPREME COURT.

FRANK T. GRAHAM, Plff. in Err.,

v.

VIRGINIA TUCKER et al.

(— Fla. —, 47 So. 563.)

Married woman — negligence — liability.

A married woman, the owner of statutory separate real estate, upon which is located

Headnote by HOCKER, J.

Case Note. — Liability of married woman for the use and safety of premises owned by her.

The earlier cases upon this subject are collated in a note to *Strouse v. Leipf*, 23 L.R.A. 622, to which this note is supplemented.

A married woman is liable for the death

a swimming pool and bath houses, conducted by the husband and wife as a public resort, is sued jointly with her husband for damages in tort by a party who was injured while lawfully using said premises, by his feet slipping and falling on his left leg upon the projecting points of planks alleged to have been negligently left uneven. Held, that, under the Constitution and laws of Florida, under the circumstances stated, the married woman is not liable in an action of tort.

(October 31, 1908.)

ERROR to the Circuit Court for Hillsborough County to review a judgment sustaining a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by the negligent construction of the flooring about a public swimming pool. Affirmed.

The facts are stated in the opinion.

Messrs. W. T. Martin and H. S. Hampton, for plaintiff in error:

The wife, sued jointly with the husband, is liable for the damages flowing from the commission of the tort.

Prentiss v. Paisley, 25 Fla. 929, 930, 7 L.R.A. 640, 7 So. 56; 2 Bishop, Married Women, 254; Brazil v. Moran, 8 Minn. 236, Gil. 205, 83 Am. Dec. 773.

Mr. Thomas Palmer for defendants in error.

Hocker, J., delivered the opinion of the court:

In July, 1907, the plaintiff in error, hereinafter called the plaintiff, filed an amended

declaration against the defendants in error in the circuit court of Hillsborough county in the following language:

"Frank T. Graham, by his attorneys, W. T. Martin and Davis & Hampton, files this his amended declaration, by leave of the court first had and obtained, and sues Virginia Tucker and James F. Tucker, her husband, in an action of case, damages, \$3,000, for that whereas, heretofore, to wit, on or about the 14th day of July A. D. 1906, the said Virginia Tucker was the owner of certain premises, situated in the county of Hillsborough and state of Florida, on which were located a certain swimming pool and bath houses, the said property being the separate statutory property of the defendant Virginia Tucker, a married woman, whose husband is James F. Tucker, the defendant herein; that on said premises on said date the said defendants were conducting a certain swimming pool, or public bathing place, where the public were invited to enter and for certain hire and reward were allowed to bathe in said pool, the same being a public resort. And plaintiff avers that, while conducting the said public bathing resort, the said defendants, in fitting up the said premises for the use of the public, disregarding their duty to provide safe premises by law, so negligently and carelessly constructed and equipped said premises that divers planks, the flooring of the walk way surrounding said pool, were uneven, and the ends of the same were allowed to project over the side of said pool, the same constituting a danger-

of a laborer employed upon a building being erected by her, although the work was being performed under the supervision of her husband, as her agent, and the intestate's death was due to the former's negligence. Schmidt v. Keehn, 32 N. Y. S. R. 11, 10 N. Y. Supp. 267.

Husband and wife are both liable for damages caused to adjoining property by reason of the negligence of those engaged in remodeling a building owned by the wife. Flesh v. Lindsay, 115 Mo. 1, 37 Am. St. Rep. 374, 21 S. W. 907. The wife's liability in such a case arises from a statute providing that the annual products of the wife's realty may be attached or levied if for any debt or liability created for the cultivation or improvement of her real estate; as the right to improve, repair, and remodel her property implies that she may employ servants for that purpose, for whose carelessness and negligence she and her husband will be held jointly liable.

But the sale of liquors by a husband upon his wife's property, will not render it liable for the payment of a judgment obtained against him for unlawful sales, under a statute making property rented or leased or permitted to be used for the sale of

liquors liable for such judgments, where the wife never consented to the use of her property for that purpose, but strongly objected thereto, and it appeared that there was no collusion between the husband and wife. Benhoff v. Weaver, 14 Ohio C. C. 370.

And the fact that the wife did not resort to legal proceedings in order to prevent such use of her property does not affect her liability, as it is not the policy of the law to stir up litigation between husband and wife. Ibid.

A married woman is liable as the harborer of her husband's dog which, with her consent, is kept upon premises owned by her. Valentine v. Cole, 1 N. Y. S. R. 719; Hugron v. Statton, Rap. Jud. Quebec 18 C. S. 200, contra Bundschuh v. Mayer, 81 Hun, 111, 30 N. Y. Supp. 622; Burch v. Lowary, 131 Iowa, 719, 117 Am. St. Rep. 443, 109 N. W. 282; Strouse v. Leipf, 101 Ala. 433, 23 L.R.A. 622, 46 Am. St. Rep. 122, 14 So. 667. For a full discussion of this question, see Quilty v. Battie, 135 N. Y. 201, 17 L.R.A. 521, 32 N. E. 47.

As to the effect of so-called married women's acts upon the husband's liability for wife's torts, see case note to Kellar v. James, 14 L.R.A. (N.S.) 1003.

ous projection to persons using said pool in the ordinary way of walking along said walk way, and the condition of said premises was known to the said defendants, or could have been known by the exercise of ordinary care, but was unknown to the plaintiff.

"Plaintiff avers that, on said date, while he was lawfully using the said premises and walking along said walk around said pool provided for the public, and without negligence on his part, his feet slipped on the wet flooring of said walk way and he was precipitated in said pool; that in falling his left leg came in contact with one of the projecting points of said planks, which were uneven and had been allowed to project over said bath pool, and from the effect of which his left leg was then and there bruised, cut, and wounded, by means of which he became sick and sore, and from thence for a period of several months was confined to his bed from said injuries. The plaintiff avers that he has been compelled to pay out a large sum of money for physicians' services and for medicine in an effort to rid himself of the injury caused by the negligence of the defendant, and, in addition thereto, was compelled to submit to two surgical operations in order to effect a cure of the injury above set forth. Wherefore plaintiff says he has been injured and sustained damages to the sum of \$3,000, and therefore brings his suit."

This amended declaration was demurred to, and the substantial matters to be argued were, among others, that, first, the declaration does not state a cause of action; second, that a married woman cannot be sued at common law for a tort such as that complained of; third, that, under the Constitution and laws of Florida, a married woman's property cannot be subjected to a judgment such as that sought for; fourth, that, under the laws of Florida, the husband has the sole control of her real property, and is alone responsible for torts committed thereby.

The demurrer was sustained, and a judgment entered for the defendants. To review this judgment a writ of error was sued out. The assignments of error here are, first, that the court erred in sustaining the demurrer; and, second, that it erred in entering judgment for the defendants.

The sole question presented and urged here by the plaintiff is whether a married woman is liable under the Constitution and laws of Florida in an action for a tort such as is described in the declaration. The only decision of this court cited to sustain the contention that she is so liable is the case of *Prentiss v. Paisley*, 25 Fla. 927, 7 L.R.A. 640, 7 So. 56. In this case this court held 19 L.R.A. (N.S.)

that "a married woman is personally liable for her wrongful civil acts or actual torts [*italics ours*], including frauds, not growing out of or founded upon, or directly connected with, or a part of, or the means of effecting, a contract which she has undertaken to make; and she may be sued jointly with her husband in respect to such acts, or separately if she survives him. His liability for her torts is a result of the mere fact that by the common-law rules a suit cannot be maintained against the wife alone during her coverture. If before or pending the action she dies, the right of action against him falls. Whenever her coverture avoids the contract, it is likewise a bar to a personal recovery for the fraud, and this cannot be overcome by suing *ex delicto*." One of the cases cited in support of this view is the case of *Liverpool Adelphi Loan Assn. v. Fairhurst*, 9 Exch. 422, which seems to be generally treated as a leading case. In *Prentiss v. Paisley* there is not the slightest intimation that the liability of a married woman for her torts is in any way enlarged or affected by the Constitution or laws of Florida, changing the common law as to her ownership of a separate legal estate and giving her power to make certain specified contracts with reference thereto, and making the same liable *in invitum* in equity to certain specified debts. It is uniformly held by this court that these constitutional and statutory changes do not make her liable to a personal judgment or decree, unless it may be that the statute allowing her to be made a free dealer would have that effect. *Prentiss v. Paisley*, supra; *First Nat. Bank v. Hirschkowitz*, 46 Fla. 588, 35 So. 22; 2 *Bishop, Married Women*, § 265. This court, in the case of *Mercantile Exch. Bank v. Taylor*, 51 Fla. 473, 41 So. 22, undertook to distinguish between those contracts of sale, transfer, and conveyance which a married woman may make under our statutes, and which may be enforced against her, and those obligations which a court of equity is authorized by the Constitution to enforce *in invitum* against her separate legal estate. It has never been held by this court that the effect of our constitutional provisions and statutes is to place a married woman in the position of a *feme sole*, but, on the contrary, that her common-law status remains, except to the extent it has been modified by these provisions and statutes. *Micou v. McDonald* (Fla.) 46 So. 291.

In the case of *Liverpool Adelphi Loan Assn. v. Fairhurst*, supra, it was held that "a *feme covert* is . . . responsible for all torts committed by her during coverture, and the husband must be joined as a defendant; and consequently they are liable for frauds committed by her as for other

personal wrongs; but, when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife."

In *Head v. Briscoe*, 5 Car. & P. 484, it was held that a husband was liable for a slander perpetrated by his wife, though he was living apart from her.

In the case of *Woodward v. Barnes*, 46 Vt. 332, 14 Am. Rep. 626, it is held that husband and wife are not jointly liable for those torts of the wife which are founded on her contracts, and it is said: "The general principle that for the torts or frauds of the wife an action may be sustained against her and her husband applies only to torts *simpliciter*, or cases of pure, simple tort, and not where the substantive basis of the tort is the contract of the wife." See 1 Bishop, *Married Women*, § 905; 2 Bishop, *Married Women*, § 261; Schouler, *Dom. Rel.* 5th ed. § 76; *Henley v. Wilson*, 92 Am. St. Rep. 160 and note (137 Cal. 273, 58 L.R.A. 941, 70 Pac. 21).

In the case of *Simpson v. Bowden*, 33 Me. 549, it is held that the law will not imply a contract in a case where the parties cannot legally make an express contract.

In the case of *Chase v. Second Ave. R. Co.* 97 N. Y. 384, 49 Am. Rep. 531, it is held that "an implied contract is one which the law infers from the facts and circumstances of the case; but it will not be inferred, so far as I can conceive, in any case where an express contract would for any reason be invalid." 15 Am. & Eng. Enc. Law 2d ed. 1078.

It may be doubtful whether this statement of the law is entirely correct. Bishop treats it under the title of "Contracts Created by Law." He says: "When the law lays on one a duty to another, it creates a promise from the former to the latter to discharge the duty. The limits of the doctrine is that where, from the nature of the case, not merely from inability of the party, there could not be a contract in fact, the law does not undertake to create the impossible." Bishop, *Contr.* 2d ed. §§ 182 to 186, inclusive. So he shows that, though the contract of a minor or insane person for necessities on agreed terms would not be binding, yet the party who furnishes the goods may recover of the one liable in law to pay, not what the contract provides, though it may be looked to, but what they were reasonably worth. *Id.* § 188.

In the case of *Marye v. Root*, 27 Fla. 453, 8 So. 636, this court has occasion to critically examine the constitutional and statutory provisions, then and now existing, conferring upon married women certain prop-

erty rights which she did not have at common law. The result of that decision is that the statute providing the property of a wife shall remain in the care and management of the husband, but that he shall not charge for the management, nor shall the wife be entitled to sue her husband for the rent, hire, issues, proceeds, or profits of her said property, is not in conflict with the constitutional provision that all property, both real and personal, of the wife, owned by her before marriage or acquired afterward by gift, devise, descent, or purchase, shall be her separate property and not liable for the debts of her husband. The present constitutional provision (Const. 1885, art. 11, § 1), modifies the former (that of 1868), in that she may make her separate property liable for her husband's debts by her consent, given by some instrument in writing executed according to the law respecting conveyances by married women. The second section of said article also provides that her separate property may be charged in equity for certain obligations. If the statute giving the husband the care and management of a wife's property was not in conflict with the Constitution of 1868 (and to that extent we approve the views of the court in that case), it is not perceived that it would violate that of 1885. *Fritz v. Fernandez*, 45 Fla. 318, 34 So. 315; *Rawls v. Tallahassee Hotel Co.* 43 Fla. 288, 31 So. 237. A married woman, it is true, has been given some additional statutory rights since the decision in *Marye v. Root*, *supra*, such as the right to her earnings and wages and the right to bring suit or actions for or concerning her real estate without joining her husband or next friend. Gen. Stat. 1906, §§ 2591, 2593. Section 2594 also provides that specific performance may be decreed against a married woman. We are not called upon to say what would be the effect of the renunciation by the husband of his statutory right to manage and control his wife's property. See *Fritz v. Fernandez*, *supra*. We can discover, however, neither in the Constitution nor statutes, any purpose to remove generally all her common-law disabilities, but only those specifically mentioned; nor any purpose to make her liable for those torts for which she was not liable at common law. In several states a married woman has either by statute or constitutional provision been placed upon the legal footing of a *feme sole*, and she is therefore held liable for her torts. In some the statutes expressly provide she shall be so liable. *Norris v. Corkill*, 32 Kan. 409, 49 Am. Rep. 489, 4 Pac. 862; *Quiltv v. Battie*, 135 N. Y. 201, 17 L.R.A. 521, 32 N. E. 47; *Strouse v. Leipf*, 46 Am. St. Rep. 122, and note (101 Ala. 433, 23 L.R.A. 622, 14

So. 667); *Henley v. Wilson*, 92 Am. St. Rep., note p. 169.

We have noticed two cases in which it is held that, under the common law, as well as under the statutes which authorize a married woman to own and control property, she is liable for a tort committed in the management of such property. One is the case of *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793, and the other is the case of *Flesh v. Lindsay*, 115 Mo. 1, 37 Am. St. Rep. 374, 21 S. W. 907. In the first case the tort consisted in making an excavation, causing a pitfall, into which the plaintiff fell. The maxim *Sic utere*, etc., is applied, and it is said she was liable at common law as well as under the statute. In the second case the tort grew out of the negligent repairing of a party wall between the property of a married woman and another. It was held that she was liable, both under the statute and at common law. But, as a married woman could not own, control, and manage a separate legal estate at common law, we cannot understand the conclusions of these courts, which are unsupported by any authority directly in point. The erection and maintenance of a party wall is a matter of contract, unless required by statute (22 Am. & Eng. Enc. Law, 2d ed. p. 240), and we have seen no authority holding a married woman liable for a tort based on a contract. Our court, as we have seen, has decided the contrary. *Prentiss v. Paisley*, supra. There is an analogy between the common-law disability of a married woman and that of an infant, and, while both are liable for pure torts, we have seen no case which holds either liable for an injury due to lack of skill and experience. 22 Cyc. Law & Proc. p. 621.

We find no authority holding a married woman liable for a tort under the circumstances stated in the declaration.

The judgment of the Circuit Court is affirmed.

All concur, except Parkhill, J., disqualified, who takes no part.

IDAHO SUPREME COURT.

ERNEST J. TAYLOR, Appt.,

v.

S. S. HULETT et al.

(— Idaho, —, 97 Pac. 37.)

Waters — determination of rights — nature of action.

1. A suit to ascertain, determine, and de-

Headnotes by AILSHIE, Ch. J.
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termine the extent and priority of a water right and appropriation partakes of the nature of an action to quiet title to real estate.

Equity — quieting title — venue.

2. An action to quiet title to real estate must be prosecuted and maintained in the jurisdiction in which the *res* or subject-matter is situated.

Waters — priorities — extraterritorial rights.

3. The courts of Idaho, in ascertaining, decreeing, and protecting property rights in water appropriations within the jurisdiction of this state, may at the same time and for that purpose inquire into and determine rights and priorities on the same stream, that are located and situated higher up the stream and beyond the state line, in order to fairly and finally judicially determine the relative rights of the parties and decree the extent of title and right of possession of the subject-matter located and situated within this state.

Same — extraterritorial diversion.

4. The jurisdiction of the courts of Idaho to ascertain and determine water appropriations within this state is not ousted or defeated by the fact that a defendant sets up

Case Note. — Jurisdiction to determine the rights of private parties in interstate streams.

This note is confined strictly to the question of jurisdiction as affected by the situs of the property or of the act of which complaint is made, and does not include the question by what law the substantive rights of the parties are to be determined, nor any other question affecting the merits. It also excludes any consideration of the question of citizenship or amount involved as affecting the jurisdiction of the Federal courts. The general question as to the jurisdiction of equity over suits affecting real property in another state or country is treated in a subject note to *Proctor v. Proctor*, 69 L.R.A. 673, and the question as to the jurisdiction of actions at law for damages for breach of contracts, or for torts relating to real property, in another state or country, will be the subject of a subsequent note in this series.

The case of *Rickey Land & Cattle Co. v. Miller & Lux*, 81 C. C. A. 207, 152 Fed. 11, which is quite similar to *Taylor v. Hulett*, is sufficiently set out in the foregoing opinion.

The position of these two cases, that the court of the state in which the property affected by the diversion of the water is situated has jurisdiction to quiet the owner's title to the water rights, and, as incidental to that jurisdiction, the power to enjoin the defendant from diverting the water, although the diversion takes place in another state, is sustained by the decision in *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210. The latter case, however, does not go to the extent of declaring that the jurisdiction of the courts

in his answer that he has an appropriation of the waters of the stream in controversy, and that he diverts the waters from such stream in the state of Wyoming for use and application in irrigating lands situated within that state.

Injunction — jurisdiction — full faith and credit — diversion of water.

5. The injunctive remedy to prevent the continuance of the diversion of the water of a stream to the detriment of a prior appropriator of the waters thereof operates *in personam*, and, where personal service has been had upon the defendant in the action for injunction, the court has jurisdiction to award the injunctive relief, and such decree is entitled to full faith and credit in the courts of every other state.

Courts — jurisdiction — enforcing decree.

6. Where the court has jurisdiction of the subject-matter, and acquires jurisdiction of the person of the defendant by service of process, it is thereby vested with full power and authority to hear and determine all questions that occur in the case and are essential to determine the

merits of the issues raised; and it likewise has authority and jurisdiction to make such orders and issue such writs and process as may be necessary and essential to carry the decree into effect and render it binding and operative.

Injunction — enforcement in foreign state.

7. The fact that a defendant against whom a writ of injunction is ordered goes beyond the jurisdiction of the state, and cannot be reached by the courts in order to punish him for contempt, does not avoid the judgment and decree; but the same may be enforced, in the orderly administration of the law, with like force and effect in the state in which the defendant is found and served with process.

(August 3, 1908.)

APPPEAL by plaintiff from a judgment of the District Court for Fremont County in defendants' favor in an action to determine and quiet title to certain water rights. Reversed.

The facts are stated in the opinion.

of the state in which the property affected is located is exclusive. Upon the contrary, it appearing in that case that water was appropriated in Wyoming by means of a head gate and ditch in that state for the irrigation of land some of which was in Wyoming and some in Montana, it was held that the owners of the Montana property, as well as the owners of the Wyoming property, could invoke the jurisdiction of the Wyoming court to enjoin the diversion of water by the defendants in Montana. The court, however, while stating that, in order to protect the rights of the Montana complainants in and to the water, it would be necessary to consider and determine what their rights were as against the defendant and to that extent the court would assume jurisdiction, declined to pass upon the question whether the jurisdiction would extend to the entering of a decree quieting the title of such plaintiffs to the water claimed to have been appropriated by them for the use of the Montana land; remarking that it was a perplexing question.

It was held in *Lamson v. Vailes*, 27 Colo. 201, 61 Pac. 231, that, under the so-called irrigation statutes, a court of Colorado has no jurisdiction to award priorities to a ditch having its headgate in Colorado, but which was intended to and does carry water outside of the state, except to the extent the appropriation is made for land in Colorado.

The Utah supreme court in *Conant v. Deep Creek & C. Valley Irrig. Co.* 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188, conceded the jurisdiction of a court of Idaho, to protect prior appropriators of water in Utah against subsequent appropriators who diverted the water in Idaho, and to limit and determine the rights of the Idaho appropriators

with reference thereto, but denied the jurisdiction of the Idaho court to adjudicate and determine, as between themselves, the rights of appropriators who diverted water from the stream in Utah and used the same for irrigation of lands in that state.

Whether or not the jurisdiction of the court of the state in which the property affected is exclusive where the suit is in its essence one to quiet the title to the water rights, it is clear from the authorities that its jurisdiction is not exclusive of that of the state in which the act complained of is done, where the suit is merely to enjoin a wrongful act, such as a diversion of the water, or to abate the nuisance created thereby. Indeed, the court, in *Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 539, Fed. Cas. No. 13,446, was of the opinion that the courts of Rhode Island had exclusive jurisdiction of a suit to abate a nuisance consisting of the diversion of water by a canal in that state to the injury of complainant's property located in Connecticut, upon the theory that the suit was *quasi in rem*. The opinion added that, if this view of the rights of the parties was not sound, it "might be reasonable in a case like this to hold a wrongdoer liable either where the direct act is done, or where the consequential injury was felt."

And so the following cases, while not necessarily implying that the jurisdiction is exclusive, nevertheless hold or assume that a Federal court sitting in the state in which the water is diverted, has, in a proper case, jurisdiction of an action to enjoin the diversion of water to the injury of property in another state. *Howell v. Johnson*, 89 Fed. 556; *Pine v. New York*, 50 C. C. A. 145, 112 Fed. 98, reversed on another point in 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct.

Messrs. Clark & Budge for appellant.

Mr. A. H. McConnell, for respondents:

Injunction does not lie unless the rights of the party invoking it are clearly established; and if, in the establishment of such rights, the title to real estate situated in another state is involved, or the right to the use and enjoyment of the same curtailed, then the court is acting in excess of its authority when it assumes jurisdiction of the case.

Wiley v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Conant v. Deep Creek & C. Valley Irrig. Co. 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188.

Allshie, Ch. J., delivered the opinion of the court:

Appellant, a resident citizen of Fremont county, in this state, commenced his action in the district court of the sixth district for the purpose of obtaining a decree establishing his right and quieting his title to a certain quantity of the water of Spring creek for irrigation purposes, and for an injunction restraining and enjoining the re-

spondents from interrupting or interfering with his right, or in any manner preventing the water of the stream flowing down to his point of diversion. It is alleged in the complaint that Spring (or Seymour) creek has its source in Uinta county, Wyoming, and flows from thence into the Teton basin, in the state of Idaho, and that the plaintiff has appropriated the water of the stream and diverted it at a point in this state, and uses and applies it on his land situated in this state; that his grantors and predecessors in interest, in the year 1901, obtained a judgment and decree, that has become final, wherein and whereby their right and priority to 8% cubic feet per second of the water of this stream has been determined. It was further alleged that, during the irrigation season of 1906, the defendants interfered with plaintiff's rights by diverting water from the stream at a point above plaintiff, so as to hinder and prevent plaintiff from receiving the amount of water to which he was entitled. The defendants were each personally served within this state, and all appeared and demurred to the com-

Rep. 592; Morris v. Bean, 123 Fed. 618 (injunction, however, denied because of defects in pleading); Hoge v. Eaton, 135 Fed. 411 (reversed in 72 C. C. A. 74, 141 Fed. 64, 5 A. & E. Ann. Cas. 487 on another ground); Anderson v. Bassman, 140 Fed. 14; Morris v. Bean, 146 Fed. 423 (affirmed in 86 C. C. A. 519, 159 Fed. 651).

So, in Holyoke Water Power Co. v. Connecticut River Co. 52 Conn. 570, it was held that a suit would lie in Connecticut, at the instance of the owner of riparian property in Massachusetts, to enjoin the raising of a dam in Connecticut.

And in Burk v. Simonson, 104 Ind. 173, 54 Am. Rep. 304, 2 N. E. 309, 3 N. E. 826, it was declared that a court of Indiana may restrain an upper proprietor in that state from doing an act on his land which will injure the land of a lower riparian owner in Ohio.

Hawley, D. J., in Miller & Lux v. Rickey, 127 Fed. 573, while upholding the jurisdiction of a Federal court sitting in Nevada, at the instance of owners of land in that state, to enjoin defendant from wrongfully diverting in California waters of a stream which flowed through the complainants' lands in Nevada, did not imply that the jurisdiction of the Nevada court was exclusive of the jurisdiction of the courts of California. He apparently distinguishes Stillman v. White Rock Mfg. Co. supra, upon the ground that that was a proceeding *quasi in rem* to abate a nuisance, whereas in the case at bar the suit was in *personam*.

The general rule, which with a few exceptions has been reluctantly adopted and followed in this country, that an action for damages for a tort in relation to real property is local, and cannot be maintained in 19 L.R.A. (N.S.)

a state other than that in which the property is located if the act complained of was not committed in the state where the action is brought, has been applied to the diversion of water from an interstate stream (Watts v. Kinney, 6 Hill, 82); and to the flooding of lands (Eachus v. Illinois & M. Canal, 17 Ill. 534 and Howard v. Ingersoll, 23 Ala. 673).

The exception to that rule, that the action may also be maintained in the state in which the act complained of is committed, has also been applied in actions for the diversion of water from an interstate stream, so as to uphold the jurisdiction of the courts of a state in which water is wrongfully diverted of an action in tort for damages for injury to riparian property in another state. Foot v. Edwards, 3 Blatchf. 310, Fed. Cas. No. 4,908; Mannville Co. v. Worcester, 138 Mass. 89, 52 Am. Rep. 261.

Upon the authority of the last case, it was held in Bannigan v. Worcester, 30 Fed. 392, that a Federal court sitting in Massachusetts has jurisdiction, at the instance of the owner of mill property in Connecticut, to entertain proceedings under the Massachusetts statute for the appointment of commissioners and the assessment of damages from the diversion in Massachusetts of water from a brook which was tributary to a stream on which the mill in Connecticut was situated.

In Thayer v. Brooks, 17 Ohio, 489, 49 Am. Dec. 474, the court, while holding that an action may be maintained in Ohio for an injury to property in that state by the diversion of water in Pennsylvania, conceded that the action would also lie in Pennsylvania.

plaint, except defendant Hulett, who filed an answer. Thereafter a motion was made to dismiss the action on the grounds that the defendants were residents and citizens of the state of Wyoming, and that all the waters that they diverted or used from Spring (or Seymour) creek was diverted from the stream at a point within the state of Wyoming, and was used on lands within that state. The motion was sustained, and the action dismissed, and this appeal is taken from the judgment.

No point is made as to the question of practice or manner of presenting the jurisdictional question to the lower court. Any irregularity as to that is apparently waived here. The question to be determined here is as to whether the court of this state has jurisdiction to quiet plaintiff's title to his water right and appropriation in this case as against defendants, and to enjoin and restrain defendants from interfering with that right. In this case appellant's appropriation, diversion, and place of use are all within Idaho. The respondents are up the stream, above appellant, and their diversion and place of use are all within the state of Wyoming. Under these circumstances, can the Idaho courts, after personal service of process on the respondents and their appearance in court, determine the priorities between the parties, and adjudicate and decree appellant's rights, and enjoin respondents from interfering with such rights?

Appellant's water right is real property appurtenant to the land to be irrigated thereby. Rev. Stat. 1887, § 2825; *Ada County Farmers' Irrig. Co. v. Farmers' Canal Co.* 5 Idaho, 793, 40 L.R.A. 485, 51 Pac. 990; *McGinness v. Stanfield*, 6 Idaho, 372, 55 Pac. 1020; *Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19. An action to ascertain, determine, and decree the extent and priority of that right partakes of the nature of an action to quiet title to real estate. *Conant v. Deep Creek & C. Valley Irrig. Co.* 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188; *Rickey Land & Cattle Co. v. Miller & Lux*, 81 C. C. A. 207, 152 Fed. 11. This action, therefore, to quiet appellant's title, should be maintained in the jurisdiction in which the *res* or subject-matter is situated. *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Nelson v. Potter*, 50 N. J. L. 324, 15 Atl. 375; *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L.R.A. 79, 7 Am. St. Rep. 802, 15 Atl. 379. If, however, in ascertaining and determining appellant's rights, it becomes necessary to also inquire into and ascertain the rights and priorities of the respondents on the same stream as a defensive issue, that certainly can and will be done by a court of equity, although the *res* or

subject-matter involved in the issue and constituting the defense be situated beyond the state line and in another jurisdiction. *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; *Rickey Land & Cattle Co. v. Miller & Lux*, *supra*.

In the case last cited the action was instituted in the state of Nevada for the purpose of determining and adjudicating the complainant's right and priority in and to a quantity of the water of Walker river, a stream flowing from the state of California into the state of Nevada. The defendant pleaded an appropriation and prior right in and to the same stream, and that its diversion and use were within the state of California. The case went to the United States circuit court of appeals for the ninth circuit on the question of jurisdiction, and Judge Wolverton, in a very lucid and well-considered opinion, says: "The defendant will not be permitted, by thus setting up a cause of suit in the state of California, to defeat the jurisdiction of the court in the state of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the defendant cannot defeat the jurisdiction by alleging that it has rights elsewhere which may conflict with the rights of the complainant. It may be said that the court in Nevada has not the power to quiet the title of the defendant in the state of California. But the defendant has the right to set up its conflicting interests, which arose in California, as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has the better right as against the defendant,—the rights of the parties arising in the states in which their respective interests are found. So that the answer and cross complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the state of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the state of California, it may look, nevertheless, under the defensive answer, to the appropriation in the state of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto." In *Willey v. Decker* the supreme court of Wyoming, in considering a kindred proposition to that here involved, said: "The district court of Wyoming has jurisdiction to adjudicate the rights of the owners of land in Montana to the water of the stream, so far as may be necessary to protect their rights, though the court may not have ju-

jurisdiction to enter a decree for quieting the title of such owners to the water claimed."

It would seem, upon both reason and authority, that the courts of this state, in ascertaining, decreeing, and protecting property rights in water appropriations within the jurisdiction of the state, may at the same time and for that purpose inquire into and determine rights and priorities on the same stream that are located and situated beyond the state line, in order to fairly and finally judicially determine the relative rights of the parties and decree the extent of the title and right of possession of the thing or subject-matter within this jurisdiction. This proposition ought to be accorded a special recognition and application by the courts in water and irrigation litigation. Streams rise in one state and flow into another, irrespective of boundary lines, and still the rules and doctrines of priority of appropriation and use are the same in most of the arid states. This is particularly true with respect to this case. Here the riparian doctrine of the common law has been abrogated in both Idaho and Wyoming, and the rule of "first in time is first in right" is recognized and enforced in both states. *Drake v. Earhart*, 2 Idaho, 750, 23 Pac. 541; *Moyer v. Preston*, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845; *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258; *Willey v. Decker*, supra. The relative rights, therefore, of appropriators of the water of an interstate stream are the same, whether the appropriations are all in the same state, or some in one state and the balance in another state. This proposition is accentuated in a case like this, where the court not only has jurisdiction of the *res* or subject-matter, but also obtains jurisdiction of the person of the defendant. In the case at bar the diversion by the defendants, being the act that causes the injury, takes place in Wyoming; but the injury itself that flows from the wrongful act takes place in this state. It has long been recognized as a general rule that, where an act is committed in one jurisdiction that occasions injury or damage in another jurisdiction, the injured person may elect to bring his action in either jurisdiction. See discussion and authorities cited in *Rickey Land & Cattle Case* above cited.

This brings us to a consideration of the injunctive relief asked by the appellant against respondents. The injunction would only be ancillary to and in aid of a decree establishing and quieting plaintiff's title. It would merely command and enforce obedience to the decree. That would be a remedy *in personam*, and would act only upon the person of the parties enjoined. 1 High, 19 L.R.A. (N.S.)

Inj. 803; 1 Spelling, Inj. §§ 1, 8. The court, having jurisdiction of both the subject-matter and person of the defendants, has the right and authority to hear and determine all questions that occur in the case and are essential to a decision of the merits of the issues; and it likewise has authority and jurisdiction to make such orders and issue such writs as may be necessary and essential to carry the decree into effect and render it binding and operative. *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Montgomery v. Tutt*, 11 Cal. 190; *French v. Hay* (*French v. Stewart*) 22 Wall. 250, 22 L. ed. 857.

The injunction prayed for in this case is merely in aid of any decree that may be entered, and would operate against the person of any defendant who might undertake or attempt to divert the water of Spring creek, so as to injure or damage plaintiff and thereby interfere with plaintiff's right as settled and established by the decree.

But it is argued that the respondents live beyond the jurisdiction of the court, and cannot be reached by the Idaho courts to punish them for contempt in the event they disobey the injunction. There would be no trouble about this if they should come within reach of the process of the Idaho court; for in that case the court could lay hold on them and deal with them as in any other case. On the other hand, if they should remain beyond the jurisdiction of this state, and there commit acts in violation of the decree and injunction, then and in that case we apprehend that appellant could go into the Wyoming court with his decree, and there obtain a like injunction from a court where personal service could be had, and the respondents would be held amenable to the orders and process of that court. The decree and injunction from the Idaho court would undoubtedly be accorded full faith and credit by the Wyoming court. *Caldwell v. Carrington*, 9 Pet. 86, 9 L. ed. 60; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960. On this question the Wyoming court evidently entertains the same view we here express, as will be seen from an examination of *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210. The judgment and order dismissing appellant's action was erroneous, and must be reversed.

Judgment reversed, and cause remanded, with directions to reinstate the action and proceed with the case in accordance with the views herein expressed. Costs awarded in favor of appellant.

Sullivan and Stewart, JJ., concur.

ILLINOIS SUPREME COURT.

WILLIAM A. BOND et al., Appts.,
v.
SALLY PALMER CURTIS MOORE et al.
LESTER CURTIS, Appt.,
v.
SAME.

(236 Ill. 576, 86 N. E. 386.)

Will — implied devise.

1. A devise to the children of the life tenant will not be implied from a gift to one for life, "but, should he die without children, then" to others.

Same — fee.

2. Under a devise to testator's only child for life, and, should he die without children, to testator's next of kin, the remainder being contingent during the lifetime of the life tenant, the reversion in fee descends to such child as heir.

Remainder — merger of life estate in fee — effect.

3. The conveyance by a life tenant, in whom the reversion in fee has vested as heir, of the life estate and the reversion, will merge the life estate in the fee and cut off contingent remainders limited upon the life estate.

(Carter, Hand, and Farmer, JJ., dissent.)

(October 26, 1908.)

CONSOLIDATED APPEALS by petitioners from several judgments of the Circuit Court for Cook County dismissing applications to have certain land titles registered. Reversed.

The facts are stated in the opinion.

Mr. Horace K. Tenney, with Mr. Albert M. Kales, for appellants:

By the will no estate in fee in remainder was created in favor of the children of the life tenant by the gift over if he should die without children.

Green v. Ward, 1 Russ. Ch. 262; Ranelagh v. Ranelagh, 12 Beav. 200; Sparks v. Restal, 24 Beav. 218; Neighbour v. Thurlow, 28 Beav. 33; Re Hayton, 4 New Reports, 55; Seymour v. Kilbee, Ir. L. R. 3 Eq. 33; Re Rawlins, L. R. 45 Ch. Div. 299; S. C. Scale v. Rawlins [1892] A. C. 342; Theobald, Wills, 6th ed. p. 707; 1 Jarman, Wills, 5th ed. *563; Page, Wills, p. 554; 2 Redf. Wills, 3d ed. p. 204; Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225; Barlow v. Barnard, 51 N. J. Eq. 620, 28 Atl. 597.

Note. — For a discussion of the effect of the union of a life estate and the remote remainder or reversion in the same person, upon an intermediate contingent remainder, see note to McCreary v. Coggeshall, 7 L.R.A. (N.S.) 433, 19 L.R.A. (N.S.)

The limitation to the "nearest relatives" of the testatrix is a contingent remainder.

Johnson v. Askey, 190 Ill. 58, 60 N. E. 76; Fearne, Contingent Remainders, pp. 5-9 et seq.; Challis, Real Prop. 2d ed. 115, 120; Leake, Digest of Land Law, 323, 324; Gray, Rule against Perpetuities, 2d ed. §§ 101, 108; Williams, Real Prop. 20th ed. pp. 335, 350, 17th ed. p. 415; Peoria v. Darst, 101 Ill. 609; McCampbell v. Mason, 161 Ill. 500, 38 N. E. 672; Furnish v. Rogers, 154 Ill. 569, 39 N. E. 989; Seymour v. Bowles, 172 Ill. 521, 51 N. E. 122; Kales, Future Interests, §§ 95-102, 105, 106; Howard v. Peavey, 128 Ill. 430, 15 Am. St. Rep. 120, 21 N. E. 503.

If any remainder is implied to the children of the life tenant, it must be a contingent remainder.

McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Temple v. Scott, 143 Ill. 290, 32 N. E. 366; Phayer v. Kennedy, 169 Ill. 360, 48 N. E. 828; Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558; Hinrichsen v. Hinrichsen, 172 Ill. 463, 50 N. E. 135; Mittel v. Karl, 133 Ill. 65, 8 L.R.A. 655, 24 N. E. 553; Chapin v. Crow, 147 Ill. 219, 37 Am. St. Rep. 213, 35 N. E. 536; Madison v. Larmon, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 550; Lombard v. Witbeck, 173 Ill. 396, 51 N. E. 61; Walton v. Follansbee, 131 Ill. 147, 23 N. E. 332; Faber v. Police, 10 S. C. 376.

Pending the taking effect in possession of the contingent remainder or remainders, there was a reversion in fee by descent in the life tenant.

Pinkney v. Weaver, 216 Ill. 185, 74 N. E. 714; Peterson v. Jackson, 196 Ill. 40, 63 N. E. 643; Harrison v. Weatherby, 180 Ill. 418, 54 N. E. 237; Madison v. Larmon, supra; Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892; Lewis v. Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384; Bates v. Gillett, 132 Ill. 287, 24 N. E. 611; Williams, Real Prop. 17th ed. 413, 20th ed. p. 348.

The life estate was destroyed by merger upon the conveyance by the life tenant to the reversioner in fee by descent.

Field v. Peeples, 180 Ill. 376, 54 N. E. 304; Egerton v. Massey, 3 C. B. N. S. 338; Craig v. Warner, 5 Mackey, 460, 60 Am. Rep. 381; Challis, Real Prop. 2d ed. pp. 109, 125, 126; 3 Preston, Conv. 3d ed. 399; Fearne, Contingent Remainders, 321, 322; Gray, Rule against Perpetuities, 2d ed. § 10; Leake, Digest of Land Law, p. 328; Williams, Real Prop. 20th ed. pp. 353, 361, 362; Hayes, Conv. 5th ed. 116, 117; Festing v. Allen, 12 Mees. & W. 279; Bull v. Pritchard, 5 Hare, 567; Rhodes v. Whitehead, 2 Drew. & S. 532; Holmes v. Prescott, 33 L. J. Ch. N. S. 264; Bennett v. Morris, 5 Rawle, 9; Faber v. Police, supra; McElwee v.

Wheeler, 10 S. C. 392; *Madison v. Larmion*, supra; *Spencer v. Spruell*, 196 Ill. 119, 63 N. E. 621; *Irvine v. Newlin*, 63 Miss. 192; *Redfern v. Middleton*, Rice, L. 459; *Lyle v. Richards*, 9 Serg. & R. 322; *Abbott v. Jenkins*, 10 Serg. & R. 296; *Stump v. Findlay*, 2 Rawle, 168, 19 Am. Dec. 632; *Waddell v. Rattew*, 5 Rawle, 231; *Penny v. Little*, 4 Ill. 301; 2 Minor, Inst. 2d ed. pp. 362-364; 1 Va. Code 1819, p. 368, § 20; Ill. Rev. Stat. 1874, chap. 28; *Re Bradwell*, 55 Ill. 535; *Brandies v. Cochran*, 112 U. S. 344, 28 L. ed. 760, 5 Sup. Ct. Rep. 194; *Bulpit v. Matthews*, 145 Ill. 345, 22 L.R.A. 55, 34 N. E. 625; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195; *Beavan v. Went*, 155 Ill. 592, 31 L.R.A. 85, 41 N. E. 91; *McCool v. Smith*, 1 Black, 459, 470, 17 L. ed. 218, 221; *Fisher v. Deering*, 60 Ill. 114; *ReQua v. Graham*, 187 Ill. 67, 52 L.R.A. 641, 58 N. E. 357; *Glaubensklee v. Low*, 29 Ill. App. 408; *Cole v. Bentley*, 26 Ill. App. 260.

Mr. John S. Huey, for appellees:

Under the will the remainder, after the expiration of the life estate, vested in Curtis's daughters.

Schaefer v. Schaefer, 141 Ill. 337, 31 N. E. 136; *Harvard College v. Balch*, 171 Ill. 280, 49 N. E. 543; *Scotfield v. Olcott*, 120 Ill. 362, 11 N. E. 351; *Chapin v. Nott*, 203 Ill. 350, 67 N. E. 833; *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237; *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. 643; *Smith v. West*, 103 Ill. 332; *Doe ex dem. Poor v. Considine*, 6 Wall. 474, 18 L. ed. 869; 4 Kent, Com. *203; *Cheney v. Tease*, 108 Ill. 473; *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505; *Siddons v. Cockrell*, 131 Ill. 653, 23 N. E. 586; *Boatman v. Boatman*, 198 Ill. 414, 65 N. E. 81; *Railsback v. Lovejoy*, 116 Ill. 442, 6 N. E. 504; *Ducker v. Burnham*, 146 Ill. 19, 37 Am. St. Rep. 135, 34 N. E. 558; *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 310; *Chapin v. Crow*, 147 Ill. 219, 37 Am. St. Rep. 213, 35 N. E. 536; *Bates v. Gillett*, 132 Ill. 287, 24 N. E. 611; *Marvin v. Ledwith*, 111 Ill. 144.

Dunn, J., delivered the opinion of the court:

Sarah Walker died testate in 1883, seised of the west quarter of lot 2, in block 32, known as No. 205 Lake street, and of the west quarter of lot 3, in block 16, known as No. 103 South Water street, both in the original town of Chicago. The second clause of her will, which was executed September 25, 1876, was as follows: "I give, bequeath and devise all of my estate, real and personal, unto my son, Lester Curtis, during his lifetime, and authorize him to sell or exchange any or all of my real estate, and to

invest the proceeds thereof as in his judgment he may think best; but should he die without children, then the estate, or so much of it as may remain after his reasonable expenses for living, etc., shall go to my nearest relatives, in such proportions as the law in such cases does provide." Lester Curtis was the only heir of the testatrix. He was unmarried at the date of the will, but at the time of the death of the testatrix he was married and had two children. Immediately after his mother's death he entered into possession of the premises, and has ever since continued in possession of them. In February, 1908, he conveyed them to William A. Bond, by deeds reciting the second clause of the will of Sarah Walker that under it Lester Curtis took a life estate, and that he was also entitled, by descent, to a legal reversion of the fee pending the event of his dying without children, and the taking effect in possession, in that event, of the gift to the testatrix's nearest relatives, and that it was the intention of the grantor to convey the life estate and the reversion in fee, so that the life estate should merge in the fee and be extinguished and prematurely destroyed, and the grantee be vested at once with a legal estate in fee in possession, and that any contingent future interest in the nearest relatives should be destroyed. On February 13, 1908, William A. Bond executed a declaration of trust in favor of Lester Curtis for the premises at No. 103 South Water street in fee, and on February 24, 1908, together with his wife, by special warranty deed, conveyed the premises at No. 205 Lake street to Lester Curtis. On February 26, 1908, Bond, claiming the fee as trustee, filed his application to have the title to the premises at No. 103 South Water street registered under the Torrens act, and Curtis filed a separate application for the registration of the title to the premises at No. 205 Lake street. The two daughters of Curtis were made parties defendant, as were also various nieces and nephews of Sarah Walker, her next of kin. Mary Isabel Curtis, one of the daughters, assented to the petition, but the appellee Sally Palmer Curtis Moore, the other daughter, filed an answer, denying that Lester Curtis and Bond were the owners of the fee, and alleging that she and her sister were the owners of the fee in remainder, subject to the life estate. The answers of the nieces and nephews alleged that, next to the daughters, they were the nearest relatives of Sarah Walker, and in case of the death of the two daughters without issue before the death of their father, such of the nieces and nephews as should survive Lester Curtis would be entitled to the fee. The causes were referred to an ex-

amizer, who found that the petitioners were the owners of the fee and entitled to have their titles registered; but, upon objection, the reports were disapproved, and decrees were entered dismissing the applications, but without prejudice to the rights of the petitioners in an estate less than the fee. The appeals, prosecuted separately to this court, have been consolidated.

The principal question arising upon the construction of the second clause of Sarah Walker's will is whether or not there was a devise, by implication, of the remainder in fee to the children of Lester Curtis, by reason of the gift over to the nearest relatives of Sarah Walker should he die without children. The appellees contend that, under this clause, the daughters of Lester Curtis took a vested remainder in fee, subject to his life estate, while the appellants contend that no remainder was given, by implication, to the children of Lester Curtis, but that the reversion in fee descended to Lester Curtis, as sole heir at law of his mother, pending the happening of the events upon which the estate given over to the nearest relatives depended, and that, upon the conveyance of the life estate and the reversion to Bond, the life estate merged in the reversion, and the contingent remainder to the nearest relatives was destroyed because of this termination of the particular estate before the happening of the event upon which the contingent remainder depended. The object of the construction of wills is to ascertain the intention expressed by the testator. The intention sought is not that which, by inference, may be presumed to have existed in the mind of the testator, but that which, by the words used in the will, he has expressed. *Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669; *Williams v. Williams*, 189 Ill. 500, 59 N. E. 966; *Bingel v. Volz*, 142 Ill. 214, 16 L.R.A. 321, 34 Am. St. Rep. 64, 31 N. E. 13. It will be presumed that it was the intention of the testator to dispose of his entire estate, and not to die intestate as to any portion thereof. Any reasonable construction will be adopted, consistent with the terms of the will, so as to dispose of the entire estate; but, where no intention is shown by the will as to the disposition of a part of the testator's property, it must be regarded as intestate. *Minkler v. Simons*, 172 Ill. 323, 50 N. E. 176; *Craw v. Craw*, 210 Ill. 246, 71 N. E. 450. Devises by implication have been recognized, but they can only be given effect in cases of such clear necessity that from the will itself no reasonable doubt of the intention can exist. Probabilities as to the testator's intentions cannot be weighed, but the implication must be so strong that an intention contrary to that imputed to the

testator cannot be supposed to have existed in his mind. *Barlow v. Barnard*, 51 N. J. Eq. 620, 28 Atl. 597; *Brown v. Quintard*, 177 N. Y. 75, 69 N. E. 225. It must be such as to leave no hesitation in the mind of the court, and permit no other reasonable inference. *Connor v. Gardner*, 230 Ill. 258, 15 L.R.A. (N.S.) 73, 82 N. E. 640. Moreover, a gift by implication must be founded upon some expression in the will. It cannot be inferred from an absolute silence on the subject. *Re Reinhardt*, 74 Cal. 365, 16 Pac. 13; *Nickerson v. Bowly*, 8 Met. 424; *O'Hearn v. O'Hearn*, 114 Wis. 428, 58 L.R.A. 105, 90 N. W. 450.

The estate given to Lester Curtis by the will is expressly limited to his life. Should he die without children, the remainder is disposed of. The will says nothing as to the disposition of the remainder should Lester Curtis have children. Appellees contend that the gift over, in default of children, implies a gift to the children should any be born. This question has arisen in the English courts, and a series of decisions has established the rule there that a devise to one for life, with a remainder over, if he dies without issue, does not, of itself give an estate, by implication, to his issue. *Greene v. Ward*, 1 Russ. Ch. 262; *Sparks v. Restal*, 24 Beav. 218; *Ranelagh v. Ranelagh*, 12 Beav. 200; *Neighbour v. Thurlow*, 28 Beav. 33; *Re Hayton*, 4 New Reports, 55; *Seymour v. Kilbee*, 1r. L. R. 3 Eq. 33; *Re Rawlins*, L. R. 45 Ch. Div. 299; *Scale v. Rawlins* [1892] A. C. 342. Such is stated to be the rule of law in *Page on Wills*, 554; and 2 *Redfield on Wills*, 3d ed. 204. In the case of *Neighbour v. Thurlow*, supra, it was said: "The court will give the most liberal construction to the words of a testator in order to carry out his intention; but it is contrary to every principle to introduce words into a distinct bequest in order to make the will more reasonable, or to supply a gift which is not to be found in the will. It is settled that, where there is a gift to A for life, and, if he die without leaving issue, to B, it does not create an implied gift to the children of A. Though it is natural enough to suppose that some words must have been omitted, still the answer is that the testator has not inserted them, and the court cannot do so for them." In *Seymour v. Kilbee*, supra, it was said that "no such gift [to children] can be implied from the gift over only, and it could only be supported by some other matters existing in the will raising an inference in favor of the issue. I can find nothing of the kind in this will. It does not contain a single word favoring the implication of any interest in the issue beyond the mere gifts over." Where in a will there is a gift to A for life.

with a gift over "on the death of A without leaving children," those words are not, by themselves, without assistance from other parts of the will, sufficient to create a gift, by implication, to the children. *Re Rawlins*, supra. The same principle was followed in the cases of *Brown v. Quintard*, and *Barlow v. Barnard*, supra. In the former case the testator directed the division of his residuary estate into four parts, one of which was to be given to one of his children, with certain deductions on account of advancements. The testator had four children but no disposition was made of the other three parts of the residuary estate. The court held that there was not a devise by implication, citing a number of cases illustrating the inflexibility of the rule that to uphold a devise by implication there must be so strong a probability of the testator's intention that the contrary cannot be supposed. Opposed to the English decisions above cited is the case of *Ex parte Rogers*, 2 Madd. Ch. 49, in deciding which the vice chancellor refers to *Crowder v. Clowes*, 2 Ves. Jr. 449, *Wainwright v. Wainwright*, 3 Ves. Jr. 558, and *Harman v. Dickenson*, 1 Bro. Ch. 91. The decision in *Ex parte Rogers* was, however, overruled by the court of appeals, and its authority is denied in *Dowling v. Dowling*, L. R. 1 Ch. 612, reversing the order of the vice chancellor in L. R. 1 Eq. 442. It was disregarded in the cases heretofore cited, all of which were decided subsequent to it.

We are referred to a number of cases as supporting the claim of appellees that a remainder is devised to the children of Lester Curtis by implication, and it is contended that the decision of all the American courts of last resort in which a like question was involved sustain appellees' position. The cases specially pressed upon our attention are *Anderson v. Messenger*, 7 L.R.A. (N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929; *Wetter v. United Hydraulic Cotton Press Co.* 75 Ga. 540. *Shaw v. Hoard*, 18 Ohio St. 227, *Holton v. Den*, 23 N. J. L. 330, and *Carr v. Green*, 2 M'Coord, L. 75. In each one of the first three of the cases above cited the language of the will which devises the property to the first taker imports a devise in fee simple, and not a life estate. It is expressly so stated in the opinion in *Anderson v. Messenger*. In that case, after the devise, of the fee to the testator's two sons, the qualifying clause provides: "If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and, if the survivor dies without lineal descendants," then the devise over follows. This devise of a fee, with the provision that, upon the death of the devisee without lineal descendants or without is-

sue, the property shall go to another, created a fee, variously called a qualified, conditional, base, or determinable fee, in the first devisee, with an executory devise in favor of those who are to take upon the determination of such base fee by the happening of the condition by which it is limited. *Friedman v. Steiner*, 107 Ill. 125; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Rifer v. Allen*, 228 Ill. 507, 81 N. E. 1105. If the event marked out as a boundary to the time of the continuance of the estate becomes impossible, the estate then ceases to be determinable, and changes into a single and absolute fee; but until that time the estate is in the grantee. The case of *Anderson v. Messenger* arose in the state of Ohio, where the effect of such a devise has been held by the supreme court to be the same as in this state. *Piatt v. Sinton*, 37 Ohio St. 353; *Niles v. Gray*, 12 Ohio St. 320; *Collins v. Collins*, 40 Ohio St. 353. In this case there was an express devise of the fee determinable upon the happening of the death of both of the sons without issue. There was, therefore, no room for application.

The court to a large extent founded its decision upon another of the cases cited by appellees,—*Shaw v. Hoard*, supra. In that case the language of the will was as follows: "I give and bequeath unto my said wife and daughter all the real estate of which I may be seised at the time of my death, to each one half. On the death of either my wife or daughter, then the survivor shall have all the property left them by me; and if both die without leaving any heirs of their body, then and in that case said property shall be given to my wife's brother, David Campbell." The first sentence would give a fee to the wife and daughter, to each one half, if it were not controlled by the first clause of the second sentence, which reduces the estate devised by the first to a life estate in the one dying first; but there is no limitation on the estate given to the survivor, and she therefore took a fee determinable upon the death of both the wife and daughter without issue. The wife died, leaving a daughter by a subsequent marriage. Thereupon the daughter, the other devisee, became the owner in fee of all the property, and upon her death the daughter of the second marriage, her half-sister and only heir, inherited the estate. The supreme court of Ohio arrived at the same result, but it was done by disregarding the express devise of the fee and implying a gift to the issue as a purchaser, thus reducing the fee to a life estate and giving a remainder to the daughter of the wife by implication. This case is inconsistent with the earlier case of *Niles v. Gray*, supra, and is, in effect, overruled

by the later cases of *Carter v. Reddish*, 32 Ohio St. 1, *Piatt v. Sinton and Collins v. Collins*, supra.

In *Piatt v. Sinton*, just cited, the devise was to Lucinda Frances Piatt of all of the testator's property of every description; and it was further provided that, in case she should die without leaving any legitimate heir of her body, the property should go to certain nephews and nieces of the testator. It was held that Lucinda Frances Piatt took all the estate of the testator, subject to be defeated upon the happening of the contingency named in the will, and that until such contingency happened the fee was vested in her and her grantees. In the case of *Wetter v. United Hydraulic Cotton Press Co.* supra, the devise was to the testatrix's daughter, "to have and to hold the same and her heirs forever." A subsequent clause provided that, if the daughter should depart this life leaving no issue or lineal heirs, the estate should go over. This, at common law, was a devise to the daughter in fee simple, and the subsequent clause merely added a condition upon which the estate should be terminated and the property pass to the subsequent takers. The court, however, disregarding the express devise of the fee, held that there was a gift, by implication, to the issue as purchasers, and that the daughter took only a life estate, with the remainder to her children in fee. We cannot follow these cases or regard them as authority. In each there is an express devise of the fee. In each a subsequent clause imposes a condition, upon the happening of which the estate in fee is to terminate and another is to take its place. This we have always held to constitute a determinable fee, subject to an executory devise to the subsequent takers. It leaves no room for implication. The fact that the event upon which the estate is to terminate is the death without issue of the first taker cannot affect the estate granted, or give the issue any interest in the devise.

The case of *Holton v. Den*, supra, appears to support appellees' contention, though the construction there was not based entirely on the gift over, but to some extent on the other provisions of the will. This case does not go into the authorities, and the court contents itself with a very brief statement of its conclusions. In *Beilstein v. Beilstein*, 194 Pa. 152, 75 Am. St. Rep. 692, 45 Atl. 73, it is held that in a devise over in case of the death of a devisee for life "without leaving a family" there is a necessary implication, in the contingency of her leaving a family, that the estate is to go to them. It is said that "this is practically assumed, without question, in the long line of cases on the subject which are carefully reviewed in 19 L.R.A. (N.S.)

Seybert v. Hibbert, 5 Pa. Super. Ct. 537." This is true. At a very early period this principle was assumed in Pennsylvania without discussion, and the courts have followed it down to the latest decisions, merely referring to their prior adjudications. In *Lytle v. Beveridge*, 58 N. Y. 592, the court, after distinguishing the words used there, "legitimate heirs," as not being the equivalent of "issue," or "issue of the body," as imputing an indefinite limitation, held that their use did not enlarge the life estate given to the first taker into a fee, but that such estate was limited to a life estate, and that upon the happening of the contingency the estate did not descend as an inheritance, but the remainder overtook effect. It is true that in argument the court said that the law would imply a devise to the children of the first taker if any had survived him; but no such decision was made or was involved in the case, and the implication seems less necessary there than in the later case of *Brown v. Quintard*, 177 N. Y. 75, 69 N. E. 225, where the court held there was no devise by implication.

The case of *Carr v. Green*, supra, sustains appellees' contention, but that case is not, and never was, the acknowledged law in South Carolina. It was decided by the court of appeals in equity in May, 1822. In May, 1821, the court of appeals at law, having this same will before it for consideration, had arrived at a precisely opposite result. *Carr v. Jeannerett*, 2 M'Cord, L. 66. Thus the rights of the parties depended upon the court in which the proceedings for their determination were brought. In 1824 these two courts were abolished, and a court of appeals was established, having final appellate jurisdiction in all cases. In 1825 a case involving the same will as the two former cases was brought to the court of appeals. The reasoning of the former cases and the decisions upon which they were based were carefully reviewed, and the court of appeals, after an elaborate examination of the authorities and consideration of the principles involved, held that, under the devise to the testator's grandsons, with a devise over in default of issue, there was no devise to the issue by implication, and that an estate is never implied to issue as purchasers. *Carr v. Porter*, 1 M'Cord, Eq. 60. This principle has since been recognized as the law by the courts of South Carolina. In *Manigault v. Holmes*, Bail. Eq. 298, it is held that issue cannot take as purchasers, by implication, from a valid limitation over in the event of the death without leaving issue, where there is no direct gift to the issue. So, also, it is held in *M'Lure v. Young*, 3 Rich. Eq. 559, and *Addison v. Addison*, 9 Rich. Eq. 58.

In this state the cases of *King v. King*, 108 Ill. 273, 48 N. E. 582, and *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731, are relied upon by appellees. In the former case the testator's scheme of distribution involved the division of his estate into five equal parts, and the giving of one portion to each living child, and one portion to the representatives of each deceased child. A trust was created as to one share, to be held for a grandson of the testator and his family, with a gift over in case of the death of the grandson's wife, and of his leaving no children surviving him. It was the clear intention of the testator, in setting apart the grandson's portion to him and his family, to provide for the children also, and that, if any part of the property held by the trustees remained after the death of the grandson and his wife, it should go to the children. It was held that such was the plain intention of the testator on the face of the will, and the court refers to the case of *Kinsella v. Caffrey*, 11 Ir. Ch. Rep. 154, in which case, also, the remainder was sustained, and in which the rule of law was stated to be that, "if there is a bequest to the parent for life, and, if he die without having or leaving children, to be, if the parent dies leaving children, they are not entitled by implication." What was said in the case of *Orr v. Yates* as to the succession of the issue of Mary Maria Yates was beyond the question under consideration, and the question where the fee would go in case of her death leaving issue was expressly left undetermined. In the case of *Stisser v. Stisser*, 235 Ill. 207, 85 N. E. 240, the testator, after devising a life estate in separate tracts of land to each of three children, directed that, in case of the death of either without issue, the land should revert equally to the legal heirs of the other children. He then added the statement, "it being the will of the testator that the title to the properties under §§ Nos. 4, 5, and 6 herein shall rest and abide in the hands of the legal heirs of the lawful heirs of the testator" hereto. The context thus clearly indicated the intention of the testator that the title should pass to the issue of the children. A devise for life, with a gift over on the death of the life tenant without issue, is not, of itself, sufficient to create a gift, by implication, to the children of the life tenant. Such implication can only arise when supported by some other matter appearing in the will raising an inference in favor of the children.

When we undertake by construction to arrive at Mrs. Walker's intention in regard to the disposition of her property at her son's death in case he should happen to leave children, we are left entirely without aid from the will itself. It is a case for

which she has not provided, whether unintentionally or purposely we have no means of determining. We may speculate or conjecture as to what may have been in her mind, but we can find no indication in the will itself to enable us to say that she intended her son's children to take the remainder. It is clear that the testatrix intended her son to have the use and benefit of the property during his lifetime, with a certain power of disposition. It is clear that she intended, if he died without children, that her nearest relatives at the time of his death should have what was left of the property. It is equally clear that it is impossible to determine her intention as to the disposition of the property if he had children. She had confidence in him, and did not refuse to give him the fee, and limit his interest to a life estate, because she feared he would squander the property; for she made him executor of her will without bond, and authorized him alone, and not in conjunction with his co-executor, to sell the real estate. She is presumed to have known that her son was her only heir, and that, as such, the property would all descend to him after the termination of the life estate, unless she disposed of it by her will. She may have believed that he would use the property for the benefit of his children, should he have any. She knew the property would naturally descend to them as his heirs. The children yet to be born might be deserving or not deserving. Circumstances, as developed by the future, might make an unequal division of the property among the children just and proper, or a diversion of a part of it in another direction desirable. It may be that, upon a consideration of all the circumstances of the situation, the testatrix wished to leave to the discretion of her son the disposition of her property, except in the one event of his dying without children. The will shows that in such contingency she wished to control the disposition of such part of the property as might remain after his reasonable expenses for living were satisfied, and she did so by directing it to go to her nearest relatives. There is no word in the will indicating a desire to interfere with the statutory disposition of the property in the alternative of her son's death having children. She may have desired him to have the use of the property during his life, and, in case of his having children, the power to dispose of it as he might in his own discretion think best for the interest of his family, but have also wished the property, in case he had no children, to go to her relatives. It is possible that the testatrix, in case of her son's death having children, desired them to take the property directly from her, but the will ex-

presses no such wish. It is equally consistent with the will that she desired her son to inherit the fee in such event. Being content with the statutory rule of descent, she made no provision to the contrary.

It may be said that it will be presumed that the testatrix intended to dispose of her entire estate, and that the will should be so construed, unless this presumption is rebutted by its provisions. It is true that any reasonable construction of a will, consistent with its terms, will be adopted so as to give it effect to dispose of all the testator's property, and not to leave a part intestate, but this rule cannot be carried to the extent of inserting provisions in the will which the testator failed to insert. Clear words are necessary to disinherit an heir; and, even where the intention is clearly manifested, the heir will take, unless the testator devises the property to someone else. *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259. The court cannot presume a will for a testatrix on mere speculation as to what might have been her intention. It is the intention of the testatrix only so far as she has communicated that intention by her will which is to govern the descent of her estate. The omission to make any gift, in the one case, may have been the intention of the testator as fully as the gift over in the alternative.

The limitation of the estate to the nearest relatives of the testatrix should Lester Curtis die without children is a contingent remainder. Since Lester Curtis was himself the nearest relative of the testatrix at the time of her death, the devise comes within the rule that, where there is a gift to one for life, with remainder to the testator's next of kin, and the life tenant is the sole next of kin at the death of the testator, the remainder will be considered as given to the persons answering the description at the termination of the estate for life. *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76. Both the event upon which the estate in remainder is to come into possession, the death without children of Lester Curtis, and the persons who may at that time be entitled, as the nearest relatives of Sarah Walker, to take the estate, are uncertain, and the remainder is therefore contingent. Until its vesting, or the determination of the impossibility of its vesting, the reversion in fee descended to Lester Curtis as the heir. *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. 643; *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237; *Pinkney v. Weaver*, 216 Ill. 185, 74 N. E. 714.

It is contended by appellants that, by the conveyance to William A. Bond of the life estate devised to Lester Curtis, and of the

remainder in fee inherited by him, the life estate became merged in the fee, and the contingent remainder to the nearest relatives was destroyed. The effect of a conveyance of his estate, by a life tenant, to the remainderman, is to cause the destruction of the particular estate, which becomes merged in the fee. *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304; 2 Bl. Com. 177; 4 Kent, Com. 100. Every remainder requires a particular estate to support it, and a contingent remainder must vest during the continuance of the particular estate, or *eo instanti* that it determines. 2 Bl. Com. 168. If the particular estate comes to an end before the event upon the happening of which the contingent remainder is to take effect occurs, the remainder is defeated; and this is so whether the preceding estate reaches its natural termination or is brought to a premature end by merger, forfeiture, or otherwise. "Unless a contingent remainder becomes vested on or before the determination of the preceding vested estate, it can never come into possession, it has perished. It makes no difference whether the preceding estates have ended by reaching the limit originally imposed upon them, or whether they have been cut short by merger, forfeiture, or otherwise. *Gray, Rule against Perpetuities*, § 10." *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556. "Contingent remainders may be defeated by destroying or determining the particular estate upon which they depend before the contingency happens whereby they become vested. Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate before any of those remainders vest, the consequence of which is that he utterly defeats them all." 2 Bl. Com. 171. So a tenant for life, with subsequent contingent remainders, might make a tortious conveyance by deed of feoffment with livery of seisin, and thus forfeit his life estate for the express purpose of destroying the contingent remainders, and, upon reconveyance of the tortious title, would hold it free from the contingent remainders. It was to prevent contingent remainders from being defeated by such premature determination or destruction of the preceding estate that the device was invented of interposing trustees to preserve contingent remainders having a legal estate to support the remainders until the happening of the contingency. When the estate for life and the next vested estate in remainder or reversion meet in the same person, notwithstanding intervening contingent remainders, the particular estate will merge in the reversion or

remainder, and the contingent remainders will be destroyed. A qualification of this rule exists where the creation of the particular estate and the remainder or reversion occur at the same time and by the same instrument. *Fearne, Contingent Remainders*, §§ 316-324; 3 *Preston, Conv.* 3d ed. 399; 2 *Washb. Real Prop.* 6th ed. 553, ¶¶ 1597, 1598; *Williams, Real Prop.* 233.

In *Egerton v. Massey*, 3 C. B. N. S. 338, the devise was to Eunice Highfield for life, remainder, in default of issue of Eunice, to Peter Highfield in fee, residuary devise to Eunice in fee. After the death of the testatrix, Eunice, by lease and release, conveyed to Peter Jackson in fee, and after her death without issue, the question of title arose between those claiming under Peter Jackson and those claiming under Peter Highfield. It was held that, under the residuary devise, the reversion in fee went to Eunice Highfield; that the life estate did not merge in it so long as both remained in the devisee, but that, upon her conveyance of both estates to Peter Jackson, the life estate merged in the fee, and that the contingent remainder of Peter Highfield was destroyed. The same question arose in *Bennett v. Morris*, 5 *Rawle*, 9, and a similar question in *Craig v. Warner*, 5 *Mackey*, 460, 60 *Am. Rep.* 381, and were similarly decided. In *Faber v. Police*, 10 S. C. 376, and *McElwee v. Wheeler*, 10 S. C. 392, the devise was for life, with contingent remainders over, the life tenant being the sole heir of the testator. The devisees made deeds of feoffment with livery of seisin, and their grantees reconveyed to the grantors. It was held that, the common law not having been modified in South Carolina at the time, the effect of the deeds was to destroy the life estates and perfect the absolute title in the life tenants. *Redfern v. Middleton*, *Rice L.* 459. The case of *Frazer v. Peoria County*, 74 *Ill.* 282, is cited as sustaining the proposition that the court will not permit a contingent remainder to be destroyed contrary to the will of a testator or grantor. A deed was made to an unmarried woman and the heirs of her body. She reconveyed before having issue, and it was held that the contingent remainder to her children was not thereby destroyed. The question there discussed was the effect of § 6 of the statute of conveyances, which modifies estates tail so as to give the first taker a life estate, with the remainder in fee simple absolute to the next. The doctrine of merger, which has just been considered, did not apply to estates tail under the statute *de donis*, which were an exception to the rule. Such estates were protected and preserved from merger by the operation and construction given to the statute *de donis* for the express purpose

of preventing the particular tenant from thus barring and destroying the estate tail. 2 *Bl. Com.* 177, 178. It was held in *Frazer v. Peoria County* that the general assembly did not intend to restore the common law as it stood before the adoption of the statute *de donis*, and leave the donee with power to alien the estate and repurchase, and thus cut off both the remainder and reversion, but did intend that the person who should first take from the tenant in tail should take a fee simple absolute, without any power in the donee to dock the remainder, or any reversion in the donor except on failure of issue. The case deals with an estate tail only under our statute, and is a case of statutory construction only, having nothing to do with the general question of the destruction of contingent remainders.

Our conclusion is that the language of the will does not warrant the implication of a devise of the remainder to the children of Lester Curtis; that the reversion descended to Lester Curtis, as heir at law; that, by his deed to William A. Bond, the life estate merged in the reversion, and the contingent remainder to the nearest relatives of the testatrix was destroyed; and that the appellants hold the title to the premises involved in the respective causes in fee simple.

The decrees are reversed, and the causes remanded for further proceedings in accordance with this opinion.

Carter, J., dissenting:

I do not concur in the foregoing opinion. The conclusion reached is manifestly contrary to the plain intent of the testatrix as expressed in the will. The paramount rule in construing wills is to ascertain the intention of the testator and to give to such intent effect, if consistent with the rules of law. *Bradsby v. Wallace*, 202 *Ill.* 239, 66 *N. E.* 1088. This is the first and great rule in the interpretation of wills, and to it all other rules must bend. *Smith v. Bell*, 6 *Pet.* 68, 8 *L. ed.* 322; *Wardner v. Seventh Day Baptist Memorial Board*, 232 *Ill.* 606, 122 *Am. St. Rep.* 138, 83 *N. E.* 1077. This will provides that the son shall have a life estate, with the right to control, manage, sell, or exchange the property and to reinvest the proceeds as he may think best; but he can only use of the proceeds that which is required for his reasonable expenses for living. It is further provided that if the son should die "without children" the remainder shall go to testatrix's nearest relatives. When she was disposing of her property she had these grandchildren in mind, and must have intended them to take something or nothing. Clearly she intended them to take something. And what could this be but the intermediate estate? *Dowl-*

ing v. Dowling, L. R. 1 Eq. 442. If reasonably possible, a will will be so construed as to dispose of the entire estate of the testator. Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351; Craw v. Craw, 210 Ill. 246, 71 N. E. 450. By this will the testatrix intended to dispose of all her property, the son taking a life interest in the entire estate. She did not mean to give the remainder to the residuary legatees unless her son died without children. The phrases "die without children" and "die without issue" have been construed by this court to mean without having had children or issue. Field v. Peeples, 180 Ill. 376, 54 N. E. 304. If the son had children, to whom did the testatrix mean that the remainder should go? Why did she mention these grandchildren, if she did not mean them to take this remainder? Ex parte Rogers, 2 Madd. Ch. 576. By necessary implication, the children of the son of testatrix should be considered as entitled thereto.

An estate may pass by mere implication without any express words, "and in general, where any implications are allowed, they must be such as are necessary (or at least highly probable). . . . The will . . . is construed . . . and expounded rather on its own particular circumstances than by any general rules of positive law." 2 Bl. Com. 381. If the testator's meaning cannot be clearly ascertained, we are at liberty, and for the sake of certainty in the possession and transmission of estates generally required, to apply such rules of construction as have by long usage been approved and used. Anderson v. Messinger, 7 L.R.A. (N.S.) 1094, 77 C. C. A. 170, 146 Fed. 929. The doctrine that the intent of a testator must be the guiding and controlling rule of interpretation requires, not unfrequently, as was said in Lytle v. Beveridge, 58 N. Y. 592, "a disregard of the usual technical meaning of words and phrases, and, when necessary, such technical meaning must yield to the evident intent of the testator." It was further said in that case: "Rules of construction are resorted to as helps or aids in arriving at the intent of a testator, and ought not to be followed when they lead to results subversive of such intent. There is no rigid rule of law to the effect that words shall only be used in one certain sense, or requiring courts to give language the same interpretation and effect under all circumstances and in every connection. The infinite variety of circumstances that may occur, distinguishing one case from another, in the use of the same words and phrases, renders it impossible to give an absolute and unbending rule for the interpretation of language applicable to all cases." The rule that the intention of the

testator must govern is so strong that in seeking for such intention courts are not restrained by unbending technical rules, but may adopt the most liberal construction without much regard to the grammatical structure of the sentences or the precise definition of the words used. These instruments are sometimes made in *extremis* and often drawn by unskillful persons. They are therefore entitled to great indulgence, and are treated with greater liberality than any other legal instruments. It frequently happens, in reading a loose and carelessly written will, that the meaning of the testator is perfectly obvious, and yet it may be difficult to explain such meaning by any strict rules of interpretation. Ferson v. Dodge, 23 Pick. 287. The implication that can be followed in construing a will must rest upon a legal inference, and not upon bare conjecture. Ibid.; O'Hara, Interpretation of Wills, chap. 14, p. 166. An estate by implication must be apparent on the face of the will and for the purpose of carrying into effect the manifest intention of the testator. Carr v. Porter, 1 M'Cord, Eq. 61.

The devise to these grandchildren of the testatrix arises by implication, founded upon expressions in the will from which such an intention on the part of the testatrix is inferred. Connor v. Gardner, 15 L.R.A. (N.S.) 73, and note (230 Ill. 258, 82 N. E. 640). The common understanding of the language of the will would convey the meaning that, if the son died without children, the remainder must go to the other relatives of the testatrix; but just as plainly the meaning is conveyed that in the other alternative—that is, if the son should leave children—it was intended that these children should take this remainder. The familiar rule of construction that the inclusion of one alternative is the exclusion of another, or *vice versa*, would tend to confirm this conclusion. Anderson v. Messinger, *supra*. Not only would this be the meaning given to these words by the ordinary layman, but the lawyer would almost certainly say, as a matter of first impression, that such a construction of the will carried out the plain intent of the testatrix. The construction placed upon this will by the majority opinion of the court would not readily suggest itself on the first reading of the will, and certainly was not intended by the testatrix. It is a construction that must be searched for. Does it not require a strained and unnatural meaning to be placed upon the words of the will? Rules of law should not be permitted to thus defeat the intention of the testatrix, unless they have been long established and upheld by the great weight of authority. It may

be admitted that it is "essential to the security of property that a rule should be adhered to when settled, whatever doubt there may be as to the grounds upon which it originally stood" (Ram, *Legal Judgment*, p. 230); that it is extremely dangerous to shake the authority of decided cases. Beal, *Cardinal Rules of Legal Interpretation*, p. 20). I find no such settled rule, however, upholding the construction placed upon this will by the majority opinion of the court. The precise question here under consideration has never been passed upon by this court; but, as will be shown hereafter, cases have been decided by this court in which this question has been discussed, and the reasoning in those cases fairly tends to uphold the construction contended for in this dissent. It is conceded that the decisions in the English courts tend to uphold the conclusion of the opinion; but it is evident, from a study of the English authorities, that they are not all in harmony on this question, and that the rule on this subject has been changed by the modern decisions of those courts. *Anderson v. Messenger*, supra. The great weight of authority in this country is opposed to the rule of construction laid down in the majority opinion of the court.

It has been held in the English courts that, while American decisions will be entitled to great respect, yet they cannot be treated as controlling or placed on the same footing as the decisions of their own courts. Beal, *Cardinal Rules of Legal Interpretation*, p. 47. It has been rightly said that the English decisions are only "quasi authority" in this country. Ram, *Legal Judgment*, p. 293. The law of this state requires that the common law of England, so far as the same is applicable and of a general nature, shall be the rule of decision in this state unless repealed by legislative authority. *Hurd's Rev. Stat.* 1908, p. 485. The English cases since the Revolution are not regarded as authority. Upon disputed doctrines in our courts, they are entitled to respectful consideration; but, where the question relates to the construction or effect of written documents, they have no greater weight than may be due to the reasons given in their support. *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55. To the same effect are *Cathcart v. Robinson*, 5 Pet. 264, 8 L. ed. 120, and *Koontz v. Nabb*, 16 Md. 549. No decisions have been cited in the opinion of the court that were decided previous to the American Revolution. The earliest of the English decisions cited is *Green v. Ward*, 1 Russ. Ch. 262, which was decided in 1826, and the latest, *Scale v. Rawlins* [1892] A. C. 342. One of the earliest decisions in this country is *Carr* 19 L.R.A. (N.S.)

v. Green, 2 M'Cord, L. 75, in which the highest chancery court of that state decided, in 1822, after a review of many of the English authorities, that the words of the will, "The rest and residue of my estate . . . to be equally divided between my two grandsons . . . at the age of twenty-one years, but should they die leaving no lawful issue" then the whole to go to others, manifested a plain intention of the testator to provide distinctly "for the issue of his grandsons, if they should leave any. And, if the common sense of the community could be consulted on it, there would not, probably, be found one mind which would hesitate in deciding that this must have been the intention of the testator." It appears that the court, in deciding this, was in conflict with some of the other courts of that state, and, when a law was passed creating a new court of appeals, that court, in 1825, reviewed the same facts in the case of *Carr v. Porter*, supra, reversing, in effect, the earlier decision in *Carr v. Green*, supra. From that day to this the American courts, so far as my attention has been called to them, have given to similar words in wills the construction contended for in *Carr v. Green*, supra.

In *Holton v. Den*, 23 N. J. L. 330, the will provided that, in case "of the decease of my son Eli before the expiration of said lease, then the house and lot called Oak Island, together with its appurtenances, shall descend to my son Andrew and his heirs and assigns forever." In discussing that provision of the will that court said (p. 334): "In the present case the devise over is to Andrew, one of the six children of the testator, on the contingency of Eli's dying before the expiration of the lease referred to in the former part of the will. It is not a limitation over to the heir at law, but to one of the heirs at law. If Eli cannot take this property by implication in case he lived beyond the expiration of the lease, the question is, What was to become of it, according to the intention of the testator? He did not mean to die intestate in regard to it, for in addition to his declaration, in the introductory part of the will, that he means to dispose of such things as God has blessed him with, he makes distinct mention of these very premises. He did not mean that his heirs general should take it, for he gave it in distinct terms to his son Andrew on a certain contingency which did not happen. And, for the same reason, it is clear to my mind he did not mean that it should be sold by his executors. I cannot resist the conviction that the intention of the testator, as gathered from the whole will, was to devise these premises to Eli in case he survived the

lease, and that he takes an estate in them by necessary implication."

In *Anderson v. Messenger*, 7 L.R.A. (N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929, the United States court of appeals had under consideration the words in a will, "If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor dies without lineal descendants, then one half, both of the decedent's original portion as well as one half of the portion taken by survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son;" and decided that, in case there were lineal descendants, the testator intended to prefer them, rather than the collateral branches of his family,—that this was clear by implication.

In *Shaw v. Hoard*, 18 Ohio St. 227, in construing the following words in a will: "On the death of either my wife or daughter then the survivor shall have all the property left them by me, and, if both die without leaving any heirs of their body, then and in that case said property shall be given to my wife's brother David Campbell,"—that court held that, by fair implication, the testator intended to give the property to the issue of his wife and daughter after their decease, if they left issue surviving them.

In *Lytle v. Beveridge*, 58 N. Y. 592, the court of appeals of New York, in construing in a will the following: "I allow my son Joseph to possess by devise of will the farm I now live on . . . [describing it], with all the rights and privileges thereunto belonging, as fully and freely as if I had made him lawful conveyance by full covenant during his natural life, but if he leaves no legitimate heirs, then in that case the property according to my will I allow to revert back to my son David, his heirs or assigns forever, without hindrance of any person whatsoever, as freely and fully as if I had given him a lawful conveyance,"—stated that from the above-quoted words the law would imply a devise in fee to the children of Joseph living at the time of his death, and thus give effect to the intent to provide for them in case there should be any such children.

In *Wetter v. United Hydraulic Cotton Press Co.* 75 Ga. 540, a will gave to a daughter, after she arrived at the age of twenty-one, the estate of the testatrix, but provided that, "if my said daughter should depart this life leaving no issue or lineal heirs, that the whole of the estate herein bequeathed should go and belong to my mother and my sister, as tenants in common, and their heirs forever," etc. The court, in con-

struing the will, said that nothing was expressly said as to what effect the existence of the children of the daughter was to have on the course of the property, but the only contingency upon which other persons—in the one case the mother and sister, and in the other the next of kin to testatrix—can take was the death of the daughter "without issue or lineal heirs," and continued: "The inference or implication seems to us plainly to be that, if there were such issue lineal or heirs left by the daughter, the property should go to them."

Practically to the same effect as the American decisions just referred to are *Re Stafford*, 11 Misc. 436, 33 N. Y. Supp. 419, *Bentley v. Kaufman*, 12 Phila. 435, and *McAlpin's Estate*, 211 Pa. 26, 60 Atl. 321. *Rood on Wills*, § 495, also tends to support the same conclusion, where certain English authorities are cited supporting the text, as does also 1 *Spence's Equitable Jurisdiction*, p. 530.

It will be noted that in most, if not all, of the cases just cited, there was in the first instance, by the terms of the will, a devise in fee to a certain person, which devise in fee was cut down to a life estate by later provisions of the will. The reasoning of the majority opinion would necessarily be much stronger in support of the construction that is contended for in that opinion as to such a wording than it would where the will plainly states, as it does here, that in the first instance the first taker is only to have a life estate. In discussing this question, *Jarman*, in his work on *Wills* (vol. 1, *Bigelow's* 6th Am. ed. *525), says: "And even where the language of the will necessarily confines the interest of the parent to his life, the children will not generally be held to take by implication. It is extremely probable that the testator intended a benefit to them. But *si voluit non dixit*. But it seems that in such a case the court will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parent." Evidently this eminent author thought the English courts had gone further than they ought in holding that a devise by implication should not arise by words similar to those contained in this will. It will be noted that he said it is extremely probable that the testator intended a benefit to them, and that the construction contended for in the majority opinion imputes to the testator an extraordinary intention.

The latest authority that has been called to my attention is *Beilstein v. Beilstein*, 194

Pa. 152, 75 Am. St. Rep. 692, 45 Atl. 73, and decided in 1899. That decision is precisely in point. In construing the following language of a will: "It is my desire that my daughter, Gertie Beilstein, shall receive the income of my property . . . as long as she lives, but should she die without leaving a family," then the remainder to the testator's brothers and sisters, that court held (page 154 of 194 Pa.): "The devise over in case Gertie should die 'without leaving a family' is an implied devise to her family if she should leave one. It is only if she does not that the devise over is to take effect, and there is a necessary implication that in the other unexpected contingency of her leaving a family the estate is to go to them. This is practically assumed without question in the long line of cases on the subject,"—citing authorities. That the construction here contended for was generally understood to be proper by the courts of this country is very clear from Washburn on Real Property, vol. 1, 6th ed. § 192, where that author says: "An instance of an estate tail by construction, where there is no direct limitation to the heirs of the donee's body, would be an estate to A, with a proviso that if he shall die without heirs of his body the estate shall revert to the donor or go over to one in remainder. Here, it will be perceived, there was no direct limitation to the heirs of A, and it is too plain for doubt that the donor intended the heirs of his body should take it at his decease; for he gives it over, or reserves it, in case he has no such heirs, and only in that contingency."

It may be conceded, as stated in the majority opinion, that some of the decisions of the American courts just cited did not all have under consideration the exact question in this case, and it may also be conceded, as suggested, that, on some other questions as to the construction of wills, rules of law are laid down in some of those decisions not in harmony with the decisions of this court; but the reasoning in these cases, whether the question under consideration was the exact one in this case or a kindred question, tends strongly to uphold the construction contended for in this dissent. Moreover, as I have stated, the decisions in our own court, while not decisive, are strongly persuasive, and the profession, in reading them, would naturally conclude that this court was inclined to follow the American rather than the English authorities on this subject.

In *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136, the will under consideration provided: "I do bequeath to my beloved daughter, . . . the following property [describing it] in trust for her sole use and benefit and of her children, and their chil-

dren thereafter. But in the event that my daughter . . . should die and leave no children as heirs to the within-mentioned property, then it is my will and desire that all of said property shall go to my brother, Jeremiah Coughly, . . . and to his heirs and assigns." This court, through the late Justice Baker, in construing this will, stated (page 344 of 141 Ill.): "Further evidence of the intention to give said children the remainder in fee is amply afforded by the provision that, if appellee 'should die and leave no children, . . . then . . . said property shall go to my brother, Jeremiah Coughly, . . . and his heirs and assigns forever.' The necessary implication from this language is that, if there were children of appellee, then primarily the property should go to them and to their heirs and assigns, forever." The holding in that case that the children were entitled to the remainder did not rest alone upon the clause of the will last quoted; but it is manifest, from the last sentence quoted from Judge Baker's opinion, that the court then had no doubt that a devise would necessarily be implied from language such as is contained in the will here in question.

In *King v. King*, 168 Ill. 273, 43 N. E. 582, where the question as to devises by implication was exhaustively presented in the briefs, the will there under consideration provided: "It is my will that in the event of the death of the wife of said William Jones King, and of his leaving no children surviving him, that then, and in such case, the said trustees, after the death of said William Jones King, shall convey and transfer to my children and their descendants all the estate, both real and personal, then in their hands or remaining undisposed of," etc. In construing this will this court stated (page 286 of 168 Ill.): "We think the intention of the testator was that the estate should go to the issue of William Jones King, if he left any." It is true that in that case there were other provisions of the will which tended to uphold the same conclusion, and the court did not rest its opinion solely upon the intention of the testator as drawn from the words quoted.

In *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731, the will provided that the testatrix devised to Jefferson Orr, trustee, certain described land, "constituting what is commonly known and called the 'Putz farm,' to have and to hold in trust for the sole use and benefit of Mary Maria Yates, for and during her natural life, and in the event of the death of the said Mary Maria Yates without child or children or descendants of child, then to have and to hold for the sole use and benefit of Lydia Yates, my

wife, if she shall be living during her natural life, and at the death of Lydia Yates, my wife, and Mary Maria Yates, my daughter (if said Mary Maria Yates dies without child or descendants of child), the fee to the said last-described tract of land known as the Putz place shall be equally divided between my brothers and sisters and their heirs and assigns," etc. In discussing the will this court said, speaking by Mr. Justice Wilkin (page 238 of 209 Ill.): "The only uncertainty is as to what shall be done with the trust property in case Mary Maria Yates dies leaving issue. Will it go to such issue in fee, or will it fall back into the estate as intestate property and descend to the heirs of William H. Yates? Our opinion is that it will vest in the issue of Mary Maria Yates. That seems to be the fair inference from the language used. If she dies without issue, then the trust continues during the life of Lydia Yates, and the fee vests in the brothers and sisters. If Mary Maria Yates dies leaving issue, that is clearly the end of the trust, and it seems to be the intention of the testator that the fee shall vest in her issue. This construction is in harmony with the rule of law that, where a party disposes of his estate, the presumption is that he intended to dispose of all of it, and courts will so construe the will as to leave no part of the estate as intestate property."

While it is conceded that in none of these three cases did the decision turn upon wording precisely like the one in the will here under consideration, yet I am confident that the profession generally adopted the view that in those decisions (and others of a similar nature where the reasoning is not quite so strong or clear) the construction insisted upon in this dissent was intended to be laid down. In note 2 to § 207 of Kales on Future Interests that author says: "Gift to issue of first taker raised by implication from gift over if life tenant leaves no issue,"—citing *Orr v. Yates*, supra, and other Illinois cases.

In the recent case of *Stisser v. Stisser*, 235 Ill. 207, 85 N. E. 240, this court construed the following words of the will: "It is my will that, should either of the above-named children [naming them] die without issue," then and in that case the property shall be disposed of in a certain way; and stated (page 210 of 235 Ill.): "We think under said clause the remainder, after the death of either of said life tenants, in the property described in said clauses 4, 5, and 6, was devised, by necessary implication, to the issue of the respective life tenants, if they had issue." This statement may be considered *dictum*, 19 L.R.A. (N.S.)

as the question was not necessary for the decision of the case or exhaustively discussed in the briefs; still the reasoning there, in connection with the former decisions of this court, might almost be held judicial *dictum*, as distinguished from mere *obiter dictum*, and as that rule was laid down by this court, speaking by the late Justice Wilkin, in *Law v. Grommes*, 158 Ill. 492, 41 N. E. 1080.

The decided weight of American authority is against the construction of the will upheld by the majority opinion of the court. If the English and American authorities are in conflict, surely the American courts ought to follow the American decisions rather than the English. unless sound reasoning and principle require the following of the English authorities; but, when not only the American authorities are substantially, if not entirely, unanimous on the question, but also the reasoning in the decisions of our own court tends to support the construction given to this will by the chancellor in the court below, then, before this court should hold to the contrary, we ought to be convinced that the rule of the American decisions is not sound in principle and is manifestly mischievous in its results. This court has time and again laid down the doctrine that the intention of the testator as stated in the will must control when not against public policy or public law. It is the courts' duty to construe wills as they find them, and not to make them. *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315. But courts may, in effect, make wills for parties by giving them a mistaken interpretation. While the doctrine of implication must be resorted to cautiously in the construction of wills, the court should not hesitate to resort to that doctrine when thus only can the manifest intention of the testator be carried out. Does not the construction given to the words by the majority opinion rest to a far greater extent on conjecture than does the construction given by the trial court? The testatrix, without question, intended that her son should only have a life estate in her property, with the right to control and manage it and with the right to use sufficient of the proceeds for his support and comfort; but is it not a most violent inference that she intended that if he had children he should have a fee-simple title instead of a life interest? The intention of a testator "is to be collected from the whole will taken together. Every word is to have its effect and every word is to be taken according to the natural and common import." *Thellusson v. Woodford*, 4 Ves. Jr. 329. The rule just quoted from this early

English authority has always been followed in this court. Applying it in this case, and giving to the words of this will their natural and common meaning, it should be held that the intermediate estate in remainder was intended to go to the grandchildren of the testatrix, if any such were born to her son. To give the estate to such issue leaves none of it intestate and will do no violence to the language of the will, but will carry into effect the purpose of the testatrix clearly implied from the language she has used in that instrument.

The only justification, it seems to me, for construing the will in accordance with the rule laid down in the opinion of the court is the decisions of the English courts during the past century. Those courts seem to apply fixed rules to the construction of devises to an extent not generally adopted in this country. *Anderson v. Messinger*, 7 L.R.A.(N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929. In following their decisions on this question, are we not adopting an arbitrary rule for its own sake, rather than to carry out the intent of the will, thus defeating, instead of promoting, justice? By so doing are we not imputing to the testatrix the "extraordinary intention" (1 *Jarman*, supra) that other and more distant relatives are to become entitled to the remainder if the son has no children, but that the remainder is not to go to these children, if any there be? Is it not "too plain for doubt" (1 *Washburn*, supra) that the testatrix intended these grandchildren to take this remainder?

Hand and Farmer, JJ., dissenting:

We concur in the dissenting opinion of Mr. Justice Carter.

Petition for rehearing denied December 8, 1908.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CLYDE WILSON, Admr., etc., of Charles P. Dewey, Deceased, Plff. in Err.,

v.

HARTFORD FIRE INSURANCE COMPANY.

(— C. C. A. —, 104 Fed. 817.)

Executor — different states — privity between.

1. There is no privity between the executors of the will of a decedent appointed in one state and an administrator with the same will annexed appointed in another state, nor between the administrators of

the estate of an intestate appointed in different states.

Same — estoppels in one state — conclusiveness in other.

2. Estoppels in favor of or against such executors or administrators in one state, by judgments or by the administration statutes of limitation of that state, do not bind or affect an administrator with the will annexed, or an administrator of an intestate appointed in another state, or a claimant against such representatives.

Same — domiciliary administrator — rights in foreign jurisdiction.

3. Administration in the state of the domicile of the decedent does not govern the administration of the property of a decedent in any other state.

Same — claims barred by statute — estoppel in foreign jurisdiction.

4. A claim against the estate of a decedent in the hands of an administrator with the will annexed in one state is not barred because it was not presented and has become barred against the estate of the decedent in the hands of the domiciliary executors of the same will in another state.

(November 2, 1908.)

Case Note. — Effect of failure to present claim within the time allowed by the administration statute of the domicile as a bar to its allowance in the state of the ancillary administration, or vice versa.

Although there are a goodly number of cases similar to those on which the court, in *WILSON v. HARTFORD F. INS. CO.*, depended for its decision, passing on the question whether or not a judgment against the executors of a will of a decedent appointed in one state is binding on an administrator with the will annexed appointed in another, or *vice versa*, very few cases have been found presenting the specific question involved in that case, whether a failure to present a claim against one within the required time is a bar to its presentation against the other; and it will be noted that those found, with the exception of *Borer v. Chapman*, 119 U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 342, which is sufficiently set out in the *WILSON CASE*, do not seem to be in accord with that case.

In *Durston v. Pollock*, 91 Iowa, 608, 60 N. W. 221, a person died in Illinois leaving property there, and land in Iowa, the last being devised to a daughter; an administrator with the will annexed was appointed in Illinois, who subsequently, owing to a peculiar statute, was also appointed administrator in Iowa; it appeared that in his lifetime the deceased had become liable on a note as surety for a son; the claim on this note was not filed in Illinois until more than two years after the appointment of the administrator, and consequently was barred by the statute; subsequently the claim was filed against the estate in Iowa. The court, however, in denying this claim,

iciliary executors of the will of a deceased person and the administrator with the will annexed of the property of such a person in another state that a bar of a claim against the former bars it against the latter? Section 4450 of the General Statutes of Kansas of 1901 reads: "Where the cause of action has arisen in another state or country, between nonresidents of this state, and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action maintained thereon in this state."

But has the cause of action which the insurance company here presses arisen in another state or country? A proceeding in a probate court to administer upon the estate of a deceased person is a proceeding *in rem*, not *in personam*. The property within the jurisdiction of the court is the defendant, the executor or administrator is its representative, and all claiming any interest in that property under the deceased are parties to the proceeding. *Grignon v. Astor*, 2 How. 319, 337, 11 L. ed. 283, 290; *Sheldon v. Newton*, 3 Ohio St. 494, 503. The probate court of Illinois and the executors which it appointed had no jurisdiction to administer or to distribute any property beyond the limits of that state, because the statutes which gave them their authority were ineffective beyond its boundaries. The property of the estate of the deceased in that state, and that alone, therefore, was the defendant, and the executors represented no other. In the proceeding in Kansas the real defendant is the property of the estate of the decedent in that state, and the administrator with the will annexed is the representative of that property and of no other. In other words, the defendant in the administration in Illinois was the property of the deceased in that state, which alone the executors represented, and not the property of the estate in Kansas; and the defendant in the administration in Kansas is the property of the deceased in that state, which alone the administrator with the will annexed represents. Now, no cause of action against the deceased arose in his lifetime, because his obligations to the insurance company did not mature until after his death. No cause of action against his property in Kansas, the only defendant in the instant suit, arose after his death either in the state of Illinois or in any other jurisdiction outside of the state of Kansas, because no court or officer beyond the limits of Kansas ever had any jurisdiction to adjudge or enforce any such cause. The only cause of action, therefore, which was barred by the failure of the insurance company to present its claim in due time in Illinois was its cause of action against the property of

the deceased in that state. That cause of action never existed, and never was judicable in Kansas, so that in the state of Kansas the bar of the Illinois administration statutes in no way affected it. The insurance company's cause of action against the property of the estate of the deceased in Kansas never existed and never was judicable in the state of Illinois, and the bar of its cause of action against the property of the estate of the deceased in Illinois by the administration statutes of that state in no way limited or affected its cause of action against the property of the estate of the deceased in Kansas.

But counsel say that the administrator with the will annexed appointed in Kansas is in privity with the executors appointed in Illinois, and, as the insurance company is estopped by the statute of limitations of Illinois from enforcing its claim against the former, it is also estopped from enforcing it against the latter. "The term 'privity' denotes mutual or successive relationship to the same rights of property." *Greenl. Ev.* 16th ed. § 189. Lord Coke divides privies into three classes,—privies in estate, privies in law, and privies in blood. The only principle upon which the doctrine of estoppel applies to one party because of his privity with another is that the party claiming through another is estopped by that which estopped that other respecting the same subject-matter. Thus the executors and the administrator with the will annexed are in privity with the testator, and are estopped by judgments and prescriptions that prevail for or against him, because they each derived the property they are respectively administering from him. But there is no privity between the Illinois executors and the Kansas administrator, because none of the property which the latter is administering was derived from the former, and none of the property which the former is administering was derived from the latter, so that an estoppel against or in favor of the latter does not relate to the same subject-matter with which the former is dealing, and they are not privies in estate. They received their authority from different sovereignties over different property, they are accountable to different courts which are acting under different laws, the authority of the executors is paramount and that of the administrator is nothing in Illinois, the authority of the administrator is paramount and the executors are without authority in Kansas, hence they are not privies in law. They are certainly not privies in blood, and the result is that they are not privies at all. The suggestion that in some incomprehensible way the domiciliary administration in Illinois is so primary and

that in Kansas so ancillary that an estoppel of a claimant to urge his demand in the former proceeding estops him in the latter is not tenable. Under the statutes of Kansas, to which we have adverted, the administration in that state can never become ancillary to that in Illinois until the probate court in Kansas has fully paid out of the property of the estate in that state all the claims there presented and allowed, and has ordered the residue to be sent to the executors in Illinois under § 2980, Kan. Stat. 1901, and then it will become ancillary only to the extent of that residue. Until that order is made the administration in Kansas is independent of and co-ordinate with that in Illinois, and estoppels between the creditors and the representatives of the property of the estate in one jurisdiction are ineffectual for or against the representatives of the property of the estate in the other.

In *Aspden v. Nixon*, 4 How. 467, 468, 497, 498, 11 L. ed. 1059, 1060, 1073, 1074, Henry Nixon, one of the executors named in the will of Matthias Aspden, a resident of England, proved the will and qualified as executor in England and in the state of Pennsylvania. He died, and successive executors were appointed, one in England and one in Pennsylvania. Administrators of the estate of John Aspden sued the executor in England for the property of the estate of Matthias, and the High Court of Chancery dismissed their bill. The Pennsylvania administrator of the estate of John then sued the Pennsylvania executor of the estate of Matthias for the property of the estate upon the same ground of action. The executor pleaded *res judicata*, but the Supreme Court overruled the plea on the ground that the property involved and the representatives of the estates in the two jurisdictions differed and there was no privity between them.

In *Hill v. Tucker*, 13 How. 458, 461, 467, 14 L. ed. 223, 224, 226, the testator, a resident of Virginia, named three executors in his will, two of whom qualified in Virginia and one in Louisiana. A claimant against his estate recovered a judgment against the Virginia executors as such, and relied upon it to sustain an action in Louisiana against the executor in that state. The Supreme Court said: "Notwithstanding the privity that there is between executors of a testator, we do not think that a judgment obtained against one of several executors would be conclusive of the demand against another executor, qualified in a different state from that in which the judgment was rendered;" but added that, under the rule in the state courts of Louisiana (*Jackson v. Tiernan*, 15 La. 485), such a judgment was admissible in evidence to meet the plea of prescription. 19 L.R.A. (N.S.)

In *Borer v. Chapman*, 119 U. S. 587, 590, 591, 598, 599, 30 L. ed. 532-534, 536, 537, a testator who resided in Minnesota, but the bulk of whose property was situated in California, named two executors in his will, one a resident of Minnesota, the other a resident of California. The will was proved in each state. The Minnesota executor accepted the trust in that state, but notice to creditors was not published and claims against the estate in Minnesota were not barred in accordance with its administration statutes. The California executor qualified in his state, notice to creditors was there published, all claims not presented were barred under the provisions of the statutes of California, the estate in that state was fully administered, and the executor was discharged. An action at law was brought in the state of Minnesota against the Minnesota executor upon a claim which had not been presented in California and which was barred under the administration statutes of that state, and the defendant pleaded that the cause of action was barred in Minnesota by virtue of the administration in California, but the Supreme Court sustained a judgment for the claimant, and said: "If he had chosen, he could have proved his claim there and obtained payment; but he had the right to await the result of the settlement of that administration, and look to such assets of Gordon as he could subsequently find in Minnesota, whether originally found there or brought there from California by the executors or legatees of Gordon's estate."

In *Brown v. Fletcher*, 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702, 704, 705, Fletcher, a resident of Michigan, died testate, leaving a suit pending against him in Massachusetts and property in that state worth \$300. His will was proved and the executors qualified in Michigan, and an administrator with the will annexed was appointed in Massachusetts. The suit was revived against this administrator, and resulted in a decree against him for more than \$400,000. This decree of the Massachusetts court was filed in the probate court in Michigan as evidence of a claim against the estate of Fletcher in that state, upon the ground that the executors in Michigan were in such privity with the administrator with the will annexed in Massachusetts that a decree against the latter was conclusive evidence of the debt against the former; but the Supreme Court held that there was no privity between them, and that an estoppel of the administrator with the will annexed in one jurisdiction constituted no estoppel of the executors of the will in another state. The converse of this proposition is equally true, and our conclusions are: There is no

privity between the executors of the will of a decedent appointed in one state and an administrator with the same will annexed appointed in another state, nor between administrators of the estate of the same decedent appointed in different states. Estoppels in favor of or against such executors or administrators in one state by judgments or by the administration statutes of limitation of that state do not bind or affect an administrator with the will annexed, or an administrator appointed in another state, or a claimant against such representatives. Administration in the state of the domicile of the decedent does not govern the administration of the property of the decedent in any other state, and a claim against the estate of the decedent in the hands of an administrator with the will annexed in one state is not barred because it was not presented and has become barred against the estate of the decedent in the hands of the domiciliary executors of the same will in another state. *Vaughan v. Northup*, 15 Pet. 1, 5, 10 L. ed. 639, 640; *Aspden v. Nixon*, supra; *Stacy v. Thrasher*, 6 How. 44, 58, 60, 12 L. ed. 337, 342, 343; *Hill v. Tucker*, supra; *McLean v. Meek*, 18 How. 16-18, 15 L. ed. 277, 278; *Borer v. Chapman*, supra; *Johnson v. Powers*, 139 U. S. 156-159, 35 L. ed. 112-114, 11 Sup. Ct. Rep. 525; *Brown v. Fletcher*, supra.

Counsel for the plaintiff in error have cited opinions of courts of eminent ability that are not in accord with these propositions. *Sanborn v. Perry*, 86 Wis. 361, 56 N. W. 337; *Latine v. Clements*, 3 Ga. 426; *Hunt v. Fay*, 7 Vt. 170; *Baldwin v. Rice*, 44 Misc. 64, 89 N. Y. Supp. 738; *Durston v. Pollock*, 91 Iowa, 668, 60 N. W. 221; *Harrison v. Stacy*, 6 Rob. (La.) 15. These decisions have been thoughtfully considered, but the more cogent reasons and the supreme authority sustain the views which have been expressed, and they must prevail.

The judgment below is accordingly affirmed.

KENTUCKY COURT OF APPEALS.

CHINA BRACKETT'S ADMINISTRATOR,
Appt.,
v.
LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(33 Ky. L. Rep. 921, 111 S. W. 710.)

Railroad — standing cars — negligent closing.

One undertaking to cross between freight cars standing on a switch track with only a narrow opening between them, to reach a railroad station as a passenger train is

arriving, assumes the risk of injury from the opening being closed in the operation of the road, although the track is between the postoffice and depot, where persons may be expected to cross, if the opening is not a continuation of any traveled path; and the railroad company cannot be held liable for injury due to his being caught between the cars if his danger was not known to the railroad employees in time to avoid the injury.

(Nunn, J., dissents.)

(June 20, 1908.)

Case Note. — Liability of railroad for injuries to one not an employee, by closing gap between standing cars at point other than a highway crossing.

The question of the defendant's negligence is for the jury where a nine-year old child, while attempting to cross a public street through a gap in cars standing upon a side track maintained by it lengthwise of the street, was injured by the sudden closing of the gap, by reason of other cars being kicked or shunted against the standing cars by defendant's servants,—the plaintiff not noticing any engine or moving cars as he started to cross the track. *Lehman v. Eureka Iron & Steel Works*, 114 Mich. 260, 72 N. W. 187. The court observed that the plaintiff was not a trespasser in crossing the track, and, the track being upon a public highway, the defendant was bound to take some precaution to guard the public from danger in placing its cars thereon, and the shunting or kicking of cars across a public highway is actionable negligence.

And, under such circumstances, the question of the contributory negligence of the plaintiff was for the jury, as the same rule would not be applicable to a mere child that would apply to an adult. *Ibid*.

So, it is not negligence *per se* for one, on his way to a railway station to meet an incoming passenger, in following a path to the station habitually used for that purpose, to attempt to pass through a gap between cars standing upon a side track at a point where it was customary to leave openings therefor; and the defendant will be liable for his death caused by the sudden closing of the gap without warning. *Nichols v. Washington, O. & W. R. Co.* 83 Va. 99, 5 Am. St. Rep. 257, 5 S. E. 171. The court said that the deceased went upon the premises over this route in pursuance of an invitation held out by the defendant, and, therefore, it was the latter's duty to notify persons entitled or invited to use such way, in some unmistakable manner before the gap was closed; and all that would be required of the deceased, under such circumstances, would be the exercise of reasonable care.

But it was contributory negligence for a person in possession of his faculties—traveling a footpath across a railway yard, which, with the defendant's acquiescence,

A PPEAL by plaintiff from a judgment of the Circuit Court of Bell County in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Mr. N. J. Weller, for appellant:

At such a place and such a time, the company, in the movement of the cars, owed a lookout duty to the persons reasonably expected on the premises about the depot.

Davis v. Louisville, H. & St. L. R. Co. 30 Ky. L. Rep. 172, 97 S. W. 1122; Illinois C.

was generally traveled in going to and from the station, where cars were frequently separated for this purpose—to attempt to pass through a gap between standing cars, when, had he looked as he approached the gap, he might have seen a train backing toward the standing cars and bystanders shouted a warning to him, before he entered the gap, to which he paid no attention. Bertelson v. Chicago, M. & St. P. R. Co. 5 Dak. 313, 40 N. W. 531.

And, under such circumstances, the fact that the bell or whistle of the approaching train was not sounded, and the servants in charge thereof were negligent in not observing the opening between the standing cars and the decedent's approach thereto, will not render the railway company liable. *Ibid.*

So, the negligence of a parent, who permits an eight or nine year old girl to pass between the cabooses of two standing trains, at a point near a public crossing, in a space but a few inches wide, will be imputed to the child, so as to prevent a recovery for injuries sustained by the closing of the gap, either by the movement of the engine attached to one of the trains, or by its gradual slacking back down an incline. Stillson v. Hannibal & St. J. R. Co. 67 Mo. 671.

And the fact that neither the bell nor the whistle of the locomotive was sounded does not disclose negligence, as this is not required except when the engine is approaching a public crossing. *Ibid.*

So, it was contributory negligence for one to attempt to pass through a gap between cars in a switch yard, which was always more or less obstructed with trains and standing cars, passageways for travelers not ordinarily being left therein, where, had he looked before entering the gap, he would have seen cars moving of their own momentum toward the gap. Flynn v. Eastern R. Co. 83 Wis. 238, 53 N. W. 494.

So, no recovery can be had where a pedestrian attempted to pass through a gap in a freight train near a station, where switching of cars was in progress, and was killed by the sudden closing of the gap, although the railway track ran lengthwise of the principal business street of the town, it appearing that the deceased was not observed by the trainmen; as, under such circumstances, the deceased was a trespasser, to 19 L.R.A. (N.S.)

R. Co. v. Murphy, 123 Ky. 787, 11 L.R.A. (N.S.) 352, 97 S. W. 729; Louisville & N. R. Co. v. Popp, 96 Ky. 90, 27 S. W. 992; Perkins v. Chesapeake & O. R. Co. 123 Ky. 229, 94 S. W. 636.

Messrs. Benjamin D. Warfield, C. W. Metcalf, and J. W. Alcorn for appellee.

Hobson, J., delivered the opinion of the court:

Mrs. China Brackett was killed by being mashed between two cars at Four Mile, a station on the Louisville & Nashville Rail-

road, whom the only duty owed was not wilfully or negligently to injure him after his presence was discovered or known. Southern R. Co. v. Mouchet, 3 Ga. App. 266, 59 S. E. 927. This doctrine was applied in Grady v. Georgia R. & Bkg. Co. 112 Ga. 668, 37 S. E. 861.

There can be no recovery under a complaint alleging the sudden closing up of a gap between cars at a point where a walk leads from a railway station across the railway company's yards, by reason of the negligence of the defendant's servants, whereby the plaintiff, who was on his way to the station to mail a letter, was injured, where the evidence discloses that no engine or servant of the defendant was near the cars at the time the gap was closed, and the cause of the closing thereof was unexplainable. Gurley v. Missouri P. R. Co. 93 Mo. 445, 6 S. W. 218.

So, one who may be regarded as a licensee cannot recover for injury sustained by the closing of a gap between cars standing upon a railway side track while he is passing through the same, where he is aware of the approach of an engine toward the cars, but believes he has time to pass through the gap, as he is guilty of contributory negligence. Nichols v. Gulf & S. I. R. Co. 83 Miss. 126, 36 So. 192.

So, it was contributory negligence for one aiding in carrying goods from a district in which a large fire was raging to attempt to cross a railroad track through a gap between cars in a railway yard, in spite of warnings of the approach of a switch engine with bell ringing, although the engineer and fireman, who were on the lookout, failed to observe him. Springer v. St. Louis Southwestern R. Co. 161 Fed. 801.

As to contributory negligence in attempting to cross or pass through a train standing upon a public crossing, see case note to Jones v. Illinois C. R. Co. 13 L.R.A. (N.S.) 1066.

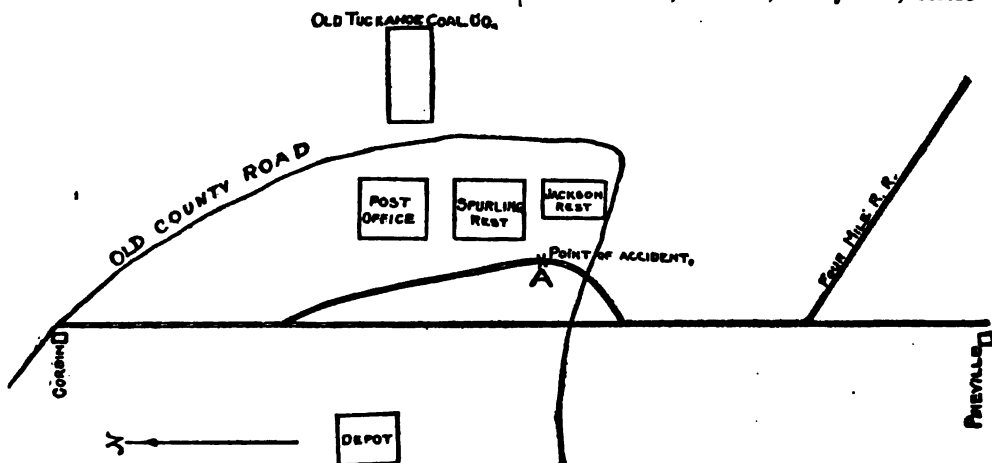
As to the liability of a railway company for acts of employee in inviting pedestrian to cross train obstructing highway, see case note to Southern R. Co. v. Clark, 13 L.R.A. (N.S.) 1071.

As to the duty of a railway company toward persons attempting to cross train obstructing highway, see case note to Texas v. Oregon Short Line R. Co. 13 L.R.A. (N.S.) 1074.

road between Pineville and Corbin, Kentucky. It is a small place. The depot is on the west side of the main track, and the storage track is east of the main track. East of the storage track is the postoffice and two restaurants. There are coal mines in the neighborhood, at which the coal cars are loaded. They are then brought to Four Mile, and put on the storage track until some train comes along to take them out. On the day on which Mrs. Brackett was killed the storage track was pretty well filled with loaded coal cars, although there were, at different places along the track, spaces between the cars. About midway between the two restaurants there was a short space between two coal cars. One witness stated that the space between the cars was 6 feet; another witness says 3 feet. Perhaps one meant that the space was 6 feet from one car to the other, while the other meant that the space was 3 feet from one of the bumpers to the other. As the passenger train was pulling in from the south, Mrs. Brackett, who had been at the postoffice, and wished to go over to the platform, thinking that her husband might come in on the train, walked from the postoffice down the track until she got to this space between the two cars. There she was joined by three other ladies, who were also going over to the platform. Just at this time a freight train, going in the opposite direction, was at the north end of the switch, and pulling in on the side track to get out of the way of the passenger train. To do this it pushed the cars standing on that track ahead of it; and, just as Mrs. Brackett was between the two cars, as she was going across the track, the cars closed in on her catching her between the two bumpers, and so injuring her that she died. The situation is shown on the following map, the point A indicating where she was caught between the two cars:

There is a walk way from the postoffice out to the track, made of plank, and a similar walk way from the Spurling restaurant out to the track. She did not follow these walks, as there was no opening in the cars at the end of either of them. The space between the two tracks was filled with cinders, so that it was a good place for walking. There was some proof offered by the plaintiff to the effect that no signal for the movement of the cars was heard just at the time they came together, and it is very evident that none of the four ladies who were crossing the track had any idea that the cars were about to be moved. It is also evident from the proof that those in charge of the freight train could not see the ladies on account of the cars obstructing the view, and that they had no idea that anybody was between the cars or would be endangered by their moving them. The freight train had whistled for the station, and was ringing its bell as it pushed in on the side track; but the noise of the incoming passenger train, which was then just rolling past, prevented the ladies from hearing the noise or the signals of the freight train. At the conclusion of the evidence the court instructed the jury peremptorily to find for the defendant. The plaintiff appeals.

It is manifest from the proof that the space between the two cars, at the point A, was not left as a pass way for persons. There was no crossing at that point, and the space was so narrow that manifestly it simply was left there by the cars rolling apart when they bumped together, as they were not coupled. It is insisted for the plaintiff that, inasmuch as it was train time, and persons were expected to be passing about these tracks, going to and from the station, the company should have anticipated the presence of persons between these cars, and therefore is liable to Mrs. Brackett. To so hold would be, in effect, to say that, before



moving cars situated like these, the company should send a man along the cars and warn everybody to get out of the way; for it is manifest that nothing short of this would have done Mrs. Brackett any good. All that occurred was that the short space between these two cars was closed up when the freight train came in at the switch and pushed the other cars down in front of it, closing up the other spaces between them until they ran back against the cars next to Mrs. Brackett. Where the space between cars has not been left as a pass way for people, especially where it is as narrow as the one shown here, the company is not ordinarily required to anticipate that persons will be in the space, and persons who thus go between cars take the risk of the space being closed up. The freight train at the other end of the switch could have plainly been seen by these ladies before they undertook to pass across the track, and, if they had considered at all, they would have known that the train had to come in on the side track to get out of the way of the passenger train. If there had been a public crossing there, or even a private crossing, at which the cars had been opened to allow people to pass, the case would be different. But it would be a hard rule to hold the railroad responsible for an accident like this, where the person injured had no right to be where she was, and where the railroad company was not required to anticipate that anyone might be between the cars. The movement of the cars was made with as little force as it could reasonably have been done. They were simply forced back out of the way of the freight train; and in a number of cases it has been held that people who go between cars which are liable to be moved take the risk, and cannot recover where the danger to them was not known to the servants of the railroad company in time to avert it.

In *Louisville & N. R. Co. v. Wade*, 18 Ky. L. Rep. 549, 36 S. W. 1125, Wade was standing or walking between the rails of the side track in Woodburn, Kentucky, at a place very much like that here shown in evidence, and was struck by a piece of timber that was on one of the cars and extended out beyond the car. It was held that he could not recover. In *Louisville & N. R. Co. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, Hocker, finding the path that he wished to walk along obstructed by cars, stepped in between two cars, and, while standing there, was seriously injured by the cars being moved without a signal. It was held that he could not recover. In *Southern R. Co. v. Thomas*, 29 Ky. L. Rep. 79, 92 S. W. 578, Thomas was a laborer in the service of the railroad company, and was sent to the office for a rake. When he got opposite the

office, he found there were some cars between him and the office. He thereupon climbed between the cars, and went over to the office, and, as he was returning in the same way, a car bumped against the cars which he was on and seriously injured him. It was held that he could not recover, although no signal or notice of the movement of the car was given. To same effect are the authorities in other states. In 23 Am. & Eng. Enc. Law, 2d ed. p. 764, the rule is thus stated: "To pass under or between the cars of a train, which one knows, or ought to know, is liable to move at any moment, or between cars, to one of which a train in full view is about to couple, is an act of gross negligence, unless the person attempting it is assured by someone in authority that it is safe to do so."

We recognize the rule that it is the duty of the railroad company to anticipate the presence of persons about its stations when a train is arriving, and that it is its duty to exercise ordinary care for their safety; but we do not think that this duty extends to persons passing between cars, or under them, or over them, where no invitation, express or implied, has been held out to them to do so. The space between the two cars before us was too narrow for a person to understand that it was left there as a pass way; and, when anyone undertook to go between the cars at this place without the knowledge of the railroad company, they took the risk. See *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 671.

Judgment affirmed.

Nunn, J., dissents.

MASSACHUSETTS SUPREME JUDICIAL COURT.

WILLIAM J. MCGURK, Appt.,
v.

GEORGE J. CRONENWETT.

(199 Mass. 457, 85 N. E. 576.)

Contract — inducing breach — corporate officer.

1. An officer of a corporation may be liable for maliciously inducing it to break its

Case Note. — Civil liability for inducing discharge of servant.

The foregoing question, confined to labor unions, is considered in a note to *Berry v. Donovan*, 5 L.R.A.(N.S.) 899. And the general question as above stated is discussed in a note to *State ex rel. Durner v. Huegin*, 62 L.R.A. 714. It is not intended herein to include the cases gathered in the foregoing notes.

The question of one's liability for in-

age." There is no averment that the defendant knew of the existence of this agreement, unless that is implied in the word "maliciously." We do not doubt that there is a right of action for purposely and maliciously preventing the performance of a contract, whether of employment or otherwise. *Walker v. Cronin*, 107 Mass. 555; *Beekman v. Marsters*, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 A. & E. Ann. Cas. 332. But where, as in the case at bar, this is the sole cause of action relied on, it is essential both to aver and prove the defendant's knowledge of the contract in question. This was the doctrine of both *Walker v. Cronin* and *Beekman v. Marsters*, ubi supra, and of *Lumley v. Gye*, 2 El. & Bl. 216. And justice requires this doctrine to be upheld. A defendant who has not been guilty of conduct otherwise actionable ought not to be held liable for having brought about, though wrongfully and without cause, the breach of a contract of which he had no knowledge. It follows accordingly that this count is insufficient unless it can be said that the charge that the defendant "maliciously" prevented the plaintiff from performing his obligations under his agreement necessarily imports an allegation that the defendant knew of the agreement of which he prevented the performance.

In the opinion of a majority of the court this cannot be said. The natural meaning of the word "maliciously" is "wilfully and intentionally." *Com. v. Goodwin*, 122 Mass. 19, 35, cited and followed in *Com. v. Jones*, 174 Mass. 401, 54 N. E. 869. In a capital case tried before two justices of this court the jury were told that the malice necessary to constitute the crime of murder meant simply that the act was "wilfully done for the purpose of carrying out the defendant's own ends, regardless of the rights of others;" and this was sustained by the full court. *Com. v. Pemberton*, 118 Mass. 36, 37, 39, 40, 43. It means an intention to do an act which is wrongful to the detriment of another, according to the language of *Bowen, L. J.*, in *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 612, quoted by Lord Watson in *Allen v. Flood* [1898] A. C. 1, 93, 94. And see *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A. C. 239. So it was held by *Bayley, J.*, in *Bromage v. Prosser*, 4 Barn. & C. 247, 255, that "malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." And it was said by this court, speaking through the present chief justice of the right to dispose of one's labor as he will, that "an intentional interference with such a right, without lawful justification, is malicious in law, 19 L.R.A.(N.S.)

even if it is from good motives and without express malice." *Berry v. Donovan*, 188 Mass. 353, 356, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 409, 74 N. E. 603, 3 A. & E. Ann. Cas. 738. And see the cases there cited; also those collected in 25 Cyc. Law & Proc. p. 1667. But we have been referred to no case, nor have we found any, in which an averment that the act complained of was done maliciously has been held to include an averment of knowledge of specific facts, when the right of action depended upon such knowledge.

It follows that in the first count of this declaration there is no averment that the defendant had knowledge of the agreement between the plaintiff and the plate glass company; and the count sets out no cause of action.

The judgment entered for the defendant must be reversed; the demurrer to the first count must be sustained; and that to the second count must be overruled.

So ordered.

MINNESOTA SUPREME COURT.

JENNIE D. BEAULIEU, Respt.,

v.

GREAT NORTHERN RAILWAY COMPANY,
NY, Appt.

(103 Minn. 47, 114 N. W. 353.)

Damages — mental anguish — breach of contract.

1. Damages for mental anguish can be recovered in an action for breach of contract only in those exceptional cases where the breach amounts, in substance, to an independent, wilful tort.

Same — transportation of corpse — delay.

2. In an action for damages for breach of contract by a railway company to transport a corpse over its line to a particular point, delivering it there to an intersecting carrier, to be conveyed to its place of destination, the breach consisting in the neg-

Headnotes by BROWN, J.

Case Note. — Mental anguish as element of damages in action for breach of contract relative to corpse.

Cases involving the question of right of property in a corpse and of the right of action for tort in relation to the corpse are, of course, without the scope of this note, as indicated in the title.

In the foregoing opinion it will be noticed that the court said that generally mental anguish could not be considered as an element of damages in an action for the breach of a contract, but that, in exceptional cases, such anguish might be considered, and the

ligence of the company's agents and servants in carrying the corpse beyond the connecting point, thus causing a delay of twenty-four hours in the funeral arrangements, it is held that, in the absence of wilful or malicious misconduct on the part of the company or its agents, damages for mental anguish cannot be recovered.

Pleading — nominal damages.

3. The complaint construed, and held not to state a cause of action within this rule, though it does state a cause of action for nominal damages.

(Jaggard, J., dissents.)

(December 27, 1907.)

APPEAL by defendant from an order of the District Court for Red Lake County

decision in reality turned upon the question whether or not a contract relative to a dead body came within any of the exceptions to the general rule. The cases generally do not recognize that the rule as to the allowance of damages for mental anguish has the exceptions suggested, and an action for such damages will succeed or fail according as the "mental-anguish doctrine" does or does not prevail in the state. Consequently the cases involving the question to be discussed in this note will be practically limited to those jurisdictions in which the mental-anguish doctrine prevails.

The majority of the cases upon this subject hold that mental anguish is a proper element of damages in such an action.

Thus, in *Western U. Teleg. Co. v. Long*, 148 Ala. 202, 41 So. 965, where a telegraph company was negligent in the transmission and delivery of a telegram announcing the death of a child, and requesting that a conveyance meet the sender and the body at a station, the court said: "Instead of being met at the train with a conveyance and by friends and relatives, and of having his people informed when he expected to bury his child, he alighted from the train a dreary, cloudy night, with no one to meet him or assist him, and to hear that no one had been apprised of his child's death, and that no arrangements had been made for the funeral the next day. Can it be thought for a moment that this man did not suffer mental anguish not measurable by dollars and cents, and that said anguish and suffering were not the proximate consequence of a nondelivery of his telegram, and that the very telegram itself was not sufficient to suggest to the defendant the result of a nondelivery? We think not. We do not mean to hold that, in all cases and under all conditions, the sender can recover for mental suffering growing out of a failure to meet him at the train, etc. But the telegram in this case contemplated more than the bare presence of the sendee. It called for the arrangements of preliminaries of a most sacred character." And to the same effect *Western U. Teleg. Co. v. McMorris* (Ala.) 48 So. 349.

So in *Western U. Teleg. Co. v. Carter* 19 L.R.A. (N.S.)

overruling a demurrer to plaintiff's complaint in an action brought to recover damages for defendant's negligence in the transportation of a corpse, causing a delay of twenty-four hours in the funeral arrangements. Affirmed.

The facts are stated in the opinion.

Mr. M. L. Countryman for appellant.

Messrs. W. E. Dodge and William A. Tautges for respondent.

Brown J., delivered the opinion of the court:

Defendant interposed a general demurrer to the complaint in this action, and appealed from an order overruling the same.

The complaint alleges, in substance, that plaintiff's child, aged three and one-half

(Tex. Civ. App.) 21 S. W. 688, where a father telegraphed to a friend of the death of his son, requesting him to send a coffin, and because of nondelivery of the telegram the funeral was delayed until the body began to decompose, the court said: "The doctrine that damage of this character may be considered the natural and direct consequences of a failure to transmit a telegraphic message such as the one in question has become so firmly fixed in our jurisprudence that the action of the appellant seems scarcely to be justified in requiring us to reannounce it."

And in *Western U. Teleg. Co. v. Crowley* (Ala.) 48 So. 381, in an action for failure to deliver a telegram announcing the death of a child, and requesting that preparations be made for the burial, it was held not error to refuse to charge that the plaintiff could not recover damages for mental pain and anguish in finding, upon his arrival at the destination, that no arrangements had been made for the burial.

So, in *Lyles v. Western U. Teleg. Co.* 77 S. C. 174, 12 L.R.A. (N.S.) 534, 57 S. E. 725, it was held that a telegraph company which fails to deliver a telegram directing preparation for a funeral is liable for mental suffering caused by the exposure of the corpse for several hours to the rays of the sun, and the delay of the burial to a very late hour of the night.

And in *Western U. Teleg. Co. v. Giffin*, 27 Tex. Civ. App. 306, 65 S. W. 661, it was held that the plaintiff could recover for injuries because of mental anguish caused by failure to send promptly a telegram announcing the death of a child, and the purpose to transport the corpse for burial, where such delay resulted in the sendee's being obliged to leave the body alone in a freight house for several hours while he sought for relatives.

So, in *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734, it was held that mental anguish and suffering were proper elements of damages in an action for failure promptly to deliver a telegram announcing a death and the forwarding of the corpse.

In *Martin v. Western U. Teleg. Co.* 81 S.

years, died at Cass lake, and plaintiff decried that the body should be buried at Ogahmah. The body was accordingly prepared for burial, and delivered to defendant for shipment to that place. The shipment required a transfer of the casket containing the body at Erskine, where the defendant's road connects with the Soo Line, over which the plaintiff and the corpse were to reach Ogahmah. The complaint further alleges that it was the duty of defendant to put the corpse off its train at said Erskine, to the end that it might be transferred to the Soo train, but that, instead of doing so, its servants and agents wrongfully and unlawfully retained possession thereof, and "negligently, wrongfully, and unlawfully, and with utter disregard of the rights and feelings of this plaintiff," carried the corpse beyond that station, and to the city of Crookston, thus delaying the funeral arrangements for twenty-four hours; that, by reason of this delay, the corpse became badly "decayed, mutilated, and damaged." As to the nature and character of the injury and dam-

age to plaintiff, it alleges: "That said funeral was to take place at White Earth on the 21st day of July, 1906, at 3 o'clock P. M., as stated, and at said time and place the plaintiff had her priest and mourners in attendance, but, by reason of the premises, said funeral and burial could not take place at said time, causing this plaintiff great annoyance and damage. That, by reason of the said neglect, wrongful, and unlawful acts of said defendant, this plaintiff has been greatly damaged, and has been greatly outraged in her feelings, and has suffered great distress of mind and great mental pain and anguish, and has become sick and nervous, and will continue to suffer great mental pain and anguish in the future, all to the plaintiff's damage in the sum of \$3,000." The complaint charges no wilful or intentional misconduct on defendant's part, or on the part of its agents, no claim is made for actual damages, and the allegations thereof, taken as a whole, show only a failure to transport the corpse of plaintiff's child to Erskine, leaving it there

C. 432, 62 S. E. 833, a recovery was allowed for negligence in failing to deliver a telegram announcing a death, through which failure the body was delivered to the state anatomical society.

Mental anguish suffered by the next of kin by reason of a breach by a third person of his contract with them to keep safely a corpse until they should desire to inter the same was held, in *Renihan v. Wright*, 125 Ind. 536, 9 L.R.A. 514, 21 Am. St. Rep. 249, 25 N. E. 822, to be a proper consideration in the assessment of damages for such a breach. (In connection with this case attention should be called to the later case, *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674, 1080, which expressly repudiated the mental-anguish doctrine, and overruled the earlier cases which recognized it.)

And in *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172, it was held, in an action by parents against a firm of undertakers for the improper burial of their child, that mental suffering and injury to feelings would ordinarily be the natural and proximate result of such improper burial, and therefore the court did not err in instructing the jury that the plaintiffs were entitled to recover actual damages for the injury to the feelings.

Damages for mental anguish are recoverable for the negligent and brutal handling of a corpse by the undertaker to whom the body was delivered for interment. *Dunn v. Smith* (Tex. Civ. App.) 74 S. W. 576.

So also a recovery was sustained in *Wells, F. & Co's Express v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824, in an action for damages for mental anguish suffered because of the negligent delay in forwarding the corpse for interment, which delay prevented church services, and compelled a burial by night.

And in the following cases it was held 19 L.R.A. (N.S.)

that mental suffering might be considered in assessing damages against a carrier for breach of its contract to transport a corpse: *Louisville & N. R. Co. v. Hull*, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433; *Hale v. Bonner*, 82 Tex. 33, 14 L.R.A. 336, 27 Am. St. Rep. 850, 17 S. W. 605; *St. Louis Southwestern R. Co. v. French*, 23 Tex. Civ. App. 511, 57 S. W. 56; *Missouri, K. & T. R. Co. v. Linton* (Tex. Civ. App.) 109 S. W. 942.

In a number of cases a recovery has been denied, but, in these cases, for the most part, the decision really turns upon some other question.

Thus, in *Hockenhammer v. Lexington & E. R. Co.* 24 Ky. L. Rep. 2383, 74 S. W. 222, it was held that there could be no recovery for mental anguish caused by the negligence of a railroad company, through which a corpse delivered to it for transportation was thrown upon the ground, where the corpse itself was in no wise mutilated.

And in *Western U. Teleg. Co. v. Turner* (Tex. Civ. App.) 78 S. W. 302, in an action for damages against a telegraph company for failure promptly to send a telegram announcing the death of a child, and requesting that the sender be met at a station, it was held error to admit evidence of the fact that, because of the delay in the delivery of the telegram, the sender was obliged to place the body for a period of about ten minutes upon the platform.

So, in an action for failure promptly to transmit and deliver a telegram announcing the sending of a body, it was held error, in *Western U. Teleg. Co. v. Burch*, 36 Tex. Civ. App. 237, 81 S. W. 552, to refuse to give an instruction to the effect that the plaintiff could not recover for mental anguish because of the fact that neighbors who had been secured to take the body to its destination permitted the wagon to stand

for reshipment over the other line to the place of destination, in accordance with its contract. The principal question for consideration, therefore, is whether, on the facts stated, a recovery may be had for the mental suffering endured by plaintiff in consequence of defendant's neglect.

The question whether mental anguish is a proper element of damage, either in actions in tort or for a breach of contract, has been presented to the courts in numerous cases, and there is much conflict of opinion upon the subject. According to the weight of authority, such damages may be recovered in all actions in tort where the plaintiff has suffered physical injury at the hands of the defendant, whether from malice or mere negligence (6 Current Law, 631, 8 Am. & Eng. Enc. Law, 2d ed. p. 658); also in that class of torts where the plaintiff is subjected to some indignity, as in libel, slander, malicious prosecution, or seduction (8 Am. & Eng. Enc. Law, 2d ed. p. 668; 13 Cyc. Law & Proc. p. 44); and, again, in those wilful wrongs where some legal right has

been invaded, though no physical injury is inflicted or character or reputation assailed (Leach v. Great Northern R. Co. 97 Minn. 503, 7 L.R.A. (N.S.) 93, 106 N. W. 955; Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034; Sander-son v. Northern P. R. Co. 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542). But such damages are not recoverable in all actions in tort. Broadley stated, their allowance is limited to actions where the plaintiff has received some injury to his person, or some legal right has been invaded of a nature naturally to cause grief and distress of mind. None of the cases, as we read them, go beyond these limits. They are not recoverable in actions for death by the wrongful act of another. Hutchins v. St. Paul, M. & M. R. Co. 44 Minn. 5, 46 N. W. 79; Blake v. Midland R. Co. 18 Q. B. 93; Donaldson v. Mississippi & M. R. Co. 18 Iowa, 280, 87 Am. Dec. 391; Munro v. Pacific Coast Dredging & Reclamation Co. 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303. Nor in actions for libeling the dead. Bradt

for some time in a public yard while the horses were being fed.

And in Nichols v. Eddy (Tex. Civ. App.) 24 S. W. 316, it was held that the plaintiff could not recover for the negligence of the defendant in transporting the corpse of plaintiff's daughter, where the contract for transportation was made by an agent of plaintiff, and the existence and relationship of the plaintiff was wholly unknown to the defendant. And to the same general effect was the decision in Wells, F. & Co's Express v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412, where it was held that a mother could not recover for the negligent delay in the shipment of the body of her child, where the contract for the shipment was made by another child.

So, in Hancock v. Western U. Teleg. Co. 142 N. C. 163, 55 S. E. 82, it was held that it could not have been within the contemplation of the parties to a telegram that it would rain two days thereafter, and that the employees of a railroad company would leave the body concerning the transportation of which the telegram was sent upon a station platform, where it would be exposed to the rain, and that this could not be deemed the proximate result of a failure promptly to transmit and deliver the telegram. When this case was before the court upon the first appeal (137 N. C. 497, 69 L.R.A. 403, 49 S. E. 952), it was held that one claiming damages for delay in the preparations for interment of his relative because of failure promptly to deliver a telegram has the burden of showing that the preparations would have been made had the telegram been promptly delivered; and such fact will not be presumed.

In Missouri, K. & T. R. Co. v. Linton, supra, the court implies that a recovery might be had for mental anguish for the 19 L.R.A. (N.S.)

negligent delay in transporting a corpse, but a judgment for the plaintiff was reversed on the ground that improper evidence had been admitted. And see Hart v. Western U. Teleg. Co. (Tex. Civ. App.) 115 S. W. 638.

In Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238, it was held that, in an action for damages for the unlawful mutilation and dissection of the plaintiff's husband, a recovery might be had for injury to the feelings and mental suffering resulting directly and proximately from the unlawful act, although no pecuniary damage was alleged or proven. It does not appear, however, in what way the defendant came to be in possession of the corpse. And this case was cited with approval in Lindh v. Great Northern R. Co. 99 Minn. 408, 7 L.R.A. (N.S.) 1018, 109 N. W. 823, where it was held that an action *ex delicto* to recover damages for injured feelings lies at the suit of the husband against a common carrier for soiling and ruining the casket containing the body of his dead wife, and for mutilating and disfiguring the corpse by negligently and wilfully exposing it to rain. The court held that there was no merit in the contention that there could be no recovery, as the action was based on a contract, for the complaint set forth a cause of action in quasi tort, at least, for which an action *ex delicto* lies.

Upon the question of the right to recover for mental anguish consequent upon the failure of a telegraph company to transmit money to prepare corpse for burial, see case note to Cumberland Teleph. & Teleg. Co. v. Quigley, post, 575.

Upon the question of mental anguish as an element of damages for mutilation of corpse, see case note to Long v. Chicago, R. I. & P. R. Co. 6 L.R.A. (N.S.) 883.

v. New Nonpareil Co. 108 Iowa, 449, 45 L.R.A. 681, 79 N. W. 122; 25 Cyc. Law & Proc. p. 426. Nor in actions for injuries to a minor child. *Sperier v. Ott*, 7 L.R.A. (N.S.) 518, and cases cited in note (116 La. 1087, 114 Am. St. Rep. 587, 41 So. 323); *Flemington v. Smithers*, 2 Car. & P. 292; *Bube v. Birmingham R. Light & P. Co.* 140 Ala. 276, 103 Am. St. Rep. 33, 37 So. 285; *Black v. Carrollton R. Co.* 10 La. Ann. 33, 63 Am. Dec. 586; *Harford County v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44. In *State use of Coughlan v. Baltimore & O. R. Co.* 24 Md. 84, 87 Am. Dec. 600, an action by a mother for the wrongful death of her son, in which she claimed the right to recover for mental anguish in addition to compensatory damages, the court said: "According to the appellant's theory, the mother and son are supposed to live on together to an indefinite age; the one craving sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss." Loss of support or loss of services is the gist of actions last referred to, and compensatory damages only are recoverable, and it is immaterial whether the act complained of was wilful and malicious, or merely the result of negligence. There may be other exceptions to the general rule mentioned, as applied to action *ex delicto*, but we are not concerned with them at this time.

It is also a rule of general application that mental anguish is not a proper element of damage in actions for breach of contract, though there is a class of wrongs arising out of contractual relations in which this element is permitted to enter. Illustrations of this are found in wilful and unlawful injuries to passengers upon railroad trains. There is, in such cases, a contract by the railroad company to carry safely the passenger to his destination, and an implied legal obligation to protect him within certain limits while the relation of passenger and carrier exists, and the courts declare that wilful or malicious violation of that duty constitutes an independent tort, for which recovery may be had for the indignity to which the passenger is subjected. *Mykleby v. Chicago, St. P. M. & O. R. Co.* 39 Minn. 54, 38 N. W. 763; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911; *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 23, 24 Am. Rep. 376; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504. An exception is also made of actions for breach of promise to marry. But such actions in all essential re-

spects partake of the nature of torts, and are so treated by the courts. *Johnson v. Travis*, 33 Minn. 231, 22 N. W. 624; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Smith v. Woodfine*, 1 C. B. N. S. 660; *Coil v. Wallace*, 24 N. J. L. 291; 5 Cyc. Law & Proc. p. 1021. The rule that damages of this nature may be recovered in an action for a breach of contract properly to send and deliver a telegram has become the settled law in a number of the states, following the lead of Texas. But a majority of the courts do not concur in the doctrine. 63 Cent. L. J. 340; 1 A. & E. Ann. Cas. 355, note. This court declined to follow it in *Francis v. Western U. Tele. Co.* 58 Minn. 252, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078, where the rule laid down in the leading English case of *Hadley v. Baxendale*, 9 Exch. 341, was approved and followed. But it would be unprofitable to prolong this opinion by an extended discussion of the general subject. Summarizing, it may be said that mental anguish is a proper element of damages in all actions sounding in tort, where the plaintiff has received some physical injury, or his legal rights have been so wilfully invaded as naturally to cause mental distress. It is an element to be considered in actions for a breach of contract in exceptional cases only; the principal exception being the telegram cases already referred to. And we pass to a consideration of the question whether this case comes within any of the exceptions.

In respect to the wrongful interference with the rights of preservation and burial of the dead, the courts are again somewhat at variance. Though the common law recognizes no property in the bodies of deceased persons (*Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *R. v. Sharpe*, 7 Cox, C. C. 214), a right of possession and preservation for burial purposes is conceded by nearly all the authorities, which the law will protect (*R. v. Fox*, 2 Q. B. 246; *Williams v. Williams*, L. R. 20 Ch. Div. 659; *Larson v. Chase*, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238, 3 A. & E. Ann. Cas. 132, note). And any wilful or wrongful interference with that right by the intentional mutilation or secretion of the body subjects the wrongdoer to an action on the case, in the determination of which mental anguish is a proper element for consideration in assessing damages. The law on the subject, so far as it relates to actions, in torts, is completely summed up by Mr. Justice Mitchell in *Larson v. Chase*, *supra*. It was said in that case: "But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article

of traffic. The important fact is that the custodian of it has a legal right to its possession for the purpose of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong." That has become one of the leading cases on the subject in this country, and has been cited with approval and followed and applied in other states. *Burney v. Children's Hospital*, 169 Mass. 58, 38 L.R.A. 413, 61 Am. St. Rep. 273, 47 N. E. 401; *Koerber v. Patek*, 123 Wis. 453, 68 L.R.A. 956, 102 N. W. 40; *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471; *Hackett v. Hackett*, 18 R. I. 155, 19 L.R.A. 558, 49 Am. St. Rep. 762, 26 Atl. 42; *Louisville & N. R. Co. v. Wilson*, 123 Ga. 62, 51 S. E. 24, 3 A. & E. Ann. Cas. 128. The contrary doctrine is upheld by plausible argument in *Long v. Chicago, R. I. & P. R. Co.* 15 Okla. 512, 16 L.R.A. (N.S.) 883, 86 Pac. 289, in which the cases holding to the view that no action will lie in such cases, either in tort or for breach of contract, are cited. The rule laid down in the *Larson Case* expresses the modern view of the question, and extends a remedy where otherwise none would exist. There being no property in dead bodies, and the wrong complained of being only the invasion of an intangible legal right, no actual damages for the wrongful mutilation of the body can be recovered, and the courts award *solatium* for the bereavement of the next of kin as the only appropriate relief. Without the element of mental distress, the action would be impotent of results and of no significance or value as a remedy for the tortious violation of the legal right of possession and preservation. 7 Current Law, 9, 54. But that rule can, on principle, have no application to actions for breach of contract. A breach of contract involves only such consequences as directly result therefrom and were within the contemplation of the parties when the contract was made, and which may be measured and determined by some definite rule or standard of compensation. While the rule of compensation to the injured party controls the measure of damages, both in actions *ex contractu* and *ex delicto*, the elements proper to be considered are in some respects widely different in the two classes of cases. In actions sounding in tort, exemplary or punitive damages are, as a general rule, awarded, in the discretion of the jury. *McCarthy v. Niskern*, 22 Minn. 90; *Peck v. Small*, 35 Minn. 465, 29 N. W. 69; 12 Am. & Eng. Enc. Law, 2d ed. p. 13. But they are compensatory in theory only. Such damages are not recoverable in actions for breach of contract, except, perhaps, in those exceptional cases where the breach amounts to an independent, wilful tort, in 19 L.R.A. (N.S.)

which event they may be recovered under proper allegations of malice, wantonness, or oppression. 12 Am. & Eng. Enc. Law, 2d ed. p. 20; *North v. Johnson*, 58 Minn. 242, 59 N. W. 1012. They cannot be recovered in actions involving ordinary negligence, where no physical injury results. *Louisville, N. A. & C. R. Co. v. Shanks*, 94 Ind. 598; *Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Gibney v. Lewis*, 68 Conn. 392, 36 Atl. 799; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590. Exemplary damages are incapable of definite ascertainment; and, though classed theoretically as compensatory, they are, in fact, imposed in the nature of punishment for the wrong complained of, and the amount rests in the sound judgment of the jury. Mental grief, from a pecuniary standpoint, is just as incapable of definite calculation as exemplary damages. The law furnishes no standard by which it may be valued, the amount awarded in any particular case must necessarily rest in the discretion of the jury, and recovery therefor should, on principle, be confined to those cases where punitive damages are allowed. In Texas, Kentucky, North Carolina, and perhaps other states, where the so-called "Texas doctrine" in the telegraph cases has met with approval, it is held that, in an action for breach of contract concerning the burial of the dead, mental anguish may properly be considered by the jury in the assessment of damages to the aggrieved party. *Louisville & N. R. Co. v. Hull*, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433; *Hale v. Bonner*, 82 Tex. 33, 14 L.R.A. 336, 27 Am. St. Rep. 850, 17 S. W. 605; *Renihan v. Wright*, 125 Ind. 536, 9 L.R.A. 514, 21 Am. St. Rep. 170, 25 N. E. 822. Those cases follow logically the Texas rule in the telegraph cases. But, wherever the Texas rule has been repudiated, as an innovation upon elementary principles of the common law, the courts have, in our view, consistently reached the opposite conclusion. The cases are collected and the subject discussed in 5 Columbia Law Rev. 179, and in 1 A. & E. Ann. Cas. 355. The extreme to which this rule leads is illustrated in two North Carolina cases. A father sent a telegram to a friend at a distant point, stating that his daughter, sixteen years of age, was on her way to visit at his home, and requesting the friend to meet her at the train, which arrived about 12 o'clock at night. Through the negligence of the company's agent, the message was not delivered, and no one met the daughter upon her arrival at the station. The conductor of the train placed her in charge of an employee of the railroad company, who procured a carriage, and she

was taken to the friend's house, safe and sound, except for her mental anguish and worry. She brought an action for damages against the telegraph company, alleging, as ground of recovery, her mental distress. The father also sued for mental anguish which he suffered when told the next day of the failure to deliver the telegram. The court sustained the right of action in each case. *Green v. Western U. Teleg. Co.* 136 N. C. 489, 67 L.R.A. 985, 103 Am. St. Rep. 955, 49 S. E. 165, 1 A. & E. Ann. Cas. 349; *Green v. Western U. Teleg. Co.* 136 N. C. 506, 49 S. E. 171, 1 A. & E. Ann. Cas. 358. These cases are not open to criticism, except to the extent the doctrine upon which they are founded is subject to adverse comment. They follow logically and consistently the "Texas doctrine," and emphasize, in our opinion, the *reductio ad absurdum* of that rule. Efforts have been made to induce the courts of some jurisdictions to apply that doctrine in various forms of action for breach of contract. In *Eller v. Carolina & N. W. R. Co.* 140 N. C. 140, 3 L.R.A.(N.S.) 225, 52 S. E. 305, 6 A. & E. Ann. Cas. 46, damages were sought for mental anguish for the breach of a contract to furnish a wedding trousseau, by reason of which plaintiff was subjected to mortification, humiliation, and mental distress. The court rejected the claim. Damages were sought in *Kansas City, Ft. S. & M. R. Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645, for negligently carrying plaintiff by the station of his destination, but the court held that distress of mind was not subject of compensation for a breach of contract of that nature. See also *Wilcox v. Richmond & D. R. Co.* 17 L.R.A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264; *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351.

But, without further citation of authorities, or discussion of the subject from the standpoint of decisions of other courts, we turn to our own decisions, and find that the question has been definitely settled by this court in *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078, wherein we declined to follow the Texas rule. The question was fully considered in that case, and the conclusion reached that, in actions for breach of contract to transmit and deliver a telegram, mental anguish occasioned by the breach furnished no proper basis for the recovery of damages. The difference between actions in tort and those for breach of contract is pointed out with clearness by Mr. Justice Mitchell, who wrote the opinion. The rule therein announced and applied has the sanction of the elementary principles of the law of damages, and is approved by a 19 L.R.A. (N.S.)

majority of the courts of this country. In addition to the cases heretofore referred to, we cite *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823; *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345. "The law looks," Judge Mitchell remarked, "only to the pecuniary value of a contract, and for its breach awards only pecuniary damages." And the court applied the general rule that, in such actions, damages must be limited to the actual pecuniary loss naturally and necessarily flowing from the breach. The logic of that decision applies to the case at bar. The complaint before us charges, at most, a negligent failure to perform the contract for the breach of which damages for mental anguish are demanded, and the case is not brought within those wherein such damages are awarded for the malicious and wanton breach, to which we have adverted. 13 Cyc. Law & Proc. pp. 44, 45. Of this class *Lindh v. Great Northern R. Co.* 99 Minn. 408, 7 L.R.A.(N.S.) 1018, 109 N. W. 823, is an example. In that case we did not intend to be understood as holding that mental anguish was a proper element of damages in an action for the failure of a common carrier safely to transport a corpse to its destination in accordance with its contract. The injuries there complained of were treated as a wilful tort, distinct from the contract, and the conclusion reached is in harmony with *Larson v. Chase*, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238. If damages for mental anguish may not be recovered in actions wholly in tort, where the parent suffers untold grief at the disfigurement of his minor child, or because of his death by the wrongful act of another, or in actions for libeling the dead, as indicated by the authorities cited, by what course of reasoning, from the view point of legal principles, uninfluenced by feelings of sentiment or resentment, can it be held that they may be recovered in an action like that at bar, for the mere negligence of a railroad company in carrying a corpse beyond the station of its destination, resulting in no injury to the body, save such as arises from its natural tendency to decomposition? We discover none.

It is urged that damages of this character in actions upon contract, as well as in tort, find support in the declaration of the fundamental law that there shall be a certain remedy for all wrongs, and that, if they be denied in breach of contract actions, the guaranteed remedy is denied. This is plausible, but not persuasive. The maxim, *Ubi jus ibi remedium*, has, like other principles

of the law, its limitations. The guaranty of a remedy for all wrongs has more particular reference to wrongs of a substantial nature, where property or character is affected, rather than to those founded wholly in sentiment. It protects property and property rights, persons, domestic relations, character, and reputation, but not necessarily grief and mental distress occasioned by some unintentional act of wrongdoing. As remarked by the supreme court of Indiana in *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 69, 54 L.R.A. 846, 60 N. E. 674, 1080, the maxim that for every wrong there should be a remedy, as applied to actions for damages for breach of contract, was intended by the fathers of the common law to include such damages as the courts, "dealing practically with the practical affairs of life, can find to be certain and measurable from evidence the source of which is open to both parties, and the nature not transcendental." Other instances where the common law has not afforded a remedy in apparently meritorious cases are numerous, chief among which is the remedy for death by wrongful act, first given in England by Lord Campbell's act, and followed by statutory enactments in this country. Without a statute providing a remedy in that class of wrongs, no action could be maintained by the relatives of the deceased for compensatory or other damages. So, in cases like that at bar, the remedy should come from legislation, and not by judicial decisions out of harmony with established principles of the law. *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674, 1080.

For these reasons, we conclude that plaintiff is not entitled to recover for her mental anguish. Her complaint, however, charges a breach of contract, and she would be entitled at least to nominal damages, and the court below properly overruled the demurrer.

Order affirmed.

Jaggard, J., dissenting:

I am unable to agree with the real major premises of the majority opinion, which concerns the distinction between actions on the contract and on the tort. According to that opinion, "the difference between actions in tort and those for breach of contract is pointed out with clearness" in *Francis v. Western U. Teleg. Co.* 53 Minn. 252, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078. In the passage referred to Judge Mitchell said: "This action is not one of tort, but on contract; its gist and gravamen being the breach of the contract, the duties and obligations growing out of which 10 L.R.A. (N.S.)

are regulated by the statute, which itself becomes a part of it. The best test of this is the fact that such an action could not be maintained without pleading and proving the contract." This amounts to defining a tort as a wrong independent of contract. The fallacy of that definition has been clearly and repeatedly demonstrated. It is elementary that the distinction between contracts and torts is not philosophical, but historical, and largely concerns the law adjective. Mr. Pollock accordingly defines a tort as "an act or omission giving rise, in virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action of contract." Pollock, *Torts*, 4.

In point of actual number, nine tenths of the actions *ex delicto* heard by this court, and by most courts, involve causes of action "which could not be maintained without pleading and proving the contract." Most of them are in trespass on the case, and are brought for the violation of a contract duty or for a violation of a duty imposed by the common law or statute upon relations entered into by contract. The bulk of these are actions for negligence, arising, for example, between carriers and patrons, masters and servants. Actions of fraud in connection with a contract constitute another large group. There are also miscellaneous actions in which it is held that the action *ex delicto* may lie upon a state of facts of which a contract is a necessary part, although no injury to the person, nor impact upon property, nor damage consequent on fraud, is involved. This will be found especially clearly set forth in *Rich v. New York C. & H. R. R. Co.* 87 N. Y. 382. It is not material whether this great branch of the law be called the law of quasi torts, as distinguished from other torts, or of impure as distinguished from pure torts. The use of the term "independent tort" in the majority opinion is, in so far as I know, peculiar to itself. It would seem a work of supererogation to cite in support of these views more than a few of the vast multitude of authorities sustaining them. The familiar principle is laid down in 1 Chitty, *Pleadings*, 135,—which has been approved times without number,—that, "if a common-law duty results from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract." In the leading case of *Boorman v. Brown* 3 Q. B. 511, Tindal, Ch. J., said: "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or nonperformance is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against at-

torneys, surgeons, and other professional men. . . . actions against common carriers, against shipbuilders on bills of lading, against bailees of different descriptions, and numerous other instances occur in which the action is brought in tort or contract, at the election of the plaintiff. . . . The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort." See also *Green v. Greenbank*, 2 Marsh. 485; *Pozzi v. Shipton*, 8 Ad. & El. 963; *Courtenay v. Earle*, 10 C. B. 73; *Legge v. Tucker*, 1 Hurlst. & N. 500; *Tattan v. Great Western R. Co.* 2 El. & El. 844; *Pontifex v. Midland R. Co.* L. R. 3 Q. B. Div. 23; *Bryant v. Herbert*, L. R. 3 C. P. Div. 389; *Fleming v. Manchester S. & L. R. Co.* L. R. 4 Q. B. Div. 81; *Cohen v. Foster*, 66 L. T. N. S. 616. All these cases are in 2 Ames & Smith's *Lead. Cases on Torts*, at pages 719-742.

2. Nor am I able to agree with the minor premise of the majority opinion, that "plaintiff's complaint charges a breach of contract only," and that, therefore, the rule of damage applicable to cases of tort may not be invoked. I think that complaint charges a violation of a duty imposed by common law upon a relation which was entered into by contract, and constitutes a cause of action in form *ex delicto*. So far as the allegations of the particular complaint are concerned, there can be, and, as I understand, there is, no doubt that it contains all necessary allegations to set forth a cause of an action *ex delicto*, if such a thing may be. The present question is not the form of the complaint, but whether plaintiff has a right to sue *ex delicto* on the facts therein stated. It is elementary that, for breach of any duty imposed by law, the person making the contract with the carrier may sue *ex contractu* or *ex delicto* for the violation of the duty. From the great number of cases on the subject, reference is made to *Orange Bank v. Brown*, 3 Wend. 158; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134; *Wood v. Milwaukee & St. P. R. Co.* 32 Wis. 398; *Sheldon v. The Uncle Sam*, 18 Cal. 526, 79 Am. Dec. 193. And see *Boorman v. Brown*, *supra*. It is clear that an ordinary action to recover from a common carrier damages for personal injury by its negligence "is in substance not an action of contract, but an action of tort against the company as carriers." Mr. Justice Williams in *Marshall v. York, N. & B. R. Co.* 11 C. B. 658. In that case, *Jervis, Ch. J.*, said: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason 19 L.R.A. (N.S.)

of a duty implied by law to carry him safely." The duty to carry safely is a part, and a part only, of the general duty imposed upon carriers by the law in the discharge of their public calling and in accordance with public arrangements. Exactly the same reasoning which entitles a proper party to sue in tort for negligent breach of the duty to carry safely either passengers or freight entitles him to so sue for failure to perform other allied duties. It is settled by reason and authority, beyond any possibility of controversy, that a carrier is bound by law to receive, for proper consideration, freight or passengers, and to carry them safely to their respective destinations, and to afford reasonable time and facilities for getting on and putting aboard, and departing from or removing from the train, respectively. When sued for any violation of that general duty, the action may be in form *ex delicto* or *ex contractu*, at the option of the plaintiff. In an action *ex delicto*, the allegation of the contract is mere matter of inducement. Its purpose is to show that the passenger was rightfully on the train. See *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 668, 74 Am. Dec. 785. The courts incline to resolve all doubts as to the form of the action in favor of the action in tort. See 2 *Wood, Railways*, § 296, p. 1197, and *post*. One essential difference resulting from the exercise of the option to sue *ex delicto* is that a larger measure of damages is applied to such actions than to actions *ex contractu*. See *Murdoch v. Boston & A. R. Co.* 133 Mass. 15, 43 Am. Dec. 480, and *post*. "To be more specific, 'the invitation to alight' cases" (See *Webb's Pollock on Torts*, 559; 9 *Century Dig.* "Carriers," §§ 1072 et seq.), the "overshooting station" cases (2 *Wood, Railway Law*, § 312, pp. 1353-1363), involve torts. To be still more specific, an action to recover damages for failure to stop for a passenger or to carry him to his destination and to enable him to alight there is a violation of a public duty, and gives rise to a cause of action in tort. Exemplary damages have been awarded in such cases, although no "independent tort" is shown. For failure to stop at the station for the passenger, see *Heirn v. McCaughan*, 32 Miss. 39, 66 Am. Dec. 588, 592; *Purcell v. Richmond & D. R. Co.* 12 L.R.A. 113 (and see notes), 108 N. C. 414, 12 S. E. 954, 956; *Illinois C. R. Co. v. Siddons*, 53 Ill. App. 607 (in which damages for mental anguish were allowed). For failure to stop at destination, and for carrying beyond, see *New Orleans, J. & G. N. R. Co. v. Hurst*, *supra*; *Alabama, G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17, 9 So. 375; *Carter v. Illinois C. R. Co.* 17 Ky. L. Rep. 1352, 34

S. W. 907. That a passenger may recover damages in an action of tort for failure to stop a train at a given station, on allegation of a negligent wrong, as distinguished from a wilful wrong, is particularly well set forth in *Alabama & V. R. Co. v. Hanes*, 69 Miss. 160, 13 So. 246.

The general theory as to the form of action involved is well stated by Handy, J., in *Heirn v. McCaughan*, *supra*. The action in that case sought to recover damages for the failure of a common carrier to stop at a certain place and take passengers in accordance with its special advertisement, because, *inter alia*, of the requirements of the mail service. The court said, in part: "The character of the action must be determined by the nature of the grievance, rather than by the form of the declaration; but in this case they both indicate that the action is founded on the violation of a general duty, and not on a breach of a special contract. And, wherever the action, in cases of this kind, is against a common carrier, the courts are inclined to consider it as founded in tort, unless a special contract be very clearly shown by the declaration. *Collyer, Partn.* §§ 735, 736, 738; *Ansell v. Waterhouse*, 6 Maule & S. 385; *Pozzi v. Shipton*, 8 Ad. & El. 963. It is manifest, therefore, that this action must be regarded as in the nature of an action on the case for the violation of the duty of the company arising from their engagements to the public. In such cases the carriers are bound by the rules of the common law to perform the work tendered them; and no consideration other than the general legal obligation resting upon them from the nature of their business need be shown by a party who has been injured by their acts of omission or commission, whether negligent, fraudulent, or deceitful. *Story, Bailm.* §§ 508, 591; *Philadelphia & R. R. Co. v. Derby*, 14 How. 486, 14 L. ed. 509. Their business as common carriers charges them with duties to the public, which, when violated, entitle the parties aggrieved to an action for the tort which is wholly distinct from a matter of individual contract." This subject and the measure of damages in tort and contract, respectively, is considered with especial clearness in *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911. The complaint sought a recovery for sickness and bodily and mental suffering of the plaintiff wife, and for mental suffering and expense and trouble on the part of the plaintiff husband, growing out of the sickness of the wife, alleged to have been caused by the negligence of the defendant's servants in directing plaintiffs to leave a train of passenger cars before they had reached their destination. The 19 L.R.A. (N.S.)

complaint charged that the defendant wholly neglected his duty in the premises. Taylor, J., said: "We see no reason for distinguishing this case from the class of cases which hold a railway company liable in tort for an injury done to a passenger while traveling on a train, caused by collision, the breaking down of a bridge, or any defect in the road or cars. All these matters are a breach of the contract to carry the passenger safely; yet the carrier is held liable in an action of tort for any injury sustained, based upon the allegation that it was incurred through the carelessness and negligence of the company. All the cases hold that the person injured . . . may proceed either upon contract, alleging the careless or negligent acts of the defendant as a breach of the contract, or he may proceed in tort, making the carelessness and negligence of the company the ground of his right of recovery; and, if he proceed for the tort, it becomes necessary on the part of the plaintiff to show that he stands in the relation of a passenger of the carrier, in order to show his right to recover damages for the negligence of the carrier in not discharging his duty in carrying him safely. Where the relation of passenger and carrier exists, the law fixes the duty of the carrier towards the passenger, and any violation of that duty is a wrong; and, if injury occurs to the passenger from such wrong, the carrier is responsible, and must make good the damage resulting therefrom. *Wood v. Milwaukee & St. P. R. Co.* 32 Wis. 398; *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 23, 24 Am. Rep. 376; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 675, 17 Am. Rep. 504, and cases cited. In this case, we deem it material to determine whether the action is an action for a tort, or an action for a breach of the contract to carry the plaintiffs to their destination, because we think the rules of damages in the two actions are essentially different. We hold that the action in this case is based upon the tort of the defendant in negligently and carelessly directing the plaintiffs to leave the cars before they reached their destination." After stating the rule of damages which may be recovered in actions for a breach of contract, as set forth in the case of *Hadley v. Baxendale*, 9 Exch. 341, and after reviewing and citing many cases, the court points out that the substance of the distinction is this: "While the rule in actions for breach of contract is that the damages recoverable are only such as the parties may reasonably be supposed to have contemplated as likely to result from such a breach, the general rule in actions for torts is that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or

could not have been foreseen by him." And see *Alabama v. R. Co. v. Hanes*, supra. The later course of opinion in Wisconsin is not material here, in view of the decisions in this state. That this court had adopted the rule in *Hadley v. Baxendale*, supra, in contract cases (for example, see *Paine v. Sherwood*, 21 Minn. 225), and the larger measure of recovery in tort cases, is clear beyond controversy. See, for example, *Christianson v. Chicago, St. P. & M. O. R. Co.* 67 Minn. 94, 69 N. W. 640. It is equally certain that it has applied the tort measure of damages to cases in which a passenger was not carried to his destination, by the negligence of the company, and in which there was no independent tort committed by the master. *Schumaker v. St. Paul & D. R. Co.* 46 Minn. 39, 12 L.R.A. 257, 48 N. W. 559.

3. I am unable to agree with the conclusion of the majority opinion that damages for mental anguish cannot be recovered in the present action. The gist of the previous discussion is not the academical one, as to the mere form of action, but the practical one, as to the measure of damages. Of course, the mere fact that the present action sounds in tort does not necessarily entitle plaintiff to recover damages for mental anguish. In some actions *ex delicto* such damages are awarded; in others they are denied. Their allowance or denial depends upon considerations peculiar to the particular action then under consideration, and not upon any general principle applying indifferently to all or most torts, except the obviously proper general disinclination to allow their assessment. The status of a dead body, it is familiar, is anomalous. It is neither a living passenger nor freight. None the less it is within the protection of the law. The carrier undertaking to ship it owes a duty for the violation of which its custodian may recover damages in an action in tort. There is no controversy as to these propositions. Whether or not the law recognizes a "kind of quasi property" in dead bodies, we need not stop to inquire. The only question here is whether that violation must be wilful or may be negligent. To my mind it follows, from the previous discussion, from principle, and from authority, that a cause of action in tort is here made out, justifying the recovery of sentimental damages, although the wrong is shown to have been merely negligent.

All pertinent analogies of the law unite in not requiring that the carrier should have done intentional wrong. Authorities as to exemplary damages seem to me out of place. No exemplary damages are here sought. Sentimental damages awarded for the violation of a custodian's right in the dead body

are primarily not vindictive, but compensatory. Take two cases: Assume that in one case a dead body is injured by negligence only; there the award of compensatory damages would be the natural injury to the feelings. Assume that, in another case, the dead body has not only been negligently exposed, but has been the subject of indignity and outrage, as by the intentional deposit of filth upon it; there an enlarged measure of recovery in the nature of exemplary damages might be permitted in strict accordance with usual principles. Wilfulness is not a necessary part of the ordinary action on the case to recover damages for breach of duty by a common carrier. No reason suggests itself for making this class of cases an exception. Why should negligence be sufficient basis for an action in tort as to ordinary passengers and as to freight, and not as to a corpse? If a wreck had been caused by admitted negligence, for example, in misplacing a switch, and thereby living passengers, a corpse, and cattle were mutilated, why should not substantial damages be recoverable in each case? If in such wreck perishable fruit, or cattle killed by the accident, or a corpse, should, by virtue of negligence in subsequent unreasonable delay, become decomposed, why should not compensation be recoverable in each case? It shocks reason and the sense of propriety alike to hold that the dead body should not have the same protection as perishable fruit or dead cattle. "It would be discreditable to any system of laws not to provide some remedy in such a case." Mr. Justice Elliott in 16 Cent. L. J. 161, 163. That in other cases where there is a wrong the law has refused a remedy has no bearing on this class of cases, in which the law has expressly provided a remedy, *viz.*, the award of sentimental damages. To permit such a remedy is not judicial legislation, but the application of admitted principles to a particular state of facts.

The discussion of the Texas doctrine as to sentimental damages is irrelevant, inasmuch as the only reason for allowing sentimental damages here is the fact that they are the only adequate damages appropriate. To permit their recovery in this case has no bearing on the ordinary cases in which other compensatory damages may be allowed. The converse of this proposition is equally true. The justice and cogency of the familiar and current objections to the award of such damages is as clear as the propriety of refusing in any wise to relax the rules which forbid their allowance. But to overrule the demurrer in this case involves neither an extension of the present law nor any modification of the principles set forth in the group of cases, of which *Francis v.*

Western U. Teleg. Co. 58 Minn. 252, 25 L. R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078, is the leading one in this state.

The more nearly specific authorities appear to me to accord with this view. How complete an innovation is the requirement of wilfulness as an essential to the right to recover damages under such circumstances will appear from an examination of the authorities stated and discussed at length in Louisville & N. R. Co. v. Wilson, 123 Ga. 62, 51 S. E. 24, 3 A. & E. Ann. Cas. 128. And see Medical College v. Rushing, 1 Ga. App. 468, 57 S. E. 1083. The whole reasoning of Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238, and the many cases which approve it, accord with this conclusion. To my mind that decision holds that the courts recognize and protect the right to preserve the corpse and to bury it, and that any violation of that right will give rise to an action for damages. See 8 Am. & Eng. Enc. Law, 2d ed. note 1, p. 835, 13 Cyc. Law & Proc. pp. 280, 281. Lindh v. Great Northern R. Co. 99 Minn. 408, 7 L.R.A.(N.S.) 1018, 109 N. W. 823, is, as I view it, directly in point. It is true that the exposure of a dead body to rain was in that case alleged to have been negligent and also wilful. The opinion does not attempt to distinguish between negligence and wilfulness as a basis for the right to recover. The cause of action of the plaintiff was distinctly held to have been not on the contract, but in tort.

Under the circumstances here presented, it is unnecessary to consider whether some of the damages alleged in the complaint were or were not remote.

KENTUCKY COURT OF APPEALS.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Appt.,

v.

RICHARD QUIGLEY.

(— Ky. —, 112 S. W. 897.)

Telegraph — delayed message — damages.

1. A telegraph company which fails promptly to transmit money sent by a father to secure the forwarding of the corpse of his daughter for burial is liable to him for mental pain and anguish by reason of the delay in shipment of the corpse, and for loss of time and expenditure of money thereby caused.

Same — contributory negligence — strangers.

2. A telegraph company cannot escape liability for damages for failure promptly to L.R.A.(N.S.)

to transmit money to secure the forwarding of a corpse for burial, on the theory that, had it performed its duty, a delay might have been caused by the one having charge of the corpse, or by the railroad company.

Same — delay in burial.

3. A telegraph company cannot escape liability for mental suffering because of its failure promptly to transmit a telegram to secure the forwarding of a corpse for burial on the theory that, the person being dead, mere delay in interment affords no cause of action.

Damages — loss of time — expenses.

4. Compensation for loss of time and for money expended in fruitlessly meeting trains to receive a corpse for burial may be recovered against a telegraph company whose negligence in failing to transmit a telegram was responsible therefor.

Appeal — erroneous argument — non-prejudicial error.

5. Statements by counsel in argument, of facts outside the record, will not require reversal if the admonition of the court was

Case Note. — Right to recover for mental anguish consequent upon failure of telegraph company to transmit money to prepare corpse for burial.

A search of the authorities reveals two other cases in which mental anguish as an element of damages in an action for failure to transmit money to prepare a corpse for burial is discussed, and these two cases are directly opposed in principle.

In Western U. Teleg. Co. v. Simpson, 73 Tex. 422, 11 S. W. 385, it was held that mental anguish was a proper element of damages for breach of a contract in failing promptly to transmit money delivered to the defendant for transmission to plaintiff for the transportation of the body of the plaintiff's husband to its place of destination. This decision is in line with CUMBERLAND TELEPH. & TELEG. CO. v. QUIGLEY.

But in Western U. Teleg. Co. v. McCaul, 115 Tenn. 99, 90 S. W. 856, in an action for failure to transmit money for the transportation of the body of plaintiff's son, it was held that the plaintiff was not entitled to recover damages for the mental anguish and grief sustained by him, if any, by the delay in receiving the money for which he wired to bring the body of his son to his home for burial, and in having to bury him from home and in a strange place; and the court said that the proper measure of damages in the case was the cost and expense of exhuming the body and its reinterment.

Upon the question of mental anguish as element of damages in action for breach of contract relative to corpse, see case note to Beaulieu v. Great Northern R. Co. ante, 564.

Upon the question of mental anguish as an element of damages for mutilation of corpse, see case note to Long v. Chicago, R. I. & P. R. Co. 6 L.R.A.(N.S.) 883.

sufficient to cause the jury to disregard the statement.

(October 16, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Barren County in plaintiff's favor in an action brought to recover damages for failure promptly to transmit a telegram. Affirmed.

The facts are stated in the opinion.

Messrs. **Baird & Richardson**, for appellant:

A telephone company cannot be held liable for delay in delivery of a message where a "new agency" must act.

Western U. Teleg. Co. v. Linn, 87 Tex. 7, 47 Am. St. Rep. 58, 26 S. W. 490; *Taliferro v. Western U. Teleg. Co.* 21 Ky. L. Rep. 1290, 54 S. W. 825; *Smith v. Western U. Teleg. Co.* 83 Ky. 104, 4 Am. St. Rep. 126; *Denham v. Western U. Teleg. Co.* 27 Ky. L. Rep. 999, 87 S. W. 788; *Western U. Teleg. Co. v. Parsons*, 24 Ky. L. Rep. 2008, 72 S. W. 800.

Damages for mental anguish are not allowed for failing to deliver money as per contract.

Robinson v. Western U. Teleg. Co. 24 Ky. L. Rep. 452, 57 L.R.A. 611, 68 S. W. 656; *DeVoegler v. Western U. Teleg. Co.* 10 Tex. Civ. App. 229, 30 S. W. 1107; *Ricketts v. Western U. Teleg. Co.* 10 Tex. Civ. App. 226, 30 S. W. 1105; *Rowell v. Western U. Teleg. Co.* 75 Tex. 26, 12 S. W. 534; *American Nat. Bank v. Morey*, 113 Ky. 857, 58 L.R.A. 956, 101 Am. St. Rep. 379, 69 S. W. 759; *Louisville & N. R. Co. v. Reynolds*, 24 Ky. L. Rep. 1402, 71 S. W. 516.

Messrs. **Harlin & White**, for appellee:

The intervention of a new agency cannot avoid liability for delay in shipment of the corpse.

Western U. Teleg. Co. v. Caldwell, 31 Ky. L. Rep. 497, 12 L.R.A. (N.S.) 748, 102 S. W. 840; *Postal Teleg. Cable Co. v. Terrell*, 124 Ky. 822, 14 L.R.A. (N.S.) 927, 100 S. W. 202.

Recovery can be had for the mental anguish endured on account of the failure promptly to transmit the money.

Louisville & N. R. Co. v. Hull, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433; *Western U. Teleg. Co. v. Van Cleave*, 107 Ky. 404, 92 Am. St. Rep. 366, 54 S. W. 827; *Postal Teleg. Cable Co. v. Terrell*, supra; *Western U. Teleg. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385.

Lessing, J., delivered the opinion of the court:

Between 8 and 9 o'clock on the morning of Friday, July 12, 1907, Richard Quigley deposited with the agent of the appellant 19 L.R.A. (N.S.)

company, the Cumberland Telephone & Telegraph Company, at Glasgow, Kentucky, \$25, to be transmitted and delivered to his daughter, Eddie Curd, in Louisville, Kentucky, for the purpose of having the body of the infant child of appellee, who had died at the home of Eddie Curd, her sister, in Louisville, Kentucky, prepared for burial, and shipped to their home in Barren county. All of the necessary charges were paid by the appellee, including the messenger fee for notifying Eddie Curd that the money had been telegraphed, and for her to call at the office of the appellant company in Louisville and get it. The money was not delivered to Eddie Curd until about noon on Saturday, and, because of its delay in transmission, appellee alleged that he was caused to lose time and expend money, and suffer great mental pain and anguish and humiliation, and he sued to recover of appellant damages therefor. This litigation resulted in a verdict in favor of appellee for \$200, and from the judgment predicated on that verdict this appeal is prosecuted.

The facts as alleged in the pleadings, and as gathered from the proof, are as follows: Appellee's daughter, a girl some eleven or twelve years old, while on a visit with her mother to her married sister, Eddie Curd, who lived in the city of Louisville, was taken sick and died. This was on Thursday, July 11th, about noon. Mrs. Curd telegraphed her father, who lived some 4 miles from Glasgow, notifying him of the death of his daughter, and also sent a special delivery letter to a friend living in Glasgow, with the instruction that he communicate with her father and apprise him of the fact that his daughter was dead. In both the telegram and the letter she notified her father to forward to her the money necessary to prepare the corpse for burial and shipment, as she was without funds herself. The telegram was received early Friday morning. Appellee at once went to Glasgow where, upon his arrival, he also received the special delivery letter. With the letter and the telegram he called upon the agent of appellant company in charge of its office in Glasgow, and notified him of the contents of the letter and of his purpose and desire to send the money at once to his daughter. Upon being assured that the money could and would be promptly forwarded, and that it would not take over thirty or forty minutes to complete the transaction, he paid to the agent the \$25, together with all the necessary charges for telegraphing and transmitting the money, together with the messenger fee to notify his daughter that the money had been sent. This was about 9 o'clock in the morning. Appellee returned to his home, and, relying upon the assurances

of the agent of appellant company that the money would be promptly transmitted to his daughter, he at once made arrangements for the necessary vehicle to meet the corpse at the 6 o'clock train in Glasgow, upon which train his daughter would have had ample time to ship the corpse had the money been promptly delivered, as he expected it to be. The corpse was not upon the train, and appellee, being at a loss to know what was the matter, or what he should do, called upon the agent of the company with whom he had the conversation that morning, and learned that the money had not yet been delivered to his daughter, but was assured that it would be delivered early Saturday morning, in time for the shipment of the corpse of his child on the morning train, which would stop at Cave City, some 3 or 4 miles away from appellee's home. Accordingly appellee went home, and again made preparation for meeting the corpse at Cave City. When the train arrived he was again disappointed, as the corpse was not on it. He then called up his daughter in Louisville, over the appellant company's line, and learned that the money had just then—about 11:30 A. M.—been paid to her. She did not have time, after receiving this money on Saturday at 11:30 A. M., to have the body prepared for shipment, secure the necessary permit, etc., to have it shipped on the 3 o'clock train, and hence was compelled to wait until Sunday morning, when the body was shipped to Cave City, arriving there at 11 o'clock Sunday, and was buried about 4 o'clock on the evening of the same day. At this time the body was badly discolored, and in an advanced state of decomposition.

Counsel for appellant offer quite a number of reasons why the judgment should be reversed. Their first complaint is that the petition was fatally defective, and that the demurrer should have been sustained thereto. In substance, it alleges that, by reason of the negligent acts of appellant in failing to transmit the money, the plaintiff was caused to suffer great mental pain and anguish by reason of the delay in the shipment of the corpse, loss of time, and expenditure of money. We are of opinion that these allegations constituted a cause of action, and, if true, appellant should be held answerable therefor.

Appellant's next complaint is that it was not liable, because of the intervention of a new agency, in the persons of Eddie Curd and the railroad company, and that it is uncertain, even though the money had been promptly delivered by appellant, whether or not Eddie Curd would have promptly, or sooner than she did, prepared the corpse for shipment, or that the railroad company, after receiving same, would have promptly shipped and delivered it to its destination in

Barren county; and, therefore, under the rule announced in the cases of *Taliferro v. Western U. Teleg. Co.* 21 Ky. L. Rep. 1290, 54 S. W. 825, *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880, and *Smith v. Western U. Teleg. Co.* 84 Ky. 604, 2 S. W. 483, there can be no recovery. In the *Taliferro Case* no recovery was allowed "because," said the court, "his telegram was only an inquiry. It may be that if his telegram had been received in the confusion of the household, an answer might not have been sent, or if sent, by some miscarriage, without fault of appellee, it might never have reached appellant. Legal damages are such as directly and naturally result from the wrongful act complained of." In the *Chapman Case* Chapman sued for loss occasioned by not being able to attend his father before death, alleging that, had the telegram been delivered, he would have visited his father, and his father would have made him a present of a note which he held against him. The recovery in this case was denied, because the claim on which the damage was founded was entirely too remote, it being uncertain whether his father would have given him the note or not, and that there was nothing in the telegram to put the company upon notice of the purpose for which Chapman wanted to see his father before death. In the case of *Smith v. Western U. Teleg. Co.* appellant sought to recover damages because of the failure to deliver to him a message notifying him of the condition of the stock market, alleging that, had he received the message, he would have telegraphed certain instructions to his broker, and thereby saved himself several thousand dollars. Here, again, the damages were held to be too remote and speculative, and that the failure to deliver the telegram in the ordinary course of events could not be charged to have been the cause of pecuniary loss. It will be observed that in none of these cases was the company notified of the particular importance attached to the telegram, which was later made the basis of the claim for damages. But not so in the case at bar. The company knew that appellee's daughter had written to him that she was unable to ship the corpse because of the lack of funds, that it would take \$25, and that it was to meet this very emergency that the money was sent. It is common knowledge that in warm weather a corpse cannot be kept long before decomposition becomes advanced. Hence appellant's agent and servants must have known that any delay on their part in the transmission of this money and the carrying out of their contract with appellee would delay the interment of his daughter, and it is but natural and human that he would suffer mental worry and anguish by having the burial of his child de-

layed until its body was in an advanced state of decomposition.

Appellee desired to give his daughter a decent and timely burial. With this end in view he sought the services of appellant, and appellant contracted with him to send the money necessary to enable him to have his daughter properly prepared for burial and promptly shipped. Had it carried out its contract, and delivered this money within a reasonable time, there is no question but what the body would have been promptly shipped, and the wish and desire of the father gratified. It failed, however, to carry out its contract, and scant excuse is offered in the record for its not having done so. An attempt is made to shift the responsibility for the delay in delivering the money to Eddie Curd, appellee's daughter, but the decided weight of the testimony and the circumstances surrounding the transaction are altogether in favor of the finding of the jury that the responsibility for this delay in the delivery of the money rested with appellant; hence, if by its negligence appellant added to the weight of sorrow then borne by appellee because of the loss of his child, it should be made answerable therefor; for, as said by this court in the case of *Western U. Teleg. Co. v. Caldwell*, 31 Ky. L. Rep. 497, 12 L.R.A.(N.S.) 748, 102 S. W. 840, appellant will not be permitted to escape responsibility for its acts upon the theory that what appellee's agent might have done was too remote to entitle him to compensation.

It is further insisted that, as the child was already dead, the mere delay in its shipment and interment affords no ground of complaint for appellee. To this we cannot agree. The delay in the delivery of the money and consequent shipment of the body denied to appellee the right to give his child a prompt burial; denied to him the right to look upon its features as they were in life, for, while it is true that before interment the casket was opened, it is equally true that at that time the body had become so discolored, and decomposition was so far advanced, that the father saw, instead of the features of his child, a badly discolored and decomposed corpse. If this condition was brought about by the negligence of appellant, and, in consequence thereof, appellee suffered mental anguish, humiliation, and pain, appellant company should likewise be held answerable therefor.

Appellant also complains that the court erred in instructing the jury that appellee might recover for loss of time and money expended, which were due to the negligence of appellant. The petition charged that there was a loss of time and expenditure of money in going to the trains for the purpose of meeting the corpse. If there was, and 19 L.R.A.(N.S.)

the delay in the shipment of the corpse was occasioned by the failure of appellant to carry out its contract promptly, then it should be held answerable therefor, and the court properly submitted this question to the jury.

Appellant also complains that the court erred in instructing the jury, but the record shows that the instructions were, if anything, more favorable to appellant than they were to appellee.

Appellant also charges that, because of misconduct on the part of counsel for appellee in addressing the jury, the case should be reversed. The language complained of is as follows: "I will tell you how you can know that the defendant did not notify Eddie Curd, and why you should believe her in preference to Clyde Harris. Eddie Curd went out and tried to mortgage her only furniture to get the money with which to buy a coffin and ship the corpse, and you know she would not have done this if she had been notified by the defendant." At the time these remarks were made counsel for appellant objected, and the court thereupon directed the jury that they must bear the evidence in mind, and, if counsel went outside of the evidence in his speech, they must disregard it. It was error for counsel to make a statement of fact which was not supported by the evidence in the case, and, upon his doing so, the trial court should have excluded it, and reprimanded him for having done so, and directed the jury to disregard the statement; but we are of opinion that the admonition of the court had this effect before an intelligent jury, and that appellant's case was not prejudiced thereby.

To the complaint that the verdict is excessive, we may say that larger verdicts have repeatedly been upheld in cases not more meritorious and under circumstances less aggravating.

On the whole case it is apparent that appellant had a fair trial, and the judgment is therefore affirmed.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA EX REL. WILLIAM T. THOMPSON, Attorney General,
v.

JOHN L. NEBLE.

SAME

v.

JOHN LATENSER.

(— Neb. —, 117 N.W. 723.)

Judiciary — appointment of commissioners.

Section 1 of article 2 of the Constitution

Headnote by REESE, J.

or the state provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." The charter of cities of the metropolitan class provides that the mayor shall be the chief executive officer of the city, shall have power, by and with the consent of the city council, to appoint all officers deemed necessary for the good government of the city, unless otherwise provided in the charter, that he shall have the superintending of all officers and affairs of the city, except when otherwise provided. The charter also provides for a board of five park commissioners, whose duties

are wholly executive and administrative, and who are responsible alone to the city, and whose reports and recommendations are made to the mayor and council exclusively. They perform no judicial functions or duties, have no connection with, and are in no sense responsible to, the district court or any of the judges thereof. Held, that that part of § 55 of the charter which provides for their appointment by the judges of the district court of the judicial district in which such cities shall be situated is unconstitutional and void, and that the appointing power is with the mayor and council.

(September 16, 1908.)

APPPLICATION for a writ of quo warranto to determine the legality of the

Case Note. — *May appointment of municipal officers be constitutionally delegated to courts or judges thereof?*

So decided a conflict is there among the authorities on the foregoing proposition, it would be impracticable to do more than set out the cases which have considered the matter.

It is not intended to include cases involving the constitutionality of provisions delegating to a court or judge thereof power to appoint officials for the performance of a public duty which is in some way connected with the administration of justice, since as to such officials the power of appointment is clearly recognized.

The cases are about evenly balanced on the question here under consideration, those wherein the power to delegate to the judiciary the right to appoint officials of municipalities is denied reaching that conclusion upon variant theories.

Thus, in *Beasley v. Ridout*, 94 Md. 641, 52 Atl. 61, an act of the legislature imposing upon certain judges the duty of appointing a board of visitors of a jail was held to be unconstitutional on the ground that the duty thus sought to be imposed was not a judicial one, and that, in making these appointments, the judges were not performing a judicial function. This case is based upon the authority of prior decisions of the courts of that state to the effect that the judiciary cannot be compelled to perform services not of a judicial nature.

An act requiring the judges of a court created by the Constitution to appoint trustees of a waterworks belonging to a municipality which is a going concern was held, in *State ex rel. White v. Barker*, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 222, 89 N. W. 204, to be unconstitutional because conflicting with the constitutional provision by which the power of government was divided into three different departments, the legislative, executive, and judicial,—especially with that provision thereof, which declares that "no person charged with the exercise of powers prop-

erly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted." It is said that powers not in themselves judicial, and that are not to be exercised in the discharge of the functions of the judicial department, cannot be conferred on courts or judges designated by the Constitution as a part of the judicial department of the state. The case strikes the keynote, of the spirit at least, of the decisions which declare the unconstitutionality of laws attempting to impose on courts or judges thereof the power of appointment, where the office does not in some form relate to the administration of justice. The court said: "Judges of courts created by the Constitution should not be burdened with executive or administrative duties. They should as nearly as possible be freed from everything not judicial in character. Respect for the position has materially lessened whenever judges have attempted to discharge duties of an executive character. The judge should have no favors to grant, no patronage to dispose of, and no friends to reward. The spoils system should have no place in the selection of judicial officers."

Much the same reasoning was used in *State ex rel. Young v. Brill*, 100 Minn. 499, 111 N. W. 294, 639, 10 A. & E. Ann. Cas. 425, in denying the right of the legislature to require judges of the district court, or a majority of them, to appoint the directors or members of the board of control of a county. The act was held unconstitutional because it attempted to impose upon the members of the judiciary powers and functions which were, by the Constitution of the state, assigned to another department of the government. In *Minnesota* the Constitution defining the power of a governor provides that he shall have power, by and with the advice and consent of the senate, to appoint a state librarian and notaries public, and such other officers as may be provided by law.

One of the leading cases sustaining this doctrine is *Re Election Supra*, 114 Mass. 247, 19 Am. Rep. 341. The question there

appointment of J. N. Neble and John Latenser by the judges of the district court as park commissioners. Judgment for the defendant in the first case, for the state in the second.

The facts are stated in the opinion.

Messrs. W. T. Thompson and W. B. Rose, for relator.

Messrs. H. E. Burnam and John A. Rine for respondent Neble.

Mr. Francis A. Brogan, for respondent Latenser:

The separation of the powers of government into three distinct departments relates to the state government only, and is not applicable to municipal or other local bodies, whose governments are created and whose offices established by the legislature.

under consideration was the constitutionality of an act directing the justice of the supreme judicial court to appoint supervisors of elections. The statute was held unconstitutional, upon the ground that the power of appointing such officers could not be conferred upon a judiciary without violating the Constitution, since such an appointment did not in any way require the exercise of judicial functions. The Declaration of Rights of that state declares that, "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the executive or legislative powers, or either of them,—to the end it may be a government of laws, and not of men."

In *State ex rel. Hadley v. Washburn*, 167 Mo. 680, 90 Am. St. Rep. 430, 67 S. W. 592, 90 Am. St. Rep. 430, a constitutional declaration that "the powers of government shall be divided into three distinct departments,—the legislative, executive, and judicial, each of which shall be confided to a separate magistracy; and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted," was construed to dispose of all the powers of the state government. An act providing for the appointment of election commissioners by one other than the executive power, was therefore held to be violative of this constitutional provision, and therefore unconstitutional, as the legislature could not appropriate to itself the power that the Constitution had conferred upon the executive, neither could it rob the executive of that power by conferring it on an outside official agency of its own appointment. There was another provision of the Constitution of that state which was that the appointment of all officers not otherwise directed by the Constitution should be made in such

People ex rel. Atty. Gen. v. Provines, 34 Cal. 520; *Staupe v. Election Comrs.* 61 Cal. 313; *Fox v. McDonald*, 101 Ala. 51, 21 L.R.A. 529, 46 Am. St. Rep. 98, 13 So. 416; *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 174, 37 L.R.A. 189, 46 N. E. 77; *Eckerson v. Des Moines*, 137 Iowa, 452, 115 N. W. 177; *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437.

The function of appointing to office does not inherently belong to the executive department, but is one which may properly and naturally, by the Constitution, or by statute not inconsistent with the Constitu-

manner as may be prescribed by law. This section was construed not to confer any power of appointment upon a legislature, but simply conferred upon it the power to direct the manner of appointment.

The earlier New Jersey cases seemed also to recognize this doctrine. It was clearly declared in *Re Cleveland*, 51 N. J. L. 311, 17 Atl. 772; and also in *Schwarz v. Dover*, 68 N. J. L. 576, 53 Atl. 214.

In *Ross v. Chosen Freeholders*, 69 N. J. L. 291, 55 Atl. 310, however, the court of errors and appeals upheld the constitutionality of an act providing for the appointment of park commissioners by a justice of the supreme court, as against an objection based upon article 3 of the Constitution, declaring that "the powers of the government shall be divided into three distinct departments, the legislative, executive and judicial," and containing the prohibitive clause, "no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others," and an excepting clause, "except as herein expressly provided." The court emphasized the fact that the force of the prohibitive clause is not to confine the legislature to powers which are legislative, the governor to powers which are executive, and the courts to powers which are judicial, but merely to forbid each department to encroach upon the powers properly belonging to another; and said that the question was whether the power of appointing to office can be said in "our" government to belong properly to the legislature, or to the governor, or to the courts, so that its exercise by any save one of these departments is prohibited. The court then proceeded to show historically that the power of appointment had been expressly distributed by the Constitution itself among all the departments of the government, and therefore did not properly belong to any one of those departments, as distinguished from the other, within the prohibitive clause already referred to. The court further said, however, that, if it had reached the conclusion that the power of appointing officers was, because of its na-

tion, be vested in such persons or bodies as the legislature, when acting within its recognized powers, may see fit to designate.

Fox v. McDonald, *supra*; People ex rel. Dunham v. Morgan, 90 Ill. 558; Cornell v. People, 107 Ill. 372; People ex rel. Grinnell v. Hoffman, *supra*; Hovey v. State, 119 Ind. 386, 21 N. E. 890; French v. State, 141 Ind. 618, 29 L.R.A. 113, 41 N. E. 2; Terre Haute v. Evansville & T. H. R. Co. *supra*; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; State v. McNay, 100 Md. 622, 60 Atl. 273; State ex rel. Sherman v. George, 22 Or. 142, 16 L.R.A. 737, 29 Am. St. Rep. 586, 29 Pac. 356; Re Terrett, 34 Mont. 325, 86 Pac. 266; Ross v. Chosen Freeholders, 69 N. J. L. 291, 55 Atl. 310; Cunningham v. Sprinkle, 124 N. C. 638, 33 S. E. 138; University of North

Carolina v. McIver, 72 N. C. 76; People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Biggs v. McBride, 17 Or. 640, 5 L.R.A. 115, 21 Pac. 878; People ex rel. Waterman v. Freeman, 80 Cal. 233, 13 Am. St. Rep. 122, 22 Pac. 173; Re Siebold, 100 U. S. 371, 25 L. ed. 717; Fairview v. Giffey, 73 Ohio St. 183, 76 N. E. 865; People ex rel. Atty. Gen. v. Provines, *supra*.

In creating offices for the government of local municipal bodies and providing for the manner of filling them, the legislature may avail itself of the services of judges of the constitutional courts, and invest them with the power of making the appointments.

Staude v. Election Comrs.; Fox v. McDonald; People ex rel. Dunham v. Morgan;

ture, covered by the distributive or prohibitive clauses of article 3, it must nevertheless have conceded that—by force of the exception clause of that article, and of the unmistakable recognition of the authority of the lawmaking department to provide for the appointment of all officers (whose appointment is not definitely regulated by the Constitution itself) by the declaration in article 7 that "all other officers whose appointments are not otherwise provided for by law shall be nominated by the governor and appointed by him with the advice and consent of the senate" the legislature was authorized to make such different provisions for the exercise of that power as it deemed proper respecting the officers whose appointments were not otherwise provided for. It was further held that the act was not in violation of the provision of article 7 of the Constitution declaring that "the justices of the supreme court and chancellor . . . shall hold no other office under the government of this state or of the United States." The court said that it could not accept the view supported by *Re Election Supra. supra*, that, whenever a new duty is cast upon an officer, he receives a new office; and that, even if it should accept that view, it would be confronted with the clause already mentioned, which empowers the legislature to provide by law for the appointment of officers, and, reading the two clauses together there was no clear implication that the discretion confided to the legislature without express limitation was so restricted that it might not vest in the justices of the supreme court or the chancellor the appointment of officers unconnected with their judicial functions. The court added that the contrary view expressed in *Re Cleveland, supra*, was *obiter*, and that *Schwarz v. Dover, supra*, was largely influenced by the *dicta* in the earlier case.

This case was followed as authority in *New Jersey Zinc Co. v. Sussex County Bd. of Equalization*, 70 N. J. L. 186, 56 Atl. 138, wherein the constitutionality of an act providing for the appointment of tax equal-

ization commissioners by the judge of the court of common pleas was sustained.

The case of *Schwarz v. Dover* was also again presented to the court in 70 N. J. L. 502, 57 Atl. 394, and, on the authority of the *Ross Case*, the former decision was held to have been overruled; and the *Ross Case* was followed as authority.

In *Fox v. McDonald*, 101 Ala. 51, 21 L.R.A. 529, 46 Am. St. Rep. 98, 13 So. 416, the Alabama supreme court, upon reasoning quite similar to that employed by the New Jersey court in the *Ross Case*, upheld a law providing for the appointment of police commissioners for a city by a probate judge of the county, against an objection based upon a provision of the Constitution that the powers of the government "shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. § 2. No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." The court said, in effect, that the question whether a particular function of government pertains to one of the departments so as to forbid its exercise by either of the others is not necessarily determined by ascertaining whether that function partakes of a legislative, executive, or judicial nature, but must be determined in view of history and experience; and that by this test the power to appoint to office, or to fill vacancies, is not so inherently an executive function as to prevent the legislature from conferring the power to exercise it upon the judiciary.

The constitutionality of an act making it the duty of the judge of a superior court of the county to appoint freeholders to constitute a board of registration and election managers for a city in the county was upheld in *Russell v. Cooley*, 69 Ga. 215, as against an objection based on a constitutional provision that "the legislative, ju-

Cornell v. People and People ex rel. Grinnell v. Hoffman,—supra; Russell v. Cooley, 69 Ga. 215; Terre Haute v. Evansville & T. H. R. Co.; State ex rel. Sherman v. George; Re Terrett and Ross v. Chosen Freeholders, supra; Foster v. Rowe, 128 Wis. 326, 107 N. W. 635, 8 A. & E. Ann. Cas. 595; People ex rel. Rhodes v. Fleming, 10 Colo. 553, 16 Pac. 298; Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; People ex rel. Atty. Gen. v. Provinces, supra; Redell v. Moores, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243.

The judges, in appointing the commissioners, are not performing judicial acts.

Mattheis v. Freemont, E. & M. Valley R. Co. 53 Neb. 681, 74 N. W. 30; Re Jorgensen, 75 Neb. 401, 106 N. W. 462; Wicomico County v. Todd, 97 Md. 247, 62 L.R.A. 809, 99 Am. St. Rep. 438, 54 Atl. 963; Stenberg v. State, 48 Neb. 209, 67 N. W. 190; Wahoo v. Dickinson, 23 Neb. 426, 36 N. W. 813; Foster v. Rowe, supra; Re North Milwaukee, 93 Wis. 616, 33 L.R.A. 638, 67 N. W. 1033; Fairview v. Giffie and Redell v. Moores, supra.

Reese, J., delivered the opinion of the court:

These two actions arise out of the following facts:

judicial, and executive powers shall forever remain separate and distinct, and no person discharging the duties of one shall, at the same time, exercise the functions of either of the others, except as herein provided." In reply to the objection that the appointment of the board of registration was not a judicial function, the court said that it was held in Beall v. Beall, 8 Ga. 211, that, whilst, the Constitution declares that the three powers of the government shall be distinct, still the separation is not, and from the nature of things cannot be, total; and the court, in the Russell Case, concludes that it could see no unconstitutionality in the act under the ruling in the Beall Case, and according to the uniform practice of the state government in each of its departments from Colonial times to the "present."

In Staude v. Election Comrs. 61 Cal. 313, the court, without regard to its own views as to the correctness or incorrectness of the doctrine, upheld the constitutionality of a statute imposing upon district judges the duty of appointing police commissioners for a city, as against an objection based on the constitutional provision that "the powers of the government of the state of California shall be divided into three separate departments,—the legislative, the executive, and judicial,—and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in 19 L.R.A. (N.S.)

In the charter of cities of the metropolitan class (chap. 12a, Comp. Stat. 1907) the authority is conferred upon the mayor of such cities, "by and with the consent of a majority of the entire council, to appoint all officers that may be deemed necessary for the good government of the city, unless otherwise provided for in this act," etc. § 26. By § 54 it is provided that in each city of the class named there shall be a board of park commissioners, who shall have charge of the parks and public grounds of the city, with power to establish rules for the management, care, and use of public parks, park ways, and boulevards, and, from time to time, devise, suggest, and recommend to the mayor and council a system of public parks, park ways, and boulevards or additions thereto within the city, or within 3 miles of the limits thereof, and to designate the lands, lots, or grounds necessary to be used, purchased, or appropriated for such purpose. Section 55 is as follows: "Said board of park commissioners shall be composed of five members, who shall be resident freeholders of such city, and who shall be appointed by the judges of the district court of the judicial district, in which such city shall be situated. It shall be the duty of said judges, a majority concurring, to appoint or reappoint one of said board

the cases hereinafter expressly directed or permitted;—upon the authority of previous decisions holding that the constitutional provision in question meant that the powers of the state government, not the local governments thereafter to be created by the legislature, shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments.

The Illinois cases are along the same line. Indeed, it may be fairly said of the decisions of that court on this question that the legislature is not regarded as a co-ordinate branch of the government, but rather as a superior branch of the government; and that it has the inherent power, where not expressly limited by the Constitution, to impose upon the judicial branch of the government the duty of exercising nonjudicial functions, as the appointment of park commissioners of a municipality. People ex rel. Dunham v. Morgan, 90 Ill. 558. It is held in that case that imposing upon the judicial department of the government the duty of making appointments of officials for political and nonjudicial offices is within the power of the legislature, and does not come within the limitation which arises by the establishment of the other departments of the government, and the constitutional provisions relating thereto, which prohibits any of said departments from exercising the powers conferred upon the other.

each year on the second Tuesday of May, and to fill for the unexpired term any vacancies existing in the board. A majority of all the members of the board of park commissioners shall constitute a quorum." This section was enacted in 1889, and, in accordance with its provisions, the judges of the district court appointed the park commissioners and continued to do so until the decision of this court of the case of *State ex rel. Atty. Gen. v. Moores* (State ex rel. Smyth v. Moores) 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175, which occurred June 23, 1898, and by which it was held that the law authorizing the governor to appoint the members of the board of fire and police commissioners was unconstitutional and void. The judges then declined to make further appointments, as it would naturally follow that the same rule would have to be applied in the matter of the appointment of park commissioners. On December 4, 1901, the case of *Redell v. Moores*, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243, was decided, and by which the conclusion reached in the former case was not sustained, and the holding was set aside and the decision overruled. For reasons which were, no doubt, well founded, the judges made no further appointments until May, 1908, when they made the appointment of

defendant Latenser as required by the section above copied. In November, 1898, the city council of Omaha passed ordinance No. 4530, which authorized the mayor to appoint the park commissioners by and with the consent and approval of the council, and the membership of said commission has been supplied by his appointments until the present time, the defendant Neble being one of the mayor's appointees. These actions are brought in the name of the state upon the relation of the attorney general for the purpose of procuring an adjudication of the question as to who has the power of appointment under the Constitution and law of this state.

It is the contention of counsel for defendant Neble that that part of § 55, above quoted, which authorizes the judges of the district court to appoint the park commissioners, is unconstitutional and void as violative of § 1 of article 2 of the Constitution of this state, for the reason that it imposes the duty of appointment upon the judicial department of the state, while the duty of appointment calls into action an executive or administrative function which can, under the Constitution, be exercised only by executive or administrative officers. It is the contention of counsel for defendant Latenser that the provision objected to is

To the same effect is *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 590, 8 N. E. 788, as to the power of the legislature to delegate to the judiciary power to appoint election commissioners of a municipality.

Dicta to the same effect may be found in *Re Terrett*, 34 Mont. 325, 86 Pac. 266.

In *Seattle v. Seattle & M. R. Co.* 50 Wash. 132, 96 Pac. 958, the validity of a law was sustained which provided that the superior court should pass upon special assessments for local improvements, and appoint commissioners.

To the same effect, also, is *Re Westlake Ave.* 40 Wash. 144, 82 Pac. 279.

In the following cases the power of the legislature to impose the duty upon the judiciary to make appointments was considered, but was not directly passed upon, as it was held that the appointments in question related to, or grew out of, the exercise by the judiciary of its judicial functions. The cases are therefore within the classes of cases that are excluded; but, as they are border-line cases and illustrate the distinction, it will not be unprofitable to refer to them:

In *Citizens' Sav. Bank v. Greenburgh*, 173 N. Y. 215, 65 N. E. 978, the delegation to the judiciary of the power to appoint commissioners of highways was held not to be unconstitutional because it conferred nonjudicial power upon the supreme court, as the power of appointment was in relation to the construction of highways by a 19 L.R.A. (N.S.),

petition to that court, and after a hearing was had thereon as to the necessity of the highway; and the appointment of the commissioners was therefore the exercise of a judicial function,—that is, a carrying out of the orders of the court. The language used in this case would indicate that, if the power of appointment had related to a non-judicial function, it would have been declared invalid.

On the same theory, in *Cahill v. Perrine*, 105 Ky. 531, 49 S. W. 344, 50 S. W. 19, the validity of an act which provided for the appointment by the circuit judge of any county, under certain circumstances, of guards to protect property against mobs, was sustained on the ground that the appointment of such guards by the judge was the exercise of a judicial power, as the judge was a conservator of the peace throughout the commonwealth.

And in *Foster v. Rowe*, 128 Wis. 326, 107 N. W. 635, 8 A. & E. Ann. Cas. 595, the constitutionality of an act authorizing the circuit judge of each circuit to appoint boards of equalization was sustained upon the theory that such appointment was the exercise of a power quasi judicial.

On the same theory, in *Madison County v. Moore*, 161 Ind. 426, 68 N. E. 905, the constitutionality of the law requiring justices of the peace, upon finding a person to be insane, to appoint a resident of the county to take charge of such insane person, was sustained.

valid for the reasons, first, that the section of the Constitution can refer only to the departments of the state government, and has no reference or application to the government of municipalities and the subordinate departments of local government; and, second, that, if the Constitution were to be so applied, the appointment by the judges would still be valid, as the mere act of appointment is neither an executive, administrative, or judicial act, nor in any degree subject to the usual classification of those functions. The two cases have been consolidated here, and are to be disposed of as one, each involving identically the same question, and are submitted on oral argument and exhaustive printed briefs. We may say at the outset that the principle of local self-government has not been invoked or discussed by counsel in this case, and the only question presented for our determination is the one first above stated.

In the investigation of this question we are confronted with the unusual and anomalous condition of meeting with many apparently well-considered cases sustaining every contention of either side, and it will be absolutely impossible for us to follow any line of decisions which will not be antagonized by holdings in many other cases, for there is a sharp conflict of authority upon every conceivable feature and phase of the case. It could serve no good purpose for us to discuss and attempt to harmonize the views of Montesquieu, Jefferson, Madison, Hamilton, Stevens, Wilson, Goodnow, and others upon the question here involved, for the reasons that it would be impossible to bring harmony out of the chaos produced by their divergent opinions, and that such discussion would extend this opinion to an unreasonable length, ending where we begin, and for the further reason that the time at our disposal is not adequate to the task. We will, therefore, be content with a brief reference to some of the later decisions, and an effort to arrive at the spirit and meaning of our own Constitution as interpreted by the courts, the legislature, and the judicial and administrative history of the state. The provision of the Constitution that "the powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted," is not a new one in the Constitutions of this country. It has been handed down from the best thinkers and greatest statesmen of the nation to nearly all state Constitutions in one form or another, and, even where not adopted in terms, it has 19 L.R.A. (N.S.)

been almost uniformly recognized as a part of our governmental system (State ex rel. Young v. Brill, 100 Minn. 499, 111 N. W. 294, 639, 10 A. & E. Ann. Cas. 425), but has never been strictly applied, and, indeed, could not be, to all the ramifications of state or national government. The duties of the officers of the several departments have, to some extent at least, overlapped and interlaced until it is hard to say in some cases where the one leaves off and the other begins. Many times the courts have defined certain duties of the executive or administrative officers as "quasi judicial," and recognized and confirmed the validity of the acts of such officers. While this definition has been approved and sanctioned by all, yet the fact remains that the function of the act itself is either administrative or judicial, and there can in reality be no middle or halfway ground between them. This being true, we are brought to the conclusion that many executive or administrative acts performed by judicial officers, and many judicial acts performed by ministerial officers, are and must be held valid, notwithstanding the section of the Constitution above quoted. Thus, it often becomes necessary to the full and proper discharge of the duties imposed upon an official belonging to one class to perform an act the function of which, strictly speaking, belongs to another.

The performance of such duties being, to some degree at least, essential to the full discharge of the duties imposed and properly within the power of the actor, the power conferred must be held to be valid; otherwise a condition of chaos would arise. We therefore conclude, as all have done, that the Constitution must receive a liberal and general, rather than a strict, construction and application, and that every case must stand or fall relying upon its own merits. In theory the Constitution is accepted as stating the one inflexible and unbending rule; yet in practice it is found impossible to obey its every mandate. It is unnecessary to cite the statutory provisions conferring this "quasi" authority, which is, strictly speaking, an evasion of the rule, and which are sustained, for the statutes of all the states, as well as of the general government, are full of them. An apt illustration of this may be found in the office of the state superintendent of public instruction. By § 1 of article 5 of the Constitution it is declared that "the executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings,"—thus clearly classing the superintendent of public instruction with the officers of the executive

department. Yet it is within common knowledge that he is clothed not only with executive, but judicial, and to some extent with legislative, powers, the judicial to perhaps as full extent as the executive. His decisions (judicial) upon all subjects determinable by him within his department are binding upon county superintendents, teachers, and school boards, unless reversed or overruled by a court having the required jurisdiction. Many other executive officers possess these same judicial powers, but in a less degree perhaps, among which might be mentioned the auditor of public accounts, sheriffs, coroners, county superintendents, and the various state, county, and other boards. The conferring and exercising of the powers prescribed are seldom, if ever, questioned, and are recognized as legal. Were such not the case, it would be practically impossible to execute and enforce the laws applicable to the various departments. If there is a limitation upon the authority of the legislature to confer these powers, it must be found in the well-known rule that an authority conferred carries with it all other powers necessary to the discharge of the general duty imposed, and that the power is limited to that extent. In other words, that the conferring of judicial powers upon an executive or administrative officer can extend to such acts as may be necessary to enable the proper discharge of the duty, or to set in motion such other agencies as may be necessary to the complete discharge of the duty required to be performed. The appointment of an officer might properly, we think, be classed as the exercise of an executive or administrative function, at least not judicial. Yet courts and judges frequently find it necessary to make such appointments in order that the judicial functions of the courts may be freely exercised. It often happens that courts or judges are clothed with this appointing power where the appointee may not be required to discharge any duty which could be in any way ancillary to the exercise of the judicial functions of the court or judge making the appointment, and yet the validity of the appointment could not be successfully questioned, for the reason that the person appointed would exercise judicial functions in the discharge of the duties imposed under the appointment. We think, however, that we may safely say that the appointment of park commissioners for cities of the metropolitan class is not the exercise of a judicial function. It may not belong to either class; but it is clearly not judicial. We think, also, that the duties imposed upon the park commissioners cannot be said to call for the exercise of judicial functions. Section 54, chap. 14, p. 19 L.R.A. (N.S.)

§ 92, Sess. Laws 1905, provides that such commissioners "shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care, and use of public parks, park ways and boulevards; and it shall be the duty of said board from time to time to devise, suggest, and recommend to the mayor and council a system of public parks, park ways and boulevards or additions thereto within the city, or within 3 miles of the limits thereof, and to designate the lands, lots, or grounds necessary to be used, purchased, or appropriated for such purpose." By § 56 it is further declared that they shall "lay out, improve, and beautify all lands, lots, or grounds now owned, or hereafter acquired, for parks, park ways, or boulevards. They may employ a secretary and such landscape gardeners, superintendents, engineers, keepers, assistants, or laborers, as may be necessary for the proper care and maintenance of such parks, park ways or boulevards, or the improvement or beautifying thereof, to the extent that funds may be provided for such purpose." These duties are in the main, if not exclusively, administrative. We find nothing in the act conferring any power or jurisdiction over the board by the judges, whether advisory or otherwise; nor is the board required to report to them upon any part or in any particular as to any action proposed or performed by it. In so far as advice, recommendations, suggestions, or consultations go, they are with the mayor and council exclusively.

The question then arises: Is it competent for the legislature under the limitations of the Constitution, to confer the power of appointment alone upon the judges of the district court of the judicial district in which cities of the class named are located, some of whom reside within the city and some who do not? It is contended by counsel representing the appointee of the judges that the appointment by them is not the exercise of a judicial function; that no action is taken or to be taken as a court, but that a majority of the persons who are holding the officers join together in selecting the commissioners. There is nothing requiring any court record of the appointment to be made, and we think, if it be said that the term "judges" is nothing more than a description or method of designation of the persons who are to discharge that duty, it might occur that a majority or possibly all the persons designated might be not only nonresidents of the city, but of the county in which the city is situated; and a serious question might then arise as to the power of the legislature to transfer the government of the city in whole or in part to non-

resident private citizens, if they are to be so treated, having no interest whatever in the care or management of city affairs. The adoption of the view that the judges would not act as judges by virtue of their several offices would lead us into devious paths from which it would be hard to find a way of escape. The mayor of a city of the class named is usually considered as the chief executive officer of such city, and the administration of the municipal affairs thereof is committed to him and the city council. The park commissioners become a part of this administrative force, and they are responsible to the city alone. As we have said, the duties to be discharged by them are in no sense judicial, and do not call into action any judicial function. They do not render any service which would assist the judges in the discharge of any judicial duties imposed upon them by law. They are clearly executive or administrative officers, owing no duty whatever to the judges from whom they receive their appointment. The naked power of appointment is the sole duty devolving upon the judges in connection with the commissioners, or the offices which they fill.

As we view the case, the first question demanding our attention is: "Is this power of appointment under these circumstances the exercise of a judicial function?" From the examination of the cases cited and others to which we have had access, we are led to the belief that it is not, but that it is executive or administrative in its essence. In the investigation of this question, as in all others arising in this case, we encounter a sharp conflict in the authorities, although it is claimed by some writers that the weight of authority is in favor of the negative of the proposition. In *State ex rel. Young v. Brill*, 100 Minn. 499, 111 N. W. 294, 639, 10 A. & E. Ann. Cas. 425, it is said: "Although there are some decisions to the contrary, it is generally conceded that the power to appoint to a public office is in its nature an executive function." In *State ex rel. Hadley v. Washburn*, 167 Mo. 680, 90 Am. St. Rep. 430, 67 S. W. 592, it is said: "To provide by law the manner in which an appointment shall be made is one thing, to make the appointment is another. The one is in its nature legislative; the other is essentially executive. . . . The act of filling a public office by appointment is essentially an administrative or executive act, and, under the Constitution, can be exercised only by an officer charged with the duty of executing the laws." In *Re Election Suprs.* 114 Mass. 247, 19 Am. Rep. 341, the statute provided that "whenever, prior to an election, five legal voters of any ward of a city shall make known in writing to a jus-

tice of the supreme judicial court, in term time or vacation, their desire to have such election guarded and scrutinized, it shall be the duty of such justice, . . . to appoint two legal voters of such ward, who shall be of different political parties, and shall be known and designated as supervisors of election," etc. A petition was duly presented to Chief Justice Gray, asking that the appointments be made for a certain ward in the city of Boston. Instead of taking action upon the petition, the chief justice gave notice of a hearing and assembled four of the seven members of the court, when the subject was presented by able counsel. The result of the hearing was a unanimous opinion that the law imposing the duty of appointment upon the judges was unconstitutional and void. In the opinion it is said: "These supervisors, although intrusted with a certain discretion in the performance of their duties, are strictly executive officers. They make no report or return to the court or to any judge thereof. Their duties relate to no judicial suit or proceeding, but solely to the exercise by the citizens of political rights and privileges. We are unanimously of opinion that the power of appointing such officers cannot be conferred upon the justice of this court without violating the Constitution of the commonwealth. We cannot exercise this power as judges, because it is not a judicial function; nor as commissioners, because the Constitution does not allow us to hold any such office." The petition was denied. In *Mechem on Public Officers*, § 104, it is said: "So it is said that appointments to office, whether made by judicial, legislative, or executive officers or bodies, are in their nature intrinsically executive acts."

This being true, we next inquire whether, under the Constitution, it is competent for the legislature to impose the burden of appointing executive officers upon judicial officers. Our attention has been called to a number of cases which are thought to be in point upon the question, and which we will briefly notice. It is insisted by counsel for the mayor's appointee that the case of *Tyson v. Washington County*, 78 Neb. 211, 12 L.R.A. (N.S.) 350, 110 N. W. 634, is directly in point as sustaining the contention that the provision requiring the judges to make the appointment is violative of the Constitution. We cannot see that such is the case, as the question there was whether the district court could take jurisdiction of and entertain an appeal from the action of the county board in directing the construction of a drainage ditch. It was held that, as the order of the board was purely administrative in its character, the power to review their action could not be conferred upon the

courts. While the logic and argument of the writer of the opinion seem to sustain the contention, yet the case itself is not similar to this, nor are the principles to be applied applicable to the question here. *State ex rel. White v. Barker*, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 222, 89 N. W. 204, is more clearly in line with the case, but in that case the act under consideration required the appointment of waterworks trustees by the district court, instead of the judges thereof. The holding was that such power could not be conferred upon the courts. The logic of the case is in support of the contention here that the power cannot be conferred upon officers of the judicial department of the government. But, in view of the contention of the state, the case is to some extent dissimilar. In *State ex rel. Young v. Brill*, supra, the legislature of Minnesota passed an act requiring the judges of the district court, or a majority of them, to appoint the members of the board of control of the county of Ramsey. After making a number of successive appointments, the judges became convinced that the act imposing the duty upon them was unconstitutional, and refused to make other appointments. The attorney general sought a writ of mandamus from the supreme court to compel action. The writ was denied; the court holding, after an exhaustive examination, that the part of the act which required the judges to make the appointment was unconstitutional and void because it assumed to impose upon the members of the judiciary powers and functions which, by the Constitution, were assigned to another department of the government.

The Constitution of the state of Ohio contains no provision similar to that contained in the Constitution of this state, dividing the powers of government into three distinct departments, and prohibiting persons of one of the departments from exercising the powers properly belonging to either of the others. The case of *Fairview v. Giffey*, 73 Ohio St. 183, 76 N. E. 865, was where an act authorizing the court of common pleas to detach unplatted farm lands from the corporate limits of cities or villages was called in question as being unconstitutional, for the reason that it imposed legislative power upon the judiciary. The court held that, as the powers were not divided and distributed by the Constitution, it was left for the legislature to do so, and, for that and other reasons, the act was held valid. We cannot see that that case is to be considered as authority in this one. It was also held that the act called into action no other than judicial functions and powers. The case of *People ex rel. Dunham v. Morgan*, 90 Ill. 558, is in many respects similar to the one under consideration, and in which an act

authorized the judge of the circuit court to appoint the South park commissioners was held valid. This is perhaps one of the leading cases in support of the constitutionality of the law, and yet it is based to a considerable extent upon the legislative and judicial history of the state on the subject of appointments of subordinate officers or agencies. It is cited and followed, generally with approval, but with some limitations, in *Cornell v. People*, 107 Ill. 373; *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *Wilson v. Genseal*, 113 Ill. 403, 1 N. E. 905; *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *People ex rel. Henderson v. Onahan*, 170 Ill. 449, 48 N. E. 1003; *People ex rel. Akin v. Kipley*, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; *People ex rel. Neil v. Knopf*, 171 Ill. 191, 49 N. E. 424; *People ex rel. Mooney v. Hutchinson*, 172 Ill. 486, 40 L.R.A. 770, 50 N. E. 599; *People ex rel. Akin v. Loeffler*, 175 Ill. 585, 51 N. E. 785; *Lasher v. People*, 183 Ill. 226, 47 L.R.A. 802, 75 Am. St. Rep. 103, 55 N. E. 663; *People ex rel. Kelly v. Raymond*, 186 Ill. 407, 57 N. E. 1066; *Morrison v. People*, 196 Ill. 454, 63 N. E. 989; *Sherman v. People*, 210 Ill. 552, 71 N. E. 618; *People ex rel. Stead v. Edgar County*, 223 Ill. 187, 79 N. E. 123; *Aurora v. Schoeberlein*, 230 Ill. 496, 82 N. E. 860. We therefore conclude that the question is finally settled in that state. But it will also appear from an examination of these cases that the particular question involved in this was not considered in all the cases as a very material inquiry. Thus, in *Cornell v. People*, supra, it is shown that the charter conferring the power of appointment upon the judge of the circuit court was submitted to the people of the municipality at an election and adopted by them. The court says: "By the vote adopting the provisions of the act, the people of the park district gave their assent that the first board of corporate authorities should be appointed by the governor of the state, and that their successors should thereafter, as often as a vacancy occurred, be appointed by the judge of the circuit court of Cook county. This was the mode provided by the act. To this the people of the district gave their assent, and upon no other terms or conditions did they agree to assume the burden of taxation which the corporate authorities under the act had the power to impose. It may be that the governor is quite as competent to select honest and capable commissioners as the circuit judge of Cook county; but that does not affect the question. Had the people of the district seen proper to reject the act when it was submitted for their adoption or rejection,

paid all dues, interest, and premiums up to and including those for the month of April, 1907, that being the date of liquidation stated in the petition; and, secondly, in cases called "class No. 2," where the borrowing shareholders, prior to such date of liquidation, had defaulted in the payment of said dues, interest, and premiums, so that, by the conditions of their mortgages and under the by-laws of the association, the principal sum of said mortgages had become due and payable. The petition further set out the facts of three concrete cases, one falling under class No. 1 and two falling under class No. 2, with respect to which latter cases the petition states that, "under the terms of said bonds and mortgages, the association has exercised its option of declaring the full principal sums of the said mortgages as due and payable." By a stipulation all of the facts stated in the petition are admitted to be true, which includes the date of liquidation. There is, furthermore, a general statement that a large part of the assets of the association consists of mortgages that fall within one or the other of the two classes, and the brief of counsel for the appellants contains the unchallenged statement that mortgages aggregating \$125,000 fall within class No. 2, and that as to these mortgages the item of premium alone amount to \$45,000. But whether the concrete facts respecting these mortgages are identical with those of the two specified cases set forth in the petition we are not informed, nor are the shareholding mortgagors other than those in the two specified cases brought into court as parties defendant.

It is evident, therefore, that, apart from the two specified cases, the direction sought by the petition was of a general character; and it is equally evident that what the petition sought to ascertain was whether the rule laid down in the court of chancery in the case of *Weir v. Granite State Provident Asso.* 56 N. J. Eq. 234, 38 Atl. 643, and approved by this court in *Harris v. Nevins*, 68 N. J. Eq. 684, 63 Atl. 172, was applicable to class No. 1, where liquidation other than by insolvency was being enforced, but chiefly whether this rule, if applicable to class No. 1, was also to be applied to class No. 2.

The first of these questions, which was answered by the court below to the effect that class No. 1 came within the rule laid down by *Harris v. Nevins*, is not now before us; the appellants having expressly abandoned their appeal as to that part of the order. Mortgages coming within this class are therefore to be allowed credits in conformity with the rule laid down by the cases that have been cited.

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Upon the second question, which was the chief one, and is the only one before us on this appeal, the learned vice chancellor reached the conclusion that the rule applicable to class No. 1 should also be applied to class No. 2—that is, mortgages that by the nonpayment of dues, interest, and premiums had, before the date of liquidation, become due and payable according to the conditions of the said mortgages and the by-laws of the association; and the conclusion thus reached is embodied in the order appealed from, which, in its direction, makes no distinction between the two classes of mortgage debts. In reaching this conclusion we think that the learned vice chancellor fell into error, and that his error consists in his failure to observe that the two classes of mortgages were clearly to be distinguished upon the essential features that constituted the basis of the equitable rule laid down in *Weir v. Granite State Provident Asso.* and *Harris v. Nevins*. The equitable considerations that gave rise to the rule laid down in these cases were, as stated by Vice Chancellor Reed in the earlier decision, that the premiums had been paid by the borrowing shareholder in consideration of the complete execution of a contract that permitted him to pay his debts by the application of his matured shares, and, when the premature termination of the existence of the company prevented the borrower from thus liquidating his debt, the contract in consideration of which he had paid his premiums had failed. The gist of this equity of the borrowing shareholder, therefore, was that his debt had become not only prematurely collectable *in invitum* and by the effect of insolvency, but that it had thus become collectible in a way and at a time entirely different from that for which he had paid the consideration represented by his premiums. The contractual relations of the parties, as evidenced by their mortgages and by the by-laws of the association, affording no legal rule applicable to this juncture, recourse to some equitable mode of adjustment was manifestly proper, and the rule laid down in the two cases cited was the result. But in the case of a borrowing shareholder, whose debt has become due, not *in invitum* by the effect of insolvency, but according to its own terms and solely by the act of the borrower himself, there is nothing to call for the application of any rule other than that provided by the contract of the parties for, just such a contingency. In such cases the fact that enforced liquidation or insolvency supervened after the borrower's debt had, by its own terms and by his default, become due, no more gives him a standing in equity than

would the breakdown of a train before reaching its destination create a legal right in a passenger who had voluntarily left the train before the breakdown occurred. The two classes of cases are therefore distinguishable upon the precise feature that invokes the equitable rule in class No. 1, while relegating class No. 2 to the terms of its legal contracts. As to mortgage debts, therefore, that were thus due by the default of the debtor and collectable by the association while it was a going concern, the appellants, as receivers, stand in precisely the same situation as the directors of the association stood when the debts fell due. As to such cases no equitable rule is to be applied, for the simple reason that the mere breach of a legal contract, nothing more appearing, gives rise to no equitable considerations of any sort. If circumstances other than those stated in the petition before us should call for equitable treatment, such cases must be dealt with as they arise, and upon their own peculiar facts, and when the parties in interest are before the court. Upon the only question now before us the receiver should be directed to proceed to the collection of all mortgage debts that were due from borrowers prior to the date of liquidation, precisely as if enforced liquidation or proceedings in insolvency had not supervened. Specific direction in such cases is not within the purview or prayer of the petition, and is not presented by this appeal. If foreclosure proceedings are defended, or if a mortgagor files his bill to redeem, as was done in the Weir Case, the facts constituting such defense or such suit to redeem may be dealt with as they arise; for, as was observed by Vice Chancellor Reed in the Weir Case, the right to foreclose and the right to redeem are so far reciprocal that questions material to the ascertainment of the debt due on the mortgage may be as well settled in one form of action as in the other.

The order of the Court of Chancery should therefore be reversed, to the end that it may be modified, so as to apply in its present form only to mortgages that had not, while the association was a going concern, become due and payable by the mortgagor's default in the payment of dues, interest, and premiums. As to mortgages that had thus become due by the default of the shareholder as aforesaid, the receivers should be directed that, in collecting or computing the amounts of such mortgages, they should proceed in like manner as the directors of the association might have done, if enforced liquidation or insolvency had not supervened.

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NORTH CAROLINA SUPREME COURT.

LILLIE JACKSON et al., Appts.,
v.

JOHN BAIRD et al.

(148 N. C. 29, 61 S. E. 632.)

Joint tenant — purchase at foreclosure.

One heir of a mortgagor may secure title through the foreclosure sale to the exclusion of his coheirs.

(May 25, 1908.)

Case Note. — Right of one cotenant to purchase the property in his own right at a sale under an encumbrance created by one through whom the cotenants derive title.

There are undoubtedly many exceptions to be found in the books to the general rule that the purchase by one cotenant of an outstanding title to, or encumbrance upon, common property, inures to the benefit of all the owners. An extensive search, however, has failed to disclose any other case in which it was held that such general rule would not apply, merely because the encumbrance so purchased was created by a former owner of the property, through whom all the tenants claim title. There are, however, as will be seen hereafter, some cases in which a purchase of such an encumbrance by one cotenant was held not to inure to the benefit of all, but the decision in those cases was not based upon the fact that the encumbrance was created by a common predecessor in title, but was upon altogether different grounds, which would be equally applicable to the purchase by a cotenant of outstanding titles and encumbrances other than those created by one through whom they derived their title. The authorities, however, seem to be unanimous against the conclusion reached in JACKSON v. BAIRD, that the fact that the encumbrance was created by a former owner, through whom all the parties claim title, will, of itself alone, make an exception to the general rule.

Thus, it was specifically held in McPheeters v. Wright, 124 Ind. 560, 9 L.R.A. 176, 24 N. E. 734, that title could not be acquired by the owner of an undivided interest in land against his cotenant, at a sale under an encumbrance created by a former owner through whom both parties derived title.

And in Tisdale v. Tisdale, 2 Sneed, 590, 64 Am. Dec. 775, it was specifically held that, where an estate in lands which had descended to several heirs as tenants in common was sold to foreclose a mortgage given by the ancestor, and was purchased by one of the cotenants, the latter would be compelled in equity to account to the others as an express trustee, unless it appeared that they had in some manner waived or surrendered their rights. The

A PPEAL by plaintiffs from a judgment of the Superior Court for Buncombe County in defendants' favor in an action brought to establish an interest in certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Frank Carter, H. C. Chodester, and R. V. Wolfe for appellants.

Mr. T. B. Womack for appellees.

Brown, J., delivered the opinion of the court:

It is admitted that Robert Baird was the owner of the land in controversy, and that he executed a deed in trust to secure \$150 to S. H. Reid, trustee. After Robert Baird's death the land was sold by the trustee, who conveyed it to Mrs. Julia D. Shuford for a consideration of \$286 by deed dated May 26,

1898. George Shuford and his wife, the aforesaid Julia, conveyed the land to defendant Laura Baird, wife of defendant John Baird, by deed dated May 28, 1898. The trustee's deed to Mrs. Shuford, although dated May 26th, recites that the sale took place on May 28th. It appears that Laura Baird joined in the execution of the note and deed in trust along with Robert Baird. The plaintiffs allege that the debt was contracted for John Baird's benefit. The defendants deny this, and aver that John Baird signed as surety for his father, Robert Baird. The evidence offered upon this point is very meager and tends to prove that the money borrowed was used in building a house upon the tract of land in controversy, which belonged to Robert Baird.

This case was presented to this court up-

court said that nothing was better settled in equity jurisprudence than that a cotenant, under such circumstances, could not take to himself individually the benefits of his purchase to the exclusion of his cotenants.

And in *Ladd v. Kuhn*, 27 Ind. App. 535, 61 N. E. 747, the court said that the general rule, though subject to many exceptions, was that one tenant in common could not, by purchasing an outstanding lien, acquire a title which would evict his cotenant; and that the rule obtained "in all its force" where the encumbrance was created by a former owner through whom both parties claimed title.

And in *Oliver v. Hedderly*, 32 Minn. 455, 21 N. W. 478, the court said that cotenancy created by descent from a common ancestor did not come within any recognized exception to the general rule that the relation was confidential in its nature, imposing an obligation upon each cotenant not to assail the common interest; that that obligation disabled each cotenant to buy in and secure to his own exclusive benefit, without the consent of the others. any outstanding encumbrance created by the ancestor through whom all derived title; and that, if a cotenant bought in such encumbrance, the others were entitled to share in the benefit of the purchase, unless they in some manner renounced or unreasonably neglected to assert their right in that respect.

So, in *Moy v. Moy*, 89 Iowa, 511, 56 N. W. 688, it was held that, upon the foreclosure of a mortgage upon property held in common, even where the mortgage was executed by a former owner, one cotenant could not, by purchasing the property and acquiring a sheriff's deed under the foreclosure sale, claim absolute title to the exclusion of his cotenants, though he would have his interest therein increased to the extent of the amount necessary for the cotenant to redeem his undivided share.

And in *Barnes v. Boardman*, 152 Mass. 391, 9 L.R.A. 571, 25 N. E. 623, it was held that, where one of several reversioners 19 L.R.A. (N.S.)

in the equity of redemption in real estate purchased the interest of the mortgagee, together with all rights which the latter had acquired under foreclosure proceedings, the former was bound, before he could complete the foreclosure as against his coreversioners, to notify them of the peril to their interests, and give them an opportunity to come in and contribute with him towards the redemption from the mortgage; and, if he failed to do so, and procured title under his foreclosure proceedings, his coreversioners would be entitled to their proportions upon payment of their shares of the mortgage debt.

And in *Montague v. Selb*, 106 Ill. 49, it was held that a purchaser of land at administrator's sale, in which land the widow of the intestate had a homestead estate and equity of redemption, could not cut off the widow's right of homestead by subsequently acquiring a deed under a decree foreclosing a mortgage given by the intestate and his wife, in which the homestead was released, as such purchaser and the widow were tenants in common; and that, accordingly, the purchaser would hold such after-acquired title in trust for the common estate, and the widow would be entitled to avail herself of it upon making a ratable contribution of the amount paid out for it.

And the conclusion reached in *JACKSON v. BAIRD*, that an encumbrance upon property held in common, created by a former owner through whom all the cotenants derive their title, is not an outstanding title adverse to the title of the encumbrancer, would seem to be opposed by the following cases, which followed the general rule that, where a cotenant acquired an outstanding title, his purchase thereof must inure to the benefit of all the cotenants, although such outstanding title was an encumbrance created by a predecessor in title of all the cotenants: *Savage v. Bradley*, 149 Ala. 169, 123 Am. St. Rep. 30, 43 So. 20; *Titworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Smith v. Osborne*, 86 Ill. 606; *Jennings v. Moon*, 135 Ind. 168, 34 N. E. 996; *Ryason v. Dunten*, 164 Ind. 85, 73 N. E. 74; *Leach*

on the theory that there is evidence that Shuford bought in the property in trust for Baird, and that consequently, as Baird is a tenant in common with plaintiffs, the title he acquired, whether legal or equitable, must inure to the joint benefit of all. We do not think there is any evidence whatever of a fraudulent combination between Shuford and Baird to effect a secret sale of the property or to suppress bidding, although the testimony of George Shuford may possibly be susceptible of the construction that he intended the property for Baird, and that he was acting in his interest. The contention of plaintiffs that John Baird could not acquire the exclusive title at the sale is founded upon a misapprehension of the law. The general rule is well settled that one cotenant cannot purchase an outstanding title or encum-

brance affecting the common estate for his own exclusive benefit and assert such right against his cotenants; but that rule does not apply under the facts of this case. The title which was acquired by Shuford, assuming that he acquired it for Baird, was not an outstanding title adverse to the title of Robert Baird. It was the title of Robert Baird himself, the common ancestor under whom all claimed, and the sale was being made under a deed executed by such ancestor and to pay his debts, which was an encumbrance on the land when it descended to plaintiffs and their coheir. It is held in the state that one cotenant lawfully may purchase his cotenants' share of the common property under execution sale to pay the debt of such cotenant. Likewise, it is held

v. Hall, 95 Iowa, 611, 64 N. W. 790; Richards v. Richards, 75 Mich. 408, 42 N. W. 954; Reed v. Reed, 122 Mich. 77, 80 Am. St. Rep. 541, 80 N. W. 996; Holterhoff v. Mead, 36 Minn. 42, 29 N. W. 675; Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317; Dillinger v. Kelley, 84 Mo. 561; Hinters v. Hinters, 114 Mo. 26, 21 S. W. 456; Nalle v. Thompson, 173 Mo. 595, 73 S. W. 599; Nalle v. Parks, 173 Mo. 616, 73 S. W. 596; Morrison v. Roehl (Mo.) 114 S. W. 981; Knolls v. Barnhart, 71 N. Y. 474; Carpenter v. Carpenter, 131 N. Y. 101, 27 Am. St. Rep. 569, 29 N. E. 1013, reversing 35 N. Y. S. R. 512, 12 N. Y. Supp. 189; Collins v. Collins, 36 N. Y. S. R. 591, 13 N. Y. Supp. 28, affirmed without opinion in 131 N. Y. 648, 30 N. E. 863; Hite v. Hite, 21 Pa. Co. Ct. 97.

In Johnson v. Brauch, 9 S. D. 116, 62 Am. St. Rep. 857, 68 N. W. 173, in which it appeared that one cotenant acquired a tax deed to the common property for taxes, which, considering the brevity of time (fifteen months) between the death of the former owner and the execution of the deed, must have been assessed against such former owner, the general rule was applied, and the purchase held to inure to the benefit of all the cotenants; while in the following cases, in which it is not shown whether the taxes for which the property in question was sold were assessed against the cotenants themselves, or against him from whom they derived title, it was also held that the purchase of a tax title by one cotenant inured to the benefit of all. Williams v. Clyatt, 53 Fla. 987, 43 So. 441; Conn v. Conn, 58 Iowa, 747, 13 N. W. 51; Clark v. Brown, 70 Iowa, 139, 30 N. W. 46; Field v. Farmers' & D. Bank, 110 Ky. 256, 61 S. W. 258; Hardy v. Gregg (Miss.) 2 So. 358; Barker v. Jones, 62 N. H. 497, 13 Am. St. Rep. 586; Re Brown, 2 Pa. St. 463; Clark v. Beard, 59 W. Va. 669, 53 S. E. 597.

So, in Lee v. Fox, 6 Dana, 172, and Perkins v. Smith, 18 Ky. L. Rep. 509, 37 S. W. 72, this rule was applied to a purchase by a husband of a cotenant, and his purchase held to inure to the benefit of his wife's cotenants; while in Beaman v. Beaman, 90 19 L.R.A. (N.S.)

Miss. 762, 44 So. 987, it was held to apply to the purchase by the wife of one of the cotenants.

The following decisions might seem at first glance to be some authority for the conclusion reached in JACKSON v. BAIRD, that an encumbrance given by a predecessor in title is not an outstanding adverse title, within the meaning of the rule that the purchase of such title by one cotenant will inure to the benefit of all, but, upon examination of these cases, it will be found that the fact that the encumbrance was given by the predecessor in title was not made the basis of any exception to the general rule, but that the decisions went off on other grounds.

Thus, in Elston v. Piggott, 94 Ind. 14, in which it appeared that one who had title to the undivided two thirds acquired by purchase from an assignee in bankruptcy, and also held by assignment a certificate of purchase of the whole tract, made to satisfy a decree against the bankrupt and his wife upon a mortgage executed by both, subsequently by reason of nonredemption acquired a deed upon the certificate, it was held that the certificate acquired while a tenant in common with the bankrupt's wife did not inure to the benefit of both, upon the ground that the title was not a common one, and the interests of the tenants were not reciprocal, and there was no fiduciary relationship between them, since the purchaser's title was by virtue of a judicial sale, and not by the same instrument nor from the same source as that from which the wife's claim was derived. The court said that there was "nothing in such a case to create relations of trust and confidence, and, therefore, the reason of the rule applicable to ordinary cases fails, and the time-honored doctrine is that, where the reason of the rule ceases, so does the rule itself.

. . . The reason of the rule is that the relationship is one imposing trust and confidence, and requiring the tenants not to assume positions of hostility." Freeman, Cotenancy & Partition, § 155, is cited to the effect that, if the interests of the cotenants

that one of the cotenants may purchase the entire property at a sale to pay the common ancestor's debt. *Baird v. Baird*, 21 N. C. (1 Dev. & B. Eq.) 536, 31 Am. Dec. 399. In that case Chief Justice Ruffin says: "It is a very common case that one brother buys at sheriff's sale the undivided estate of another brother in descended lands, either for the debt of the ancestor, or that of the brother himself contracted after the father's death; and we believe the legality of such a purchase has never been questioned." Again: "It is not the duty of one heir, or of one tenant in common, as such, to pay the debts of another heir or tenant in common, . . . nor to refrain from buying it, to his own disadvantage, more than it is the duty of any other person wholly unconnected with them." So it is said by Judge Gaston that "a tenant in common, as such, is not a trustee for his companion." *Saunders v. Gatlin*, 21 N. C. (1 Dev. & B. Eq.) 92. It is likewise held in England that there is no fiduciary relation existing between tenants in common, as such; and that a tenant in common of property previously mortgaged, who purchased the entire property at the mortgage sale, was entitled to hold it for his sole benefit. This is an interesting case, decided by the House of Lords

and privy council, in which an elaborate opinion is delivered by Lord Herschell and concurred in by the other Lord Justices. [*Kennedy v. de Trafford* [1897] A. C. 180]. See also 17 Am. & Eng. Enc. Law, 2d ed. p. 676, and cases cited; also, *Freeman, Cotenancy & Partition*, §§ 162-165; *Blodgett v. Hildreth*, 8 Allen, 186; *Sutton v. Jenkins*, 147 N. C. 11, 60 S. E. 643.

When the land in controversy descended upon these plaintiffs and upon their coheir, John Baird, it was encumbered with the mortgage to Reid made by their ancestor. When that mortgage was foreclosed in the manner allowed by law, any one of the heirs had a right to purchase the entire estate to protect his own interest, and he would acquire the title discharged of any trust to his coheirs. There is no evidence that John Baird agreed to purchase for the benefit of the other heirs, or endeavored to suppress bidding, or practised any other fraud upon his cotenants. So far as the record discloses, the sale appears to have been fairly made by the trustee, and it was open to the plaintiffs or any of them to attend and purchase if they so desired.

We think, therefore, the judgment of nonsuit should be affirmed.

accrued at different times and under different instruments, and neither had superior means of information respecting the state of the title, then either, unless he employed his cotenancy to secure an advantage, might acquire and assert a superior outstanding title,—especially where there was no joint possession of the premises. Indeed, this case is directly opposed to the conclusion reached in *JACKSON v. BAIRD*, since the court went on to say that the case before them was altogether different from one where the encumbrance was created by a former owner through whom both parties claimed title.

And in *Boynton v. Veldman*, 131 Mich. 555, 91 N. W. 1022, it was held that, where a cotenant purchased the entire property for taxes levied against a predecessor in title, such purchase did not inure to the benefit of a cotenant who had acquired his title at a different time and by a different instrument. In this case, however, the claim to share such benefit was not made by the other cotenant, who was not a party to the action, and who had always refused to contribute towards the payment of such taxes, and never asserted any title to the land.

And in *Fielding v. White* (Tex. Civ. App.) 32 S. W. 1054, it was held that a cotenant might, by purchase at a foreclosure sale of a mortgage on the common property given by the one from whom all the common owners claimed title, acquire title for his own exclusive benefit, if there had never been any understanding between him and his

fellow owners as to the payment of the mortgage debt or the title to, or possession or use of, the land, and neither had exclusive possession thereof. The court did not base its conclusion upon the fact that the encumbrance had been created by the former owner, but exclusively because the cotenants had acquired their individual titles by different instruments and at different times, which it deemed had been established as a rule of property by other Texas decisions (which are not in point in this note). Chief Justice Fisher, however, in delivering the opinion, said that, if the question were an open one, he would be inclined to rule differently in accord with what he conceived to be the decided weight of authority. To quote his language: "The unity of possession, or the right of joint possession, was the principal factor that created the relationship of tenants in common at common law. Their rights were acquired by several and distinct titles, or by the same title but at different periods; and the grand incident of such estates was the unity of possession, or the present right of possession, coextensive with the entire estate. And, in my view of the law, when such relationship is once ascertained, or such estates are found to exist, *eo instanti* there springs into existence a reciprocal and mutual obligation and duty resting upon each co-owner, in dealing with the common estate, to observe the right of each other, and to abstain from acts in which benefit and profit may result to one to the injury of the other, although there be an absence of facts tending to

show special circumstances creating trust relationship."

In *Watson v. Watson*, 198 Pa. 234, 47 Atl. 1096, in which it appeared that the mortgage in question was executed by one from whom the cotenants derived title, the decision was not at all based upon that fact, the specific finding being that, if the cotenants joined in a letter directing the mortgagee, who was about to foreclose, to convey the land absolutely to one of their number on condition that the latter pay the mortgage, a deed subsequently made in accordance with this direction passed the title of the premises divested of any interest which the grantee's former cotenants might have had therein, in the absence of any fraud on his part.

In *Blodgett v. Hildreth*, 8 Allen, 186, one of the cases cited in *JACKSON v. BAIRD*, the court did hold that the principle that one tenant in common cannot purchase an outstanding title or encumbrance upon the joint estate for his exclusive benefit, and assert the same to the prejudice of his cotenant, could not be properly applied to a purchase by one cotenant of an outstanding mortgage upon the joint estate, and accordingly denied the right of the nonpurchasing tenant to maintain partition against the purchasing tenant. As a matter of fact the mortgage in this case was executed by one through whom both cotenants claimed; but the decision apparently does not rest upon that fact, but rather upon the fact that the purchase of the mortgage by one cotenant left the other in full enjoyment of the right of redemption from the mortgage that he previously enjoyed. The court said: "Such a title may temporarily inure to the benefit of a cotenant who elects to make such purchase. But it leaves the other party in the full enjoyment of the right of redemption that he previously enjoyed. He may, as he would have been required to do in the case of the mortgage title remaining in the hands of a third person, pay the whole amount of the encumbrance, and be put in possession of the whole premises unless the cotenant elects to contribute his share." In other words, the real reason for the denial of the equitable principle in this case seems to be that it is unnecessary since the nonpurchasing tenant is fully protected by the preservation to him of his pre-existing right to redeem from the mortgage, which is not cut off by the purchase of the mortgage by his cotenant any more than it would have been if the mortgage had been purchased by a third person. There is therefore an obvious distinction between such a case and one where the purchase by one cotenant under a foreclosure of a mortgage operates to cut off the equity of redemption and leaves the nonpurchasing tenant remediless unless the principle in question can be invoked by him.

In *Sutton v. Jenkins*, 147 N. C. 11, 60 S. E. 643, also cited in *JACKSON v. BAIRD*, it appeared that, not only had the alleged cotenants undertaken to divide the land by 19 L.R.A. (N.S.)

running a division line and entering into possession of their respective parts, but the encumbrance in question had been foreclosed and a deed under the foreclosure proceedings executed almost four years before the alleged cotenant acquired any title from the purchaser at the foreclosure sale.

The quotations found in *JACKSON v. BAIRD*, from *Saunders v. Gatlin*, 21 N. C. (1 Dev. & B. Eq.) 92, and from *Baird v. Baird*, 21 N. C. (1 Dev. & B. Eq.) 536, 31 Am. Dec. 399, are *dicta* merely, as there was in neither case a purchase of an encumbrance created by a predecessor in title, while in *Kennedy v. de Trafford* [1897] A. C. 180, anonymously referred to by the North Carolina court, the purchase in question was of a mortgage executed by the cotenants themselves.

This note, of course, does not include cases where a purchase was made after the cotenancy had altogether ceased to exist, nor does it include cases such as *Aubuchon v. Aubuchon*, 133 Mo. 260, 34 S. W. 569, in which land ordered to be sold by the probate court for the payment of the decedent's debts was purchased by one of the heirs.

TENNESSEE SUPREME COURT.

A. D. BRADFORD et al., Plffs. in Certiorari,
v.
MRS. H. L. CALHOUN et al.

(— Tenn. —, 109 S. W. 502.)

Will — renunciation — effect.

A written renunciation of a devise of an interest in real estate, made the day the will is admitted to probate, defeats a levy upon the property under execution against the devisee.

(February 15, 1908.)

Case Note. — Mode and effect of renouncing benefit under will.

Judge Story said in *Webster v. Gilman*, 1 Story, 499, Fed. Cas. No. 17,335: "We know of no rule of law by which a mere naked nonpossession, or nonexercise of the right of entry and possession, of real estate under a devise, short of the period prescribed by the statute of limitations to bar a right of entry, is held to amount to a positive renunciation or disclaimer of a devise, or to proof thereof. It may be even doubtful whether, under our laws, any renunciation or disclaimer, not by deed or matter of record, would be an extinguishment of the right of the devisee. But, at all events, it should be evidenced by some solemn act or acknowledgment in writing, or by some open and positive act of renunciation or disclaimer, which will prevent all future cavil, and operate in point of evidence as a quasi estoppel."

An he also said, in *Ex parte Fuller*, 2

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Chancery Court for Davidson County in defendants' favor in a suit to enjoin the sale of certain property under execution. Reversed.

The facts are stated in the opinion.

Messrs. R. J. Cooper and James O. Bradford, for plaintiffs in certiorari:

The acceptance of a devise is essential to the vesting of title in the devisee.

4 Kent, Com. § 533; Shep. Touch. 452; 2 Story, Eq. Jur. 12th ed. 1079; 2 Redf. Wills, 304; Pritchard, Wills & Administration, § 754; Ex parte Fuller, 2 Story, 327, Fed. Cas. No. 5,147; Townson v. Tickell, 3 Barn. & Ald. 31; Doe ex dem. Smyth v. Smyth, 6 Barn. & C. 112; Defreese v. Lake, 109 Mich. 421, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; Re Bryce, 194 Pa. 135, 44 Atl. 1076; Tarr v. Robinson, 158 Pa. 60, 27 Atl. 859.

Mr. Walter Stokes for defendants in certiorari.

Henderson, Special Judge, delivered the opinion of the court:

The bill in this case was dismissed by the chancellor. On appeal to the court of civil appeals, his decree was affirmed; and the case is before this court on certiorari.

Mrs. Lou H. Sneed died January 13, 1906, leaving a will by which, among other provisions, she devised to her husband, Thomas H. Sneed, a life estate in certain land, with

remainder to her sister and a niece. The will was admitted to probate January 17, 1906. On the same date Thomas H. Sneed, executed a paper which, after setting out the clause of the will making said devise to him, adds:

"It is my wish that the other members of the family who may be entitled to this property under the law may receive it. I therefore decline to accept anything under said will, and renounce the same in toto, so far as any interest coming to me is concerned, and leave it to descend under law to the parties entitled, free from any encumbrance on account of the provision in said will."

This paper was acknowledged before the county court clerk February 8, 1906, on which date it was registered. The parties had been married about five years, and had no children.

Prior to the death of Mrs. Sneed, and on January 11, 1906, defendant Mrs. H. L. Calhoun brought suit before a justice of the peace of Davidson County against Thomas H. Sneed, and, on January 27, 1906, recovered judgment against him for \$445.50. Execution was issued from this judgment February 3, 1906, and was, on same day, levied on the life estate so devised by the will to Sneed. The papers before the justice of the peace in the case were filed in the circuit court for condemnation, and order of sale was entered therein July 6, 1906. The bill is filed by the remaindermen in said land and all of the surviving heirs of the testa-

Story, 327, Fed. Cas. No. 5,147, that, if an "estate is devised absolutely and without any trust or encumbrances, the law will presume it to be accepted by the devisee because it is for his benefit, and some solemn, notorious act is required to establish his renunciation or disclaimer of it."

It was held in Bryan v. Hyre, 1 Rob. (Va.) 94, 39 Am. Dec. 246, that, in an action of ejectment brought by the heirs of the devisee of the fee, it could not be shown in defense that the latter had, by parol, renounced the devise, on the ground that a devise of a freehold estate can be renounced only by a written instrument executed with equal solemnity as the devise.

And in Doe ex dem. Smyth v. Smyth, 6 Barn. & C. 112, it was questioned whether a devise of a freehold could be renounced by parol.

But the presumption of an acceptance of a beneficial devise of realty is rebuttable, and, when a renunciation is shown, the title under the devise does not vest, and a deed of renunciation is unnecessary, except where the title has already vested in the devisee by an acceptance. Defreese v. Lake, 109 Mich. 421, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505.

Whether the conduct of a devisee amounts to a revocation is a question for the jury where a second life tenant, during 19 L.R.A. (N.S.)

the lifetime of the first life tenant acquires a tax title to the freehold, and immediately records the same, and, after the termination of the first life estate, goes into possession and subsequently conveys the fee title to another, it appearing that the will was never placed upon record. Defreese v. Lake, supra. The court observed that, up to the time the tax title was acquired, the second life tenant, not being in possession, had done nothing tending to show whether he had accepted the devise prior thereto.

In Stebbins v. Lathrop, 4 Pick. 43, the court, in substance, said there seemed to be no good reason why a benefit under a will should not be renounced before the probate court in a proceeding to admit the will to probate, when all the parties were present, and the fact of renunciation could be verified by the records of the court.

So, a written renunciation filed in a probate court by one to whom land was devised, charged with a burden, is sufficient, a deed being unnecessary, even though the renunciation is filed fourteen years after the admission of the will to probate, during which time the testator's widow, and not the devisee, had been continuously in possession of the land devised. Ward v. Ward, 15 Pick. 511.

A written notice of an intention not to take a legacy of personalty, and a return

trix, seeking to enjoin the sale of the property under said condemnation proceedings.

The court of civil appeals, in a learned opinion, one of the court dissenting, adopts what is said to be the old English common-law rule, which requires a renunciation of a beneficial devise of real estate to be by deed of record; and that court was of opinion that this is in accord with our system of registration, and would tend to the prevention of frauds. This is said to be so, especially when intervening rights of creditors are concerned. This can be so only on the assumption that the devise, without more, and independent of the assent, express or implied, of the devisee, vests the estate in him, so that it can be divested only by deed, and, in order to avail against creditors, the deed must be registered.

In 3 Washburn on Real Property, 402, it is said: "An heir at law is the only person who, by the common law, becomes the owner of land without his own agency or assent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect." At page 700 of the same authority it is said: "It is hardly necessary to add that no one can make another the owner of an estate against his consent, by devising it to him, so that, if the devisee disclaims the devise, it becomes inoperative and goes to the heir."

On this subject the court says in Defreese v. Lake, 109 Mich. 421, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 506: "It is

said that a parol disclaimer will not prevent the devisee from subsequently claiming the devise, and that the reason of the necessity of a deed grows out of the presumptive vesting of the devised interest in the devisee before entry. See Perry v. Hale, 44 N. H. 365. It is, in our opinion, illogical to say that a deed is necessary because of the presumption that the title has vested, when the title does not vest by a devise unless there is an acceptance. It would seem that the deed would be necessary only where the title has actually vested, which appears to depend upon acceptance. If it be admitted that the law will presume an acceptance, it is not a conclusive presumption, and, when it is shown to have been renounced, it is shown that the title did not vest, and apparently there would be no occasion for divesting a title that had not vested."

In 4 Kent, Com. 533, it is said: "An estate vests, under a devise, on the death of the testator before entry; but a devisee is not bound to accept of a devise to him *volens volens*, and he may renounce the gift, by which act the estate will descend to the heir, or pass in some other direction under the will. The disclaimer and renunciation must be by some unequivocal act, and it is left undecided whether a verbal disclaimer will be sufficient. A disclaimer by deed is sufficient, and some judges have held that it may be by a verbal renunciation. Perhaps the case will be governed by circumstances."

thereof to the executor, is a sufficient renunciation to permit the devisee to assert an antagonistic title to real estate devised to others by the testator's will. Watson v. Watson, 128 Mass. 152.

It is not necessary that a renunciation of a devise of land be made in a court of record, a deed of renunciation being sufficient. Townson v. Tickell, 3 Barn. & Ald. 31.

And, even though an acceptance is presumed, a devisee's refusal to accept land charged with certain payments will defeat a levy of execution thereon by his creditors during the period the land, by the terms of the will, remains in the possession of executors. Tarr v. Robinson, 158 Pa. 60, 27 Atl. 859.

A renunciation under the hand and seal of a devisee of slaves is sufficient to relieve him of a statutory liability of a devisee to the testator's creditors. Rogers v. Farrar, 6 T. B. Mon. 421.

A renunciation of a devise of corporate stock, charged with the payment of the testator's debts, is shown by the devisee's oral refusal to accept, and his subsequent offer to purchase the stock from those entitled thereto. Haebler v. John Eichler Brewing Co. 42 App. Div. 95, 58 N. Y. Supp. 894, affirming 25 Misc. 576, 55 N. Y. Supp. 1071.

The refusal of a devisee of land, during his lifetime, to permit the erection of a house of 19 L.R.A. (N.S.)

a certain value thereon, as provided by the will, will estop his representative, after his death, from claiming the value of the house from the testator's estate. Re Bryce, 194 Pa. 135, 44 Atl. 1076.

The renunciation by one of two joint devisees of a life estate vests the whole estate in the other. Pendleton v. Kinney, 65 Conn. 222, 32 Atl. 331.

It was said in Wonsetler v. Wonsetler, 23 Pa. Super. Ct. 321, that the refusal to accept a bequest must be absolute and unqualified, not merely in word, but in deed; however positive the terms of refusal, they may be made ineffectual by conduct inconsistent with a refusal, such as acts of dominion over the subject of the devise; and a gift of it by the devisee to another is such an act.

It has been said that, if property is devised, subject to a condition or burdened with a charge, the devisee will be allowed a reasonable time and opportunity to judge of the value of the bequest, and the burden or condition, before he decides to accept or renounce it. Perry v. Hale, 44 N. H. 365; Wheeler v. Lester, 1 Bradf. 203.

As to the right of creditors or personal representatives to make or control election for or against a will, or between different provisions of a will or statute, see case note to Re Fleming, 11 L.R.A. (N.S.) 379.

A number of ancient authorities on the subject are discussed in the case of *Bryan v. Hyre*, 1 Rob. (Va.) 94, 39 Am. Dec. 246, among them *Townson v. Tickell*, 3 Barn. & Ald. 31, in which it is said: "The law presumes that . . . [the devisee] will assent until the contrary is proved. When the contrary, however, is proved, it shows that he never did assent to the devise, and consequently that the estate never was in him."

The same principle is held in *Burritt v. Silliman*, 13 N. Y. 96, 64 Am. Dec. 530, where it is said: "When it turns out that the estate has not been accepted, it remains in the original owner, precisely as if the conveyance had not been executed."

Quite a number of decisions of other states are cited by counsel; but it is not necessary to pursue the discussion of them. The tendency of our own decisions is along the line of those above referred to. In *Hughes v. Brown*, 88 Tenn. 582, 8 L.R.A. 480, 13 S. W. 286, *Brown* had been appointed trustee and required to execute bond. He failed to execute the bond. Some years afterwards he was sued as trustee, and in his answer disclaimed ever having accepted the appointment. It is held that his disclaimer, in the absence of acts indicating an acceptance, must be taken to relate back to the time of his appointment.

In *Goss v. Singleton*, 2 Head, 77, the question under consideration was with regard to the renunciation by persons named as trustees. The court, through *McKinney, J.*, says: "It seems, in general, that every gift, by deed or will, or otherwise, is supposed prima facie, unless the contrary appears, to be beneficial to the donee. Consequently the law presumes, until there is proof to the contrary, that every estate is accepted by the person to whom it is expressed to be given. *Hill, Tr.* (1854 ed.) 304. But the law does not force anyone to accept the gift of an estate, whether made in trust, or otherwise; and therefore it is competent for the person appointed trustee to refuse both the estate and the office attached to it, provided he has done no act to deprive himself of that right. *Id.* 312. The gift is not perfect until ratified by the assent of the donee; and a disclaimer of the trust operates as evidence that such assent was never given. *Id.* 316. There is some difference of opinion as to what shall be a sufficient disclaimer. There are authorities which seem to maintain that a parol disclaimer of a gift, either by deed or will, of a freehold estate, is sufficient. But, however this may be, it is well settled that the renunciation may be by deed, by matter of record, or any written instrument, or by answer in chancery. *Id.* 316, 317. And such disclaimer or refusal to accept the trust, whenever made, will relate back, and 19 L.R.A. (N.S.)

will be held to have been made at the time of the gift, if no act has been done to preclude the party. *Id.* 313."

While that case related to the renunciation of a trust, we think that the same principle applies with equal, if not greater, force to the beneficial devisee. The true rule, founded upon principle, is that it is optional with the devisee to accept the devise, however beneficial it may be to him; and when he elects to renounce, before any act on his part indicating an acceptance, his renunciation shall relate back, and will be held to have been made at the time of the gift, and will displace any levy of creditors that may in the meantime have been made. Surely that principle should apply to this case, since *Sneed* renounced the devise on the day that the will of his wife was admitted to probate.

It is insisted by learned counsel for defendant that this renunciation was made for the purpose of defeating the collection of the defendant's judgment, or, if not, it was in effect a voluntary conveyance and void as against existing creditors. As it was optional with *Sneed* to accept or renounce, it is immaterial what his motives were, so long as there is no collusion with the remaindermen or residuary devisees, by which he fraudulently receives a benefit for his renunciation; and there is no proof of this. The renunciation is not a voluntary conveyance, void as against existing creditors, because, when he has properly renounced, the renunciation relates back to the date of the gift, and, as he has never accepted the gift, he has had nothing that could be made the subject of a voluntary conveyance.

It results that the decree of the Court of Civil Appeals, affirming the decree of the chancellor, is reversed, and decree will be entered here making perpetual the injunction against the sale of the land in controversy under the order of condemnation in favor of the defendant against *Sneed*. Defendant will pay the costs of this and the chancery court.

WISCONSIN SUPREME COURT.

JOHN SCHOENMANN et al., Appts.,
v.

JOHN L. WHITT, Resp't.

(— Wis. —, 117 N. W. 851.)

Broker — exclusive authority — commissions.

A broker receiving exclusive authority to sell real estate by a writing which he does not sign cannot recover commissions in case the property is sold by the owner without aid from him, if he fails to show

that, prior to the sale, he had used ordinary diligence in endeavoring to make a sale of the property, resulting in the expenditure of time, money, or effort under the contract.

(Timlin, J., dissents.)

(September 29, 1908.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Iowa County in defendant's favor in an action brought to recover commissions alleged to be due for the sale of real estate. Affirmed.

Statement by Barnes, J.:

This action is brought to recover a commission of \$270 claimed to be due upon the

sale of a farm. The alleged contract upon which recovery is sought was lost, but what purported to be a copy of at least the material portion of it was produced, and offered, and received in evidence, and is as follows:

Spring Green, Wis., Oct. 14, 1904.

I hereby grant unto Schoenmann & Son the exclusive right to sell and to enter into a contract for the conveyance of the property described on the opposite side of this card, and authorize them to list the same for sale upon the terms and conditions mentioned and agree to pay said Schoenmann & Son, in the event of a sale of said property, the regular commission of two and one half. I however reserve the right to

Case Note. — Mutuality of contract giving real-estate broker exclusive authority to sell, or promising him commissions in case of sale by anyone else, but which does not in terms impose any obligation upon him.

This note is limited strictly to those cases which deal with the question whether a writing giving a real-estate broker exclusive authority to sell certain property, or promising him commissions in case the owner himself sells, without in express terms requiring him to do anything, is of sufficient mutuality or upon sufficient consideration so that, in case the property is sold by the owner himself or another agent, the broker may recover the stipulated commissions or sue for breach of contract. It therefore does not include those cases in which the broker seeks to recover his commission because, as he claims, the sale was in fact brought about through his efforts.

It seems to be a general rule that, although a writing purporting to give a real-estate broker the exclusive authority to sell certain property, or promising him commission in case anyone else sells, without in express terms requiring him to do anything, is not signed by such broker, if the latter enters upon the performance, and expends time, money, or effort under the contract, it cannot be said to be void for want of mutuality or lack of consideration, so as to prevent the broker from recovering his commissions in case the landowner himself, or someone aside from the broker, sells the land.

Thus, in *Attix v. Pelan*, 5 Iowa, 336, it was held that a writing granting a firm of real-estate brokers the exclusive right to sell certain property, with certain stipulations as to commissions, is not void for want of mutuality, so as to prevent a recovery of commissions in case the property is sold by the owners themselves, it appearing that, although it had not been signed by the brokers, the latter had acted upon it; the court saying that in such case it is the same as if they had put their names upon it.

A case holding to the same effect, but 19 L.R.A. (N.S.)

involving a contract in which the owner promised to pay the commission also in event he himself sold the property, is *Goward v. Waters*, 98 Mass. 596, where the court took occasion to say: "The position of the defendant's counsel is undoubtedly true, that at the time the contract was signed it was a mere *nudum pactum*. The plaintiffs paid nothing, incurred no expense or loss, and entered into no obligation on their part. They were at liberty to act or not, as they pleased; and would incur no liability by failing to do anything. But it is also apparent that the writing contemplated services to be rendered and expenses to be incurred by the plaintiffs for the defendant; and that the promises were made in view of such future services and expenses. The writing is merely a stipulation, by the defendant, of the terms upon which compensation shall be made by him. Subsequent performance of services and expenditure of money, in prosecution of the employment thus authorized, furnish a sufficient consideration for the promises of the defendant."

In *Lapham v. Flint*, 86 Minn. 376, 90 N. W. 780, it was held that, even conceding an agreement signed by a real-estate owner to pay a broker certain commissions in the event either found a purchaser to be a unilateral contract, and invalid upon its face, yet the broker's partial performance was a sufficient acceptance so as to make the owner liable for commissions where he himself sold the property. The court, in distinguishing *Stensgaard v. Smith*, 43 Minn. 11, 19 Am. St. Rep. 205, 44 N. W. 669, said: "The contract under consideration in *Stensgaard v. Smith*, supra, contained no express provision that the owner should pay the agent commission in case he should himself make the sale. The only question before the court in that case was whether the contract, upon its face, unaided by evidence or allegations in the complaint, expressed a mutuality of obligation; and it was properly held that it did not, because there was nothing in the contract to indicate any acceptance of the obligation, either in writing or by performance."

In *Metcalf v. Kent*, 104 Iowa, 487, 73 N.

revoke this agreement by giving said Schoenmann & Son ninety days' notice in writing. [Signed] John L. Whitt.

The foregoing writing was not signed by the plaintiffs or either of them. The defendant asserted that the written memorandum did not express the entire agreement, and that it should be reformed so as to exempt him from the payment of any commission in the event of his making a sale of the farm himself. The court, on disputed testimony, refused to reform the instrument, and found that the agreement was fully expressed in the writing. Some three weeks after the signing of the written memoran-

dum, the defendant sold the farm without any aid or assistance from the plaintiffs for a price in excess of what they were authorized to sell for. He refused to pay any commission because of such sale. A jury was waived, and the case was tried by the court. The trial court found that plaintiffs had not exhibited the farm in question to any purchaser, had not taken any steps to sell the same, and had not incurred any expense in reference thereto, except to talk with one person about it, to whom they expected to show it, but before doing so they learned it was sold, and that the contract lacked mutuality and therefore never had any binding force or effect; and award-

W. 1037, a written contract, signed by both parties, to be good until a certain date, by which the broker had the exclusive right to sell the property upon certain terms and conditions with the promise of certain commissions in case the property was sold during the pendency of the contract, or to a person whom the broker found, was construed as a mutual contract giving the broker the exclusive right to sell between the dates mentioned and entitling him to commissions on any sale which was made between those dates, even though made by the owner himself and without the aid of the broker. The court said that the consideration of the contract was that the plaintiff would find a purchaser, and that, by his efforts to find a purchaser, he performed his part of the contract.

In Kimmell v. Skelly, 130 Cal. 555, 62 Pac. 1067, a contract between the owner of real estate and a firm of brokers, making them, in consideration of their services, exclusive agents to sell, and agreeing to pay them a specified commission upon any sale made by them, or by anyone else including the owner, was held not to be invalid for want of consideration; and therefore the brokers, having attempted to find purchasers, were entitled to recover the stipulated commissions although the property was sold by the owner himself without the influence of the brokers. The court said: "If this contract had provided in terms that, 'in consideration of the brokers' efforts to secure a purchaser, whether or not those efforts were successful, defendant would pay the amount agreed upon as commissions in case she herself sold the property during the life of the contract,' I see no possible legal objection to the validity of that kind of a provision, and, in substance, that is this contract."

In Hoskins v. Fogg, 60 N. H. 402, a contract signed by the owner of land to pay a real-estate broker a certain sum if he procured a purchaser, and half the sum if the owner himself sold it outside the agent's influence; with the further agreement that no other party should have the selling of the same,—was held to be a contract upon a good consideration, entitling the agent who, while performing his part of the contract, was prevented from making a sale by the owner selling it outside his influence, to re- 19 L.R.A. (N.S.)

cover the half sum agreed in the contract to be paid.

In Stringfellow v. Powers, 4 Tex. Civ. App. 199, 23 S. W. 313, a contract on the part of a landowner, giving a real-estate broker the exclusive authority to sell and the promise of all he could get over a certain amount as remuneration, was held not to be void for want of consideration. The court said that the bringing about of a sale was a valid consideration, and therefore such broker, upon the property being sold by the owner himself, was entitled to a recovery of the stipulated commission. It appeared in this case, however, that the broker had advertised the property, and was doing all he could to sell the land, and in fact was negotiating with the very person to whom the property was afterward sold by the owner.

In Singleton v. O'Brien, 125 Ind. 151, 25 N. E. 154, an agreement with a broker on the part of a landowner, looking to the sale of certain land, but reserving the right to make a sale himself, and providing that, in case he did so, the agent was to receive the same fee, was held to rest upon a sufficient consideration, and to entitle the broker to the commission, where the owner, within a short time after its execution, sold the property, although the broker had taken no steps to negotiate a sale.

In Crane v. McCormick, 92 Cal. 176, 28 Pac. 222, an agreement on the part of a real-estate owner who had listed his property with a broker to give the latter, in consideration of his expenses and efforts in attracting settlers to the county, commissions in case the land was withdrawn from sale or sold through any means during the continuation of the agreement, was held to be a valid contract, entitling the broker to his commission in case of sale by the owner; it appearing that the broker had acted upon the contract, and sent out a large amount of advertising matter.

In Gregory v. Bonney, 135 Cal. 589, 67 Pac. 1038, it was held that an agreement signed by both parties, obligating the owner of land not to sell it except through the agency of a real estate broker within a time limited; and that, in case of a sale made by the owner within such time, or, within a further period, to one whom the broker had recommended the property, he would pay the bro-

ed judgment dismissing complaint, from which judgment this appeal is taken.

Messrs. Thomas W. King and Grothorst, Evans, & Thomas for appellants:

Messrs. Richmond, Jackman, & Swansen, for respondent:

The contract was void for want of mutuality.

Greve v. Ganger, 36 Wis. 369; Bishop, Contr. § 78; 1 Parsons, Contr. 9th ed. p. 486, note; 1 Page, Contr. p. 452; Hammon, Contr. p. 682; Hoffman v. Maffioli, 104 Wis. 630, 47 L.R.A. 427, 80 N. W. 1032; Teipel v. Meyer, 106 Wis. 41, 81 N. W. 982; Stensgaard v. Smith, 43 Minn. 11, 19 Am.

St. Rep. 205, 44 N. W. 669; Hirschhorn v. Nelden-Judson Drug Co. 26 Utah, 110, 72 Pac. 386; Kolb v. J. E. Bennett Land Co. 74 Miss. 567, 21 So. 233; Walker v. Denison, 86 Ill. 142; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. 57 L.R.A. 696, 52 C. C. A. 25, 114 Fed. 77; A. Santaella & Co. v. Otto F. Lange Co. 84 C. C. A. 145, 155 Fed. 719; Eastern R. Co. v. Tuteur, 127 Wis. 382, 105 N. W. 1067.

Barnes, J., delivered the opinion of the court:

It is perfectly apparent that the signing of this paper by the defendant did not make a contract. It was not signed by the plain-

ker his full commission,—though a hard contract, was valid, in the absence of fraud, and entitled the broker to recover his commission, upon the owner selling his property to one from whom the broker had obtained a larger offer, which was not accepted.

An interesting case on this question is Owens v. Wehrle, 14 Pa. Super. Ct. 536, where it was held that, if an owner of real estate contracts under seal with a broker for the sale of his property,—which in that case was not exclusive, but provided for commissions in case a sale was made by either the broker or anyone else,—the owner cannot escape the payment of such commissions by pleading want of consideration, being prevented from doing so by the presence of the seal.

However, in Stensgaard v. Smith, 43 Minn. 11, 19 Am. St. Rep. 205, 44 N. W. 669, it was held that a writing purporting, in consideration of a broker's agreeing to act as agent for the sale of certain property, to give him exclusive authority to sell for three months, and the promise of compensation in case of sale, which, however, was not signed by the broker, was not a valid contract, being void for want of mutuality and lacking any other consideration, but was effectual only as a present revocable grant of authority to sell; and, therefore, it appearing that the owner himself sold the property before the expiration of the three months, the broker could not recover damages for breach of contract. In this case the evidence showed that the broker immediately took steps to effect a sale of the land, posted notices upon it, published advertisements in newspapers, and individually solicited purchasers. The court, however, took occasion to say: "No express agreement was shown. The mere receiving and retaining this instrument did not import an agreement thus to act for the period named, for the reason that, whether the plaintiff should be willing to take upon himself that obligation or not, he might accept and act upon the revocable authority to sell, expressed in the writing; and, if he should succeed in effecting a sale before the power should be revoked, he would earn the commission specified. In other words, the instrument was presently effectual and of advantage to him, whether he chose to place himself under contract obligations or not. For the same reason L.R.A. (N.S.)

son, the fact that for a day or a month he availed himself of the right to sell, conferred by the defendant, by attempting to make a sale, does not justify the inference, in an action where the burden is on the plaintiff to prove a contract, that he had accepted the offer of the defendant to conclude a contract covering the period of three months, so that he could not have discontinued his efforts without rendering himself liable in damages. In brief, it was in the power of the plaintiff either to convert the defendant's offer and authorization into a complete contract, or to act upon it as a naked revocable power, or to do nothing at all. He appears to have simply availed himself, for about a month, of the naked present right to sell if he could do so. He cannot now complain that the landowner then revoked the authority, which was still unexecuted."

In several cases the mutuality or consideration of the contract was not raised, these cases merely holding that, where a broker is given the exclusive right to sell certain property within a certain time, he is entitled to his commissions if he finds a purchaser within that time who is ready and willing to accept the terms, although the owner has already sold the property. Among these cases are Schultz v. Griffin, 5 Misc. 499, 26 N. Y. Supp. 713, and Levy v. Rothe, 17 Misc. 402, 39 N. Y. Supp. 1057. And this would also seem to have been held in Black v. Snook, 204 Pa. 119, 53 Atl. 648.

In Waterman v. Boltinghouse, 82 Cal. 659, 23 Pac. 195, it was held that a real-estate broker who has a contract giving him the exclusive right to sell land within a certain time cannot recover his commissions of his employer who himself sells within the time without the agency of the broker, unless he has produced a purchaser ready and willing to buy according to the terms of the contract.

Effect upon right of real-estate broker to commission on fact that owner sells to broker's customer at reduced price, see case note to Ball v. Dolan, 15 L.R.A. (N.S.) 272.

For cases dealing with the broker's right to commissions when sale is made by the owner in ignorance of the former's instrumentality in procuring the purchaser, see case note to Quist v. Goodfellow, 8 L.R.A. (N.S.) 153.

tiffs and contained no stipulation requiring them to do anything. At the time of its delivery to the plaintiffs it was entirely lacking in mutuality. The plaintiffs might have accepted the implied obligations of the writing on their part by doing the work and incurring the expense that such writing contemplated should be performed and incurred, and such acceptance, so made, would result in a binding contract. *Arnold v. National Bank*, 126 Wis. 362, 365, 3 L.R.A.(N.S.) 580, 105 N. W. 828; *Hooker v. Hyde*, 61 Wis. 204, 207, 21 N. W. 52; *Superior Consol. Land Co. v. Bickford*, 93 Wis. 220, 67 N. W. 45; *Goward v. Waters*, 98 Mass. 596, 598; *Lapham v. Flint*, 86 Minn. 376, 90 N. W. 780, 781. The implied obligation contemplated by the writing required plaintiffs to use ordinary diligence in endeavoring to make a sale of the property; and the burden was upon them to show that such diligence had been exercised by them. The inherent weakness of the plaintiffs' case was their failure to show that they had in good faith assumed and carried out their part of the obligation before the defendant consummated a sale of the property without assistance of any kind from them.

There is no finding as to the time that elapsed between the signing of the memorandum by the defendant and the sale of the farm by him. There is no finding, and no evidence, that any expense was incurred by the plaintiffs in connection with the sale of the lands. There is no proof that any particular time was spent or effort was made by plaintiffs in endeavoring to effect a sale, except as appears in the findings of the court. There is an express finding by the court that plaintiffs "had not exhibited said farm to any purchaser or taken any steps to sell the same or incurred any expense therein, except that the plaintiff, John Schoenmann, had talked to one person with respect thereto, and expected to exhibit said farm to said person, but, before doing so, was notified by the defendant that the farm was already sold." How long this conversation took place after the writing was signed by the defendant does not appear. Neither does it appear whether the conversation was merely casual, or whether time and effort was consumed in looking up this particular person, or whether he had the ability or inclination to purchase the farm in question, or why he had not looked it over before the sale was made. The finding of the court negatives the idea that the plaintiffs had accepted their obligation by using any reasonable degree of diligence to make the sale of the farm. It is true the plaintiffs claim that the finding of the court in respect to efforts used by them to sell the farm is not a correct summary of, or conclusion to draw 19 L.R.A.(N.S.)

from, the testimony in the case. The finding seems to embody every material thing that was testified to on the trial, with the possible exception of some evidence showing that one of the plaintiffs had communicated to the defendant the information that they expected to have a prospective purchaser look at the farm. It is very doubtful if this question is preserved by any proper exception to the findings of fact made by the court; but we do not deem the evidence of sufficient importance to change the result of our decision in any event.

Judgment affirmed.

Timlin, J., dissenting:

The contract was one for services in which the consideration necessary to support the contract is not the performance of the services, but the agreement to so perform. I think there was an acceptance of the written contract by the plaintiff; hence an agreement upon his part to perform. The opinion of the court seems to me to be in conflict with elementary principles of the law of contracts, and to confound failure to perform with lack of consideration.

ALABAMA SUPREME COURT.

J. H. FULTON, Appt.

v.

A. P. LONGSHORE, Probate Judge.

(— Ala. —, 46 So. 989.)

Judge — disqualification — partisanship.

1. That a judge is an active partisan does not disqualify him to try a contested election one of the parties to which is a member of his political party.

Same — bias.

2. The mere fact that a judge expressed his opinion on election day that a challenged voter had a right to vote is not sufficient to show bias sufficient to disqualify him to sit in a contest between candidates at such election, as to which was entitled to the office.

(June 3, 1908.)

Case Note. — Political affiliations as ground for disqualification of judge.

Although there are many cases in which it has been sought to disqualify a judge by reason of personal interest, prejudice, bias, or hostility, having its source in political affairs, as, for example, where the matter in controversy is a protest against a list of nominees which includes the judge himself, or a contest over an election of another officer based upon the same ground as a contest pending against the election of the judge himself, there seems to be but

APPEAL by plaintiff from a judgment of the Circuit Court for Shelby County denying a writ of mandamus to compel the judge of the Probate Court to declare his disqualification to sit as judge in a contested election case. Affirmed.

The facts are stated in the opinion.

Messrs. McMillan & Hayne, Brown & Leeper, S. B. Weakley, and J. D. Weakley for appellant.

Messrs. Whitson & Dryer for appellee.

Tyson, Ch. J., delivered the opinion of the court:

This proceeding was instituted for compelling the respondent thereto, by writ of mandamus, to certify his incompetency as judge of probate to hear and try a contested election case involving the title to the office of sheriff of his county. The contest over the right to the office is between the petitioner in this case, who is and was a Democrat, and one Norris, who is and was a Populist. It is shown by the petition, by the return thereto, and by the testimony that the respondent is, and was at the time of the election out of which the contest arose, a Populist. The grounds upon which it is sought to have him adjudged disqualified may be stated to be two: First, he had expressed the opinion, on the day of the election, to a proffered voter whose right to vote had been challenged, that he was qualified under the laws of the state to vote at the election; second, that he was an active and partisan supporter of the Populist candidate for sheriff, whose right to that office he is to hear and try as judge.

It is not contended that either of these asserted grounds would work a disqualification under the statute (Civil Code 1896, § 2637); but it is insisted that they show prejudice and bias to such an extent as that the petitioner may not have a fair and impartial trial. At the common law, as now administered in England and in the United States, bias or favor, not the result of interest or relationship, is not supposed to

exist. Says Mr. Blackstone: "For the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea." In *Turner v. Com.* 2 Met. (Ky.) 626, the court said: "At common law there were but two objections that went to the disqualification of a judge to try a cause, to wit, interest in his own behalf in the result or being of kin to others interested therein." In *Re Peyton*, 12 Kan. 407, the court said: "It will be admitted that at common law, prejudice did not disqualify a judge." In *Conn v. Chadwick*, 17 Fla. 439, this language was used: "In the time of Bracton and Fleta, a judge might be refused for good cause; but at the common law, as administered in England and the United States for centuries, judges and justices could not be challenged. There were disqualifying causes, such as interest and being of kin to the party." For a general statement of this principle, though it is, perhaps, not entirely accurate, see the text in 23 Cyc. Law & Proc. p. 582, and 17 Am. & Eng. Enc. Law 2d ed. p. 738. In the note to these works will be found many adjudged cases, where the courts have applied this principle and held the judge not disqualified on account of bias or prejudice, where no relationship or personal interest was shown, even though there existed bitter feeling and animosity between him and one of the litigants to the cause pending in his court.

No case in this state has been cited where this court has ever held to the contrary of the common rule as announced above. In some of them it has been held—and properly so—that the disqualifying interest need not necessarily be a pecuniary one, but may be a personal one to the judge. An illustration of this may be found in the case of *Medlin v. Taylor*, 101 Ala. 239, 13 So. 310, where the judge was personally interested in a pending cause involving the same contestations that were being tried in *Medlin's Case*. In *Ex parte Cornwell*, 144 Ala. 497, 39 So. 354, the disqualification of the judge

one case in addition to *FULTON v. LONGSHORE* which discusses the effect of party affiliations alone to disqualify a judge in the absence of any allegation of personal interest, prejudice, bias, or hostility except as it may be implied by the very fact of his party affiliations.

In *Powers v. Com.* 114 Ky. 237, 70 S. W. 644, 71 S. W. 494, 1050, in which the specific holding was that, if the judge had conceived and entertained such a feeling of hostility and prejudice against the accused, it was sufficient to disqualify him, the court went on to state that it did not mean to be understood as saying that a judge of one political faith might not prop-

erly try a case of a litigant of a different political faith, though the question involved was one purely political; or that the mere fact that a different political belief or affiliation was a legal ground for objecting to a trial judge. The court also said that it did not believe that the political views of judicial officers ever controlled their decisions upon matters of law before them for adjudication, though cases might arise where a judge would be disqualified in fact and in law from properly presiding at a trial by an undue bias growing out of a political controversy, as well as any other controversy.

was placed distinctly upon the point—as it was in the Medlin Case, *supra*—of personal interest in the subject-matter of the prosecution, in that, “by the alleged misconduct of the petitioner, he was made to suffer a loss in property,—money deposited in the bank,” whose assets the petitioner was charged with embezzling. Indeed, the disqualification might well have been placed distinctly upon the point of the pecuniary interest of the judge, since, under the statute, had the prosecution terminated in a conviction, a judgment in favor of the bank could well have been rendered against the petitioner for the sum shown to have been embezzled by him. *Crim. Code 1896, § 5052. In Ex parte State Bar Asso. 92 Ala. 118, 12 L.R.A. 134, 8 So. 768, is an able and exhaustive opinion, reviewing many of the authorities, upon the question of the character of interest that will disqualify a judge. It is there said: “The interest which will disqualify must be a pecuniary one, or one affecting the individual rights of the judge.” In that case it was held that Judge Head was not disqualified, notwithstanding he was a member of the association (contributing to its maintenance and support) which instigated and instituted the prosecution which he was to try. That prosecution, it was held, involved no pecuniary or personal interest of the judge. Many opinions of other courts are cited, which clearly sustain the conclusion. Indeed, we regard that case, and those cited approvingly, as conclusive of the question that no pecuniary or personal interest is here shown which will disqualify the respondent. He can have no possible pecuniary interest in the result of the contest over the sheriff’s office, nor does the contestation in any possible way affect any of his individual or personal rights. It cannot be supposed that the interest he felt, as a party man, for the success of the Populist ticket, would influence him in the discharge of his sworn duty to try the case fairly and impartially. The law tolerates no such supposition or presumption, and therefore it can have no legal existence. Such a presumption could only be indulged upon legal grounds of disqualification. The interest which a judge may have as a citizen in a public question is not a personal one. This is fully illustrated in the cases cited and quoted from in the case last above cited.*

It remains now only to dispose of the first ground above set forth, relied on for a disqualification. It was open to the trial judge, under the evidence in this case, to find that the opinion expressed by respondent was upon a statement of facts made to him which clearly showed that the voter was qualified to vote at the election, and that 19 L.R.A. (N.S.)

the opinion was expressed without knowing for whom the voter intended to cast his vote. Clearly no legal disqualification was shown here. The question of the propriety of the conduct of respondent as a citizen, in view of his judicial position, with respect to making partisan political speeches and the like, is not one for the courts, but for the electorate of his county.

Affirmed.

Dowdell, Simpson, and Anderson, JJ., concur.

ALABAMA SUPREME COURT.

SIGMUND ROMAN, Appt.,

v.

MONTGOMERY IRON WORKS et al.

(— Ala. —, 47 So. 136.)

Judgment — garnishment — direct proceeding — effect.

A judgment discharging a subscriber to the stock of a corporation as garnishee for its debt upon failure of the plaintiff to contest his answer denying indebtedness is *res judicata* of the question of indebtedness in a subsequent direct proceeding by the creditor against him to apply his individual stock subscription to the payment of the corporate indebtedness.

(Dowdell and Denson, JJ., dissent.)

(February 20, 1908.)

Case Note. — Judgment in favor of garnishee as res judicata.

In most jurisdictions the principal debtor is not a party to a garnishment proceeding to such an extent that a judgment in favor of the garnishee in such a proceeding may be used by the garnishee as a bar to a proceeding by the debtor in which the same liability or right to property is in issue as was in issue in the garnishment proceeding.

In Illinois it is expressly provided by statute that, if a person is summoned as garnishee, a judgment shall be no bar to an action brought against him by the defendant (the judgment debtor), for the same demand. *Finch v. Alexander County Nat. Bank, 65 Ill. App. 337.*

A statute is also to be found in Vermont which provides that, if a trustee is discharged in the trusteeship proceedings, the trustee’s suit is no bar to an action by the principal debtor. *Gen. Stat. p. 314, § 58; Laport v. Bacon, 48 Vt. 176.*

A similar statute is also to be found in Maine. *Webster v. Adams, 58 Me. 317.*

In Pennsylvania it seems that the principal debtor is, by rule, excluded from taking interest or part in a proceeding by his creditor to reach his money or property in the hands of a third person. It is therefore

A PPEAL by plaintiff from a decree of the City Court of Montgomery in defendant's favor in a suit to apply unpaid subscriptions of stockholders of the Montgomery Iron Works in satisfaction of its debt to plaintiff. Affirmed.

Plaintiff was the holder of certain bonds of the Montgomery Iron Works. He secured judgment on them, and execution thereon was returned "No property." To aid in the collection of these judgments, plaintiff garnished Messrs. J. W. Dimmick, A. M. Baldwin, and G. W. Craik, stockholders in the corporation, alleging that their stock subscriptions were unpaid. The garnishment was not fruitful for reasons stated in the opinion, and plaintiff thereupon instituted this proceeding as a creditors' bill to reach the amount still remaining due on stock subscriptions.

Further facts appear in the opinion.

Messrs. Gunter & Gunter, for appellant:

That the garnishee moved for his discharge after a contest was filed, but, before trial, the plaintiff took a nonsuit, did not amount to a plea in bar as *res judicata*.

Sharpe v. Wharton, 85 Ala. 225, 3 So. 787;

held in that state that judgment in favor of the garnishee cannot be used by him as a bar to an action by the principal debtor relating to the same subject-matter as that litigated in the garnishment proceeding. Ruff v. Ruff, 85 Pa. 333.

To the same effect are Lewis v. Tams, 4 Phila. 276 (action by another creditor), and Hukill v. Yoder, 29 Pittsb. L. J. N. S. 94.

In Alexander v. Segee, 101 Me. 561, 64 Atl. 1049, it was said that, where no service of a writ had been made upon the principal defendant, and he had no opportunity to be heard upon the question of the jurisdiction of the court, or the liability of the trustee, he could not be concluded by any decisions adverse to him which might be made respecting either of these questions.

Where, however, the question of the effect of a judgment in favor of a garnishee defendant arises in another action by the same plaintiff, in which it is sought to relitigate the issues which were once decided in favor of the garnishee, being substantially the question passed upon in ROMAN v. MONTGOMERY IRON WORKS, it has been held, as it was in that case, that the judgment is a bar to any subsequent action.

Thus, in Nelke v. Boldridge, 43 Mo. App. 333, on a creditor's bill to reach property in the hands of a third person, which it was claimed had been fraudulently transferred by the debtor to such third person, the court held that judgment in favor of a garnishee defendant upon his answer in a prior garnishment proceeding relating to the same subject-matter, and by the same creditor, was a final judgment upon the 19 L.R.A. (N.S.)

American Mortg. Co. v. Inzer, 98 Ala. 608, 13 So. 507; 1 Freeman, Judgm. §§ 127, 257; 1 Black, Judgm. §§ 242, 593; Munday v. Vail, 34 N. J. L. 418; Griel v. Loftin, 65 Ala. 591; Wise v. Falkner, 45 Ala. 473; McAbee v. Parker, 83 Ala. 169, 3 So. 521; Baldwin v. Roman, 132 Ala. 323, 31 So. 596; Harrison v. Nixon, 9 Pet. 503, 9 L. ed. 208; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; Lincoln Nat. Bank v. Virgin, 36 Neb. 735, 38 Am. St. Rep. 747, 55 N. W. 218; Spoors v. Coen, 44 Ohio St. 497, 9 N. E. 132; Sheldon v. Newton, 3 Ohio St. 494.

The plea must conclusively show that the judgment pleaded as a bar, was rendered on the merits of the new suit.

Burgess v. Sugg, 2 Stew. & P. (Ala.) 341; McCall v. Jones, 72 Ala. 371; 2 Black, Judgm. § 593; Griel v. Loftin and Baldwin v. Roman, supra; Jennings v. Pearce, 99 Ala. 303, 13 So. 605.

Mr. Massey Wilson for appellees.

Anderson, J., delivered the opinion of the court:

When this cause was here upon former appeal (147 Ala. 434, 41 So. 811) we held

merits, and was therefore necessarily a bar to the creditors' bill.

Fulton v. Gesterding, 47 Fla. 150, 36 So. 56, also seems to recognize that, if the same subject-matter has once been litigated in a garnishment proceeding, it will be a bar to a subsequent action relating to the same matter by the same plaintiff. It was, however, held in this case that the garnishee, in pleading and using such former garnishment suit as a bar, had not sufficiently shown that it was precisely the same subject-matter that had been litigated in the former suit, and that, therefore, it would not operate as a bar to the second action.

But Hamilton Nat. Bank v. Horton, 68 N. H. 235, 44 Atl. 296, said that, after the discharge of a trustee in a trustee action, there is nothing to prevent the money in the hands of the trustee from being paid over to the principal defendant, and therefore a third party could attach it and have it applied on his claim; and, this being true, it was held that there was no reason why the plaintiff in the original action could not again bring trusteeship proceedings in a new suit on another cause of action to reach the same property, and that the former discharge would not be a bar to the action. The proceedings in this action related to wages due the principal defendant, and which he claimed to be exempt from garnishment or attachment.

In Hilliard v. Burlington Shoe Co. 76 Vt. 57, 56 Atl. 283, it was held that a verdict in favor of the garnishee in a proceeding in which the principal defendant was not served with process was not binding and *res judicata* as between the principal defendant and the plaintiff as to any issues tried therein.

that the plea of *res judicata* interposed by Dimmick was sufficient, and, as its averments were admitted, he was entitled to his discharge. We are still of the opinion that the judgment rendered, discharging him upon the denials of his answer, was conclusive on this particular creditor (Roman), and that there was nothing owing from Dimmick to the Montgomery Iron Works. Had the complainant contested the answer, there could be no question as to the conclusiveness of the judgment. On the other hand, when the garnishee filed his sworn answer denying indebtedness, the plaintiff had the right to contest it, and, failing to do so, he in effect conceded that it was true, and the garnishee was entitled to his discharge. *Hurst v. Home Protection F. Ins. Co.* 81 Ala. 174, 1 So. 209. And a judgment so rendered was an adjudication by the court as to an indebtedness *vel non*. It was a finding upon the only issue involved in the controversy, and was to all intents and purposes a judgment upon the merits. It is true that a judgment of nonsuit or dismissal in a garnishment case would conclude nothing but costs. *Wise v. Falkner*, 45 Ala. 471. But the failure of the creditor to contest the answer, and who in the meantime permits the court to proceed to judgment, is unlike the mere dismissal of the garnishment, but is in effect an admission of the recitals of the answer. And a judgment rendered thereon for the plaintiff, if the answer admitted indebtedness, would be conclusive between the immediate parties, and one rendered for the garnishee, when the answer denied indebtedness, would also be conclusive as between the creditor and the garnishee.

The creditor makes the only issue the law contemplates, by making the affidavit which is the institution of the suit, and which charges the garnishee with being indebted, etc., to the debtor. If the garnishee admits the charge by his answer, the plaintiff would be entitled to a judgment against him, and there would be no room to question the conclusiveness of the judgment. If he denies the indebtedness, that merely puts upon the plaintiff the burden of proving his charge, which he can do by contesting the answer, and failing to do so is no failure to present an issue, as the issue was previously presented, but is a declination on his part to prove the one and only issue involved. And a judgment rendered for the garnishee would be as conclusive as one rendered for the plaintiff, when the indebtedness was admitted by the answer. Our court, in the case of *Steiner Bros. v. First Nat. Bank*, 115 Ala. 379, 22 So. 30, speaking through Brickell, Ch. J., in discussing judgments in gar-

nishment suits, and the effect of same, says: "A garnishment, as it has often been defined and described in the course of judicial decision, is 'the institution of a suit by a creditor against the debtor of his debtor, and is governed by the general rules applicable to other suits adapted to the relative situation of the parties.' 1 Brickell, Dig. p. 173, § 276. Such being the nature and character of the proceeding, it follows necessarily that the judgment rendered, as between the parties, the plaintiff instituting it, and the garnishee standing in the relation of a defendant, has all the properties and qualities of finality and conclusiveness of a judgment rendered in any other civil suit. A judgment against the garnishee in favor of the plaintiff as finally and conclusively fixes and determines the liability of the garnishee and the rights of the plaintiff as if it had been rendered in a suit *inter partes* commenced in the ordinary mode of instituting civil suits; and such is in effect the declaration of the statute. Code 1886, § 2983. A judgment against the plaintiff, discharging the garnishee, the only final judgment which can be rendered in his favor, as conclusively adjudges that he was not subject to the process, was not the debtor of the plaintiff, and had not possession or custody or control of effects of such debtor. Either judgment, the one in favor of the plaintiff, or that in favor of the garnishee, concludes the rights of the parties in respect to the cause of action involved,—the matter of right asserted by the one and denied by the other."

The decree of the City Court is affirmed.

Haralson, Simpson, and McClellan, JJ., concur.

Dowdell and Denson, JJ., dissent.

Petition for rehearing denied July 8, 1908.

DISTRICT OF COLUMBIA COURT OF APPEALS.

W. T. WALKER FURNITURE COMPANY,
NY, Appt.,
v.

WILLIAM H. DYSON.

(32 App. D. C. 90.)

Appeal — exception — generality.

1. An exception that a charge is contrary to law is too general to be of avail on appeal.

Trespass — conditional sale — retaking property — force.

2. A conditional vendee of personalty, who, in the contract, agrees that, upon

failure to make the requisite payments, the vendor may take possession of the property and remove the same, cannot recover against the vendor in trespass for using only the necessary force in retaking the property, requisite to overcome resistance wrongfully interposed by him.

(November 4, 1908.)

Case Note. — Right to employ force in retaking property sold conditionally.

As to liability for the abuse of the right to retake property sold conditionally, on breach of condition, see note to *Flaherty v. Ginsberg*, 13 L.R.A. (N.S.) 1132.

The courts are not in entire harmony as to the right of a seller of property on conditional sale to employ force in retaking it. The note above mentioned shows that the seller would be liable if he abused the license given him to retake the property upon a breach of condition, and, applying that principle, the courts are unanimous that unnecessary force will render the seller liable for such damages as may result from the use of such excessive force.

In some jurisdictions the courts deny to the seller the right to exercise any degree of force in retaking property sold conditionally on breach of condition. Thus, in *Pagan v. Drake Furniture Co.* 73 S. C. 364, 53 S. E. 542, the seller was held liable for entering upon the premises of the purchaser on conditional sale of a tablecloth, and intimidating the purchaser by drawing a pistol and cursing her, and threatening to kick her, and using violence in seizing the cloth. It is not entirely clear whether the case was submitted to the jury on the theory that the seller would be liable only if the claim of the purchaser that the tablecloth was paid for were found to be true, or whether that was simply one of the elements entering into the question of the wrongfulness of the act and the amount of damages to be awarded therefor.

In *Culver v. State*, 42 Tex. Crim. Rep. 645, 62 S. W. 922, a seller of rugs was held properly convicted of an assault upon the purchaser thereof by conditional purchase, for forcibly removing them on the theory that he had no right to exercise any degree of force in retaking the rugs on breach of condition. The clause in the agreement to pay the purchase price empowered the seller to take possession of and sell the rugs on default in payment of the purchase money and interest thereon. Upon the question whether the license thus given authorized the use of force, the court said: "Nor do we agree that he [the seller] was in possession of the rugs, by merely taking manual possession of the same in the room without her [the purchaser] consent. The room was her home, and it and all therein was in her possession, and she had a right to prevent appellant or anyone else from taking the goods that were in her possession in said room from the same without her consent; and ap- 19 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Supreme Court in plaintiff's favor in an action brought to recover damages for alleged wrongful seizure of property belonging to plaintiff. Reversed.

The facts are stated in the opinion.

Mr. Lorenzo A. Bailey, for appellant:

The contract was a license to enter and

pellant had no right to forcibly eject her from the door, and so take his departure with her goods. In thus holding, we are not nullifying appellant's rights under the contract. This, as we understand it, only gave him authority to take possession with her consent, and not against her consent. If she improperly withheld this consent, the courts were open to him."

In *Terry v. Williams*, 148 Ala. 468, 41 So. 804, the fact that one, in borrowing money of pawnbrokers, entered into a contract with them for the purchase of certain property, by which the title was reserved to the seller, when, as a matter of fact, no property was purchased, but the property purported to have been purchased was then the property of the borrower, was held to give to the seller or lender no right to enter upon the premises of the buyer, and, in a rude, wanton, and reckless manner, possess himself of the property. For the application of this doctrine to a conditional sale see *Stowers Furniture Co. v. Brake* (Ala.) 48 So. 89.

While the specific question was not passed upon, it was stated in *Ramey v. W. W. Kimball Co.* 22 Ky. L. Rep. 597, 58 S. W. 471; *White Sewing Mach. Co. v. Conner*, 111 Ky. 827, 64 S. W. 841, and *C. F. Adams Co. v. Sanders*, 23 Ky. L. Rep. 1978, 66 S. W. 815, that the seller of property conditionally was not liable for retaking the same, unless in so doing he inflicted personal injury upon the purchaser by the use of force.

This doctrine was also apparently recognized in *North v. Williams*, 120 Pa. 109, 6 Am. St. Rep. 695, 13 Atl. 723.

A different rule was, however, applied in *Lambert v. Robinson*, 162 Mass. 34, 44 Am. St. Rep. 326, 37 N. E. 753, wherein the doctrine was enunciated and applied as to the right of a seller of property at a conditional sale to exercise force in retaking the same. That "a person who has a right to enter upon the land of another and there do an act may use what force is required for the purpose, without being liable to an action. If he commits a breach of the peace, he is liable to the commonwealth. If he uses excessive force, he is liable to a personal action for an assault." It was held that the evidence in this case was sufficient to authorize the submission to the jury of the question of excessive force.

While it does not appear what, if any, force was used in *Wilmerding v. Rhodes-Haverty Furniture Co.* 122 Ga. 312, 50 S. E. 100, yet it does appear that the seller forcibly retook possession of property sold conditionally. The court, however, held that he was not liable for a trespass in so doing.

take the furniture upon default by the plaintiff; and that license was coupled with an interest in the goods, and was therefore irrevocable.

2 Cooley, Torts, 3d ed. pp. 636, 638; Walsh v. Taylor, 39 Md. 592; Lambert v. Robinson, 162 Mass. 34, 44 Am. St. Rep. 326, 37 N. E. 753; Heath v. Randall, 4 Cush. 195; Smith v. Hale, 158 Mass. 178, 35 Am. St. Rep. 485, 33 N. E. 493; Fischer v. Johnson, 106 Iowa, 181, 76 N. W. 658; Erskine v. Savage, 96 Me. 57, 51 Atl. 242; Sterling v. Warden, 51 N. H. 240, 12 Am. Rep. 80; Blades v. Higgs, 10 C. B. N. S. 713; Hodgesden v. Hubbard, 18 Vt. 507, 46 Am. Dec. 167; Baldwin v. Hayden, 6 Conn. 457; Hopkins v. Dickson, 59 N. H. 235.

Messrs. R. B. Dickey and John Ridout, for appellee:

Contracts such as the one here in question contemplate a peaceable entry; and, should resistance be offered, the vendor must resort to the courts for redress.

White Sewing Mach. Co. v. Conner, 111 Ky. 827, 64 S. W. 841; McClelland v. Nichols, 24 Minn. 176; North v. Williams, 120 Pa. 109, 6 Am. St. Rep. 695, 13 Atl. 723; Sampson v. Henry, 11 Pick. 379; Churchill v. Hulbert, 110 Mass. 42, 14 Am. Rep. 578; Heath v. Randall, 4 Cush. 195; Drury v. Hervey, 126 Mass. 519; Shireman v. Jackson, 14 Ind. 459.

Robb, J., delivered the opinion of the court:

This is a suit in trespass on a declaration in which plaintiff, William H. Dyson, averred that on May 25, 1906, he was the owner and possessor of certain household goods and furniture then lawfully in his possession and daily use in his dwelling house and home in this city, and that the defendant, the W. T. Walker Furniture Company, a corporation, through its officers, agents, and employees, on that day, with force and arms wrongfully came upon said premises and into said dwelling house and home, and wrongfully and unlawfully took and carried away said furniture.

The defendant interposed a plea of not guilty, and also averred a conditional sale between it and the plaintiff under the terms of which the goods mentioned in the plaintiff's declaration were the property of the appellant, the title to said goods being reserved until plaintiff had paid the stipulated sum of \$66 for all of said goods, and that the amount then paid was \$53, leaving a balance due of \$13; that, under the terms of said conditional sale, the defendant was authorized and empowered to take possession of said goods and remove the same, and retain as rent for said goods all moneys theretofore paid on said contract by the 19 L.R.A. (N.S.)

plaintiff; that plaintiff in said contract agreed to "waive, relinquish, and release any trespass and right of action for damages whatsoever, which he could or might have against the defendant by reason of any matter or thing done in obtaining possession of said chattels."

The evidence of the plaintiff tended to show full payment for the furniture and compliance with the terms of the contract, and that the defendant's agents forcibly entered and carried away most of said furniture.

The defendant introduced the contract described in its plea, and its evidence tended to show a balance due under the contract, and that no more force was used in retaking the furniture than was reasonably necessary.

The plaintiff obtained a verdict and judgment in the sum of \$171.25 and defendant appealed.

At the close of the court's charge to the jury the defendant excepted to each part thereof "on the ground that the same was contrary to law." This exception was clearly too general to avail the defendant here. He should have stated the specific grounds for his exceptions, and thereby given the trial court an opportunity to pass upon them. If parties are to be permitted to avail themselves of such general exceptions, it is apparent that a reversal of a case may be asked on grounds not suggested to or considered by the trial court. This question has so recently been adverted to that it is not necessary to pursue it further here. McDermott v. Severe, 202 U. S. 600, 50 L. ed. 1162, 26 Sup. Ct. Rep. 709, affirming 25 App. D. C. 276; Brown v. Savings Bank, 28 App. D. C. 353; District of Columbia v. Duryee, 29 App. D. C. 327, 10 A. & E. Ann. Cas. 675.

The appellant specifies as error the refusal of the trial court to instruct the jury "that if, upon all the evidence, they believed that the goods taken by the defendant's employees were part of the goods received by the plaintiff from the defendant under the contract mentioned in the testimony, and that at the time of such taking the plaintiff had paid under said contract not more than \$56, and that, in entering the plaintiff's house and in the taking and removal therefrom of said goods by the defendant's employees, they had used only such force as was reasonable and necessary, the verdict should be for the defendant."

That the clause in the contract authorizing the vendor to enter the premises of the vendee and take possession of and remove the goods mentioned in the contract, upon a breach of the terms thereof, constituted an irrevocable license coupled with an interest,

is not open to question. The question, therefore, for determination, is, whether one who has given such a license can recover in trespass in a case where he wrongfully interposed resistance, and the vendor used only such force as was reasonably necessary in overcoming such resistance.

In the early case of *Wood v. Manley*, 11 Ad. & El. 34, the plaintiff sold a quantity of hay then on his land to the defendant, with license to enter and take the same. Subsequently plaintiff served upon defendant a written notice not to enter or commit any trespass on plaintiff's premises. The plaintiff having locked his gate, the defendant broke open the same, entered, and carried away the hay. Lord Denman, Ch. J., in passing upon the case, said: "Mr. Crowder's argument goes this length: That, if I sell goods to a party who is by the terms of the sale to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this. A license thus given and acted upon is irrevocable."

Hodgden v. Hubbard, 18 Vt. 504, 46 Am. Dec. 167, was an action for assault and battery, brought by one who had fraudulently obtained possession of certain personal property, and from whom such property had been forcibly retaken by agents of the vendor. The court said: "Whoever is guilty of a breach of the peace, or of doing unnecessary violence to the person of another, although it may be in the assertion of an unquestioned and undoubted right, is liable to be prosecuted therefor. But the fraudulent possessor is not the protector of the public interest. . . . The plaintiff had no lawful possession, nor any right to resist the attempt of the defendants to regain the property, of which he had unlawfully and fraudulently obtained the possession. By drawing his knife he became the aggressor, inasmuch as he had no right thus to protect his fraudulent attempt to acquire the stove, and the possession of the same, and it was the right of the defendants to hold him by force, and, if they made use of no unnecessary violence, they were justified; if they were guilty of more, they were liable."

In *Walsh v. Taylor*, 39 Md. 592, the facts were quite similar to the facts in this case. The court said: "The contract, the construction of which was for the court, plainly gave the defendant an irrevocable license, or, rather a license coupled with an interest; and, as such, the plaintiff could not withdraw from it, and hold the defendant as a trespasser for doing what she had agreed he might do with impunity."

Lambert v. Robinson, 162 Mass. 34, 44 Am. St. Rep. 326, 37 N. E. 753, was an ac- 19 L.R.A. (N.S.)

tion in tort for entering and breaking plaintiff's close, and for assault. The plaintiff was in possession of certain articles of household furniture under an agreement, the terms of which were similar to the terms of the agreement in the present case. The acts complained of were committed by the defendants in retaking the furniture. The court ruled that the defendants, having a right to enter and remove the furniture, were entitled to use such force as was reasonably necessary, and that they were only liable in case they used excessive force; and "that a person who has a right to enter upon the land of another and there do an act may use what force is required for the purpose, without being liable to an action. If he commits a breach of the peace, he is liable to the commonwealth. If he uses excessive force, he is liable to a personal action for an assault."

To the same effect are *White v. Elwell*, 48 Me. 360, 77 Am. Dec. 231, and *Willoughby v. Northeastern R. Co.* 32 S. C. 410, 11 S. E. 339.

Jones, in his *Treatise on Landlord and Tenant* (at § 558), says: "It may be stated as a general rule that, though an entry by force might subject a landlord to penalties for a breach of the law criminally, it confers no right of action on the tenant thus holding without any right of possession" § 561. "The Colorado statute takes away the right that existed at common law to make entry by force, although the right to possession may exist. Yet a license reserved in the lease to make such an entry does not contravene the statute, and, under such a provision, the landlord may enter and remove a tenant upon condition broken, if he use no unnecessary force to accomplish his purpose." The same author alludes to the rulings in *Ambrose v. Root*, 11 Ill. 497, 52 Am. Dec. 456, and *Fabri v. Bryan*, 80 Ill. 182, to the effect that, although courts will not lend their aid to enforce a contract to accomplish something prohibited by law, an agreement authorizing an entry without liability as a trespasser for the use of force is not an agreement to do an unlawful act; and that a party acting under such a contract would be liable criminally for a breach of the peace, but not liable in a civil action for assault and battery.

In this case the plaintiff authorized the defendant to retake the goods in the plaintiff's possession upon a breach of the conditions of the contract. If the jury should find that a breach of the contract had occurred, and that the defendant used only such force as was reasonably necessary in overcoming the resistance the plaintiff thus wrongfully interposed, the plaintiff is not entitled to recover in this action. If, on

the other hand, the jury should determine that there had been no breach of the terms of the contract, and that the plaintiff had paid for the furniture, then the defendant was a trespasser and liable to respond in damages.

Such contracts are burdensome and often oppressive, but, in the absence of fraud, the vendee is himself responsible for the situation, for he signed the contract. The liability to original prosecution and the certainty of being required to respond in damages for an abuse of the license thus obtained, will deter vendors from the use of force. The defendant was entitled to the instruction requested, and, therefore, the judgment must be reversed with costs and the case remanded for a new trial.

IOWA SUPREME COURT.

HEMMER, Plff. in Certiorari,
v.

ROBERT BONSON, District Judge.

(— Iowa, —, 117 N. W. 257.)

Certiorari — erroneous decree — who entitled to.

1. A consent decree in an action under the statute by a citizen to enjoin the maintenance of a liquor nuisance, which permits acts contrary to the statute and prejudicial to the community, of which he fails or refuses to seek correction by appeal, may be reviewed under a writ of certiorari at the suit of any citizen, upon a proper showing of his qualifications.

Same — interest.

2. The owner of property adjoining that on which is maintained a liquor nuisance has sufficient interest to be entitled to seek a writ of certiorari to review a consent decree in a suit by a citizen to enjoin the maintenance of the nuisance, which permits

acts contrary to the statute and prejudicial to the community.

Same — motive.

3. That the real motive of an interested person in applying for a writ of certiorari to review a decree in a suit to enjoin the maintenance of a liquor nuisance, which permits acts contrary to the statute and prejudicial to the community, is to compel the purchase of his property at an exorbitant price, cannot be considered by the court as a reason for denying the relief.

Same — extraneous matters.

4. Neither the oral statements of a judge in entering a decree enjoining the maintenance of a liquor nuisance, which by its terms, permits acts contrary to the statute and prejudicial to the community, nor the interpretation which the parties have put upon the decree, can be considered upon a petition for a writ of certiorari to correct the decree.

(July 9, 1908.)

PETITION for a writ of certiorari to review a judgment of the District Court for Dubuque County enjoining the maintenance of a liquor nuisance. Annulled.

The facts are stated in the opinion.

Messrs. William Graham and Andrew P. Gibbs for petitioner.

Weaver, J., delivered the opinion of the court:

Briefly stated, the case is as follows: In April, 1907, one Thorne, a citizen of Dubuque, began an action in equity, alleging that certain persons, named as defendants therein, were maintaining a liquor nuisance on lot No. 295, in said city, and asking that the same be enjoined, as provided by statute. To this petition the parties charged with maintaining the nuisance appeared and defended, and, after due hearing, the court found that the allegations of the petition had been sustained, and entered a decree of perpetual injunction in words as follows (omitting title):

Case Note. — *Who is entitled to invoke certiorari to review a decree or order affecting the sale of intoxicating liquors?*

Whatever the general rule may be as to the issuance of the writ of certiorari at the demand of one who was not named as a party to the proceedings in which the judgment or order sought to be reviewed was entered, if it is true, as was said in *HEMMER v. BONSON*, that when the matter to be reviewed is one which affects the public generally, an individual citizen may ordinarily invoke the remedy of certiorari, it would seem that the rule allowing an individual such right would be especially applicable to cases involving the sale of intoxicating liquors; and it is probably for this reason that it has been generally held that where a license for the

sale of intoxicating liquors is granted by a body not having the authority to do so, a writ of certiorari may be allowed at the instance of persons who are mere residents and taxpayers of the municipality, and who had remonstrated before the local body against its action, although there is some conflict of opinion on the question of the necessity of the remonstrance.

This is clearly so held in *State, Dufford, Prosecutor, v. Staats*, 54 N. J. L. 286, 23 Atl. 667; and was evidently also recognized in *State, Dufford, Prosecutor, v. Nolan*, 46 N. J. L. 87; and *State, Austin, Prosecutor, v. Atlantic City*, 48 N. J. L. 118, 3 Atl. 65.

In *State, White, Prosecutor, v. Atlantic City*, 62 N. J. L. 644, 42 Atl. 170, it was held that where a license to sell intoxicating liquors has been granted by a municipal body contrary to law, such action may, in the dis-

"Now, on this June 12, 1907, a regular day of said court, the above-entitled cause came on for hearing, J. C. Chalmers appearing as counsel for plaintiff, and H. Michel appearing as counsel for defendants, and the court, after duly considering the pleadings, proof offered, and statements of counsel, finds, in pursuance thereof, the allegations of plaintiff's petition to be sustained in the particulars hereinafter specially enjoined: It is therefore ordered, adjudged, and decreed by the court that the defendant occupants, Schaffhauser Bros., be and are hereby perpetually enjoined from maintaining and continuing the condition complained of in the saloon upon the premises described as city lot No. 295, in the city of Dubuque, county of Dubuque, and state

of Iowa, to the extent and in the particulars as follows: (1) From permitting or making sales of intoxicating liquors therein, or elsewhere, in any saloon in the nineteenth judicial district, on the first day of the week, commonly called Sunday, or on the evening of such day, or general election days, and on Christmas. (2) From making sales of such liquors earlier than 5 o'clock A. M., or making sales later than 11 o'clock P. M., during the week days. (3) From knowingly making sales of such liquors to men who have taken the so-called cures for drunkenness, minors, and drunkards. (4) From the sale of such liquors to any person whose wife, husband, parent, child, brother, sister, guardian, ward over fourteen years of age, or employer shall, by written notice,

cretion of the court, be reviewed on certiorari, at the instance of a citizen and taxpayer of such municipality, although he had not remonstrated before the local body against its action. The court said: "It has usually happened in such cases that the party applying for the writ has not only been a resident and a taxpayer, but also that he has remonstrated before the local body against its action. But the fact that the applicant for the writ has been a remonstrant against the action complained of, although it may be persuasive in determining whether or not his application should be granted, is not jurisdictional. The fact that the applicant is a resident and taxpayer, without more, is sufficient to justify the action of the court in allowing the writ."

In *State ex rel. Campbell v. Heege*, 37 Mo. App. 338, it was held that after the refusal by the attorney general of the state and by the prosecuting attorney of the county to institute proceedings, due to the views taken by them of their scope of duty, a writ of certiorari may be granted upon application of assessed, tax-paying citizens of the township, who had filed a remonstrance, to review the alleged illegal action of the county court in granting a certain dramshop license. The court took occasion to say: "Our statutes relating to dramshop licenses recognize the principle that the granting of a dramshop license is of interest to the assessed, tax-paying citizens of the cities, towns, or municipal townships, by making it a condition precedent to the granting of such license that the applicant shall support his application by the petition of at least a majority of the tax-paying citizens of the city, incorporated town, or municipal township containing twenty-five hundred inhabitants or more; and we think we merely carry out the policy of this statute in recognizing the right of citizens of the municipality or township remonstrating against the issuing of the license to remove the record of the county court to a superintending court, for the purpose of having the question determined whether it has been granted in a case within the jurisdiction of the county court." 19 L.R.A. (N.S.)

A similar case and holding to the same effect is *State ex rel. Hill v. Moore*, 84 Mo. App. 11. In this case, however, it was contended that because no remonstrance had been filed it was distinguishable from the *Heege* Case. The court, however, said that the dramshop act failed to disclose any right of the tax-paying citizens to file a remonstrance against the granting of dramshop licenses, or, by any form of protest, to become in any sense parties to the record; such proceedings being purely *ex parte*.

In *State ex rel. Ferry v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219, it was held that a citizen who desires to inspect recommendations filed with the collector of taxes as the basis for issuing pending liquor licenses, in order to ascertain whether the provisions of the law have been observed, is entitled to mandamus to compel the exhibition of such letters. The court, after reviewing a number of cases relevant to this question, said: "These cases seem to indicate that with us the exception to the rule is extended so far as to justify this court in acting by mandamus, certiorari, or quo warranto, at the instance of private persons, for the redress or prevention of public wrongs by public bodies and officers whose official sphere is confined to some political division of the state, whenever the applicant is one of the class of persons to be most directly affected in their enjoyment of public rights, and the public convenience will be subserved by the remedy desired."

In *McCreary v. Rhodes*, 63 Miss. 308, it was held that a qualified voter of a city, who appears before the municipal authorities of such city some time after the filing of a petition for a license to retail liquor, but before final action thereon, and objects to the issuance of such license, thereby becomes connected with the proceedings sufficiently to enable him to prosecute a writ of certiorari to have the same reviewed.

In *Darling v. Boesch*, 67 Iowa, 702, 25 N. W. 887, it was held that, under a provision of the Code permitting any resident of the county to appear and show cause why a permit to sell intoxicating liquors should not be granted to an applicant therefor, such person

forbid the same. (5) From having any obscene pictures in said saloon. (6) From permitting gambling with cards, dice, billiards, by bowling, or by maintaining slot machines, in said saloon, or permitting music, dancing, or other like form of entertainment therein. (7) From establishing or conducting any new saloon without first obtaining a resolution of the city council of the city of Dubuque consenting thereto, and filing same with the county auditor. (8) From having any women employed in said saloon, from serving any free lunches therein, and from conducting said saloon otherwise than in a quiet, orderly manner. (9) From conducting a saloon on the premises described herein, or elsewhere in this nineteenth judicial district of Iowa, while holding any township, town, city, or county office to which he may hereafter be elected. (10) From allowing any wine rooms in or as a part of said saloon. (11) From the sale of such liquors in the saloon on the premises herein described, in any other than a single room, and from erecting or maintaining screens or blinds in front of said saloon or obstructing the view from the street, except that blinds or screens not more than 5 feet in height, measuring from the sidewalk, may

be maintained during the times when sales are not otherwise herein prohibited. (12) The defendant owner, Geo. Schaffhauser, is hereby perpetually enjoined from knowingly permitting any violation of the terms of this decree in the saloon upon the said described premises. (13) Judgment is hereby rendered against the defendant occupant Schaffhauser Bros. for the costs of this action, taxed at \$—, including the statutory attorney's fee of \$25 for plaintiff's attorney, and the same shall be and remain a lien against the premises herein described until fully paid, and execution shall issue therefor unless sooner paid.

"Robert Bonson, Judge of said court."

It will be observed that this decree does not enjoin the defendants from continuing to keep and sell intoxicating liquors upon the premises; but, on the contrary, in form and substance, it presupposes the continuance of the business. The injunction goes no further than to regulate such business in certain particulars. It does not recite or find that the provisions of the mulct law, so called, had ever been complied with by the county or state, or that the defendants had in any manner attempted to observe the conditions necessary to entitle them to the

in effect becomes a party to any proceeding for the granting of a permit to sell such liquors, and therefore, in a proper case, is entitled to have the proceedings reviewed on certiorari, although he has no pecuniary or property interest that is affected by the action of the board.

It has been held, however, that where no one signed a counter petition against the issuance of the license, and no objections whatsoever had been made, a number of the qualified voters of the town are not so connected with the proceedings as to enable them to invoke the common-law writ of certiorari, and thereby have reviewed the proceedings of the board of mayor and aldermen, who had granted the license. *McCreary v. O'Flinn*, 63 Miss. 204.

In *Stokes v. Wall*, 112 Ga. 349, 37 S. E. 383, it was held that the granting by municipal authorities of a license to sell intoxicating liquors is not reviewable at the instance of a citizen and taxpayer who undertakes, as such, to sue out a certiorari for this purpose, when there is no provision of law authorizing him to contest the granting of such license, or to become in any manner a party to the application therefor. It appeared in this case also that the petitioner had appeared at the meeting of the town council when the license was granted, and objected to the granting of the same. The court, however, after distinguishing *McCreary v. Rhodes*, supra, on the ground that a statute in Mississippi permitted, on the filing of a petition for a license to retail liquor, the presentation of a counter petition by one or more legal voters of the town, 19 L.R.A. (N.S.)

said: "If he had a right to appear at a meeting of the town council, and object to a license being granted to an applicant therefor, and, upon his objection being disregarded, to sue out a writ of certiorari, every other citizen and voter of the town had the same right; and to permit the official acts of the mayor and council to be interfered with in such manner would be intolerable, and contrary to all precedent, so far as we know."

In *Deberry v. Holly Springs*, 35 Miss. 385, it was held that although at common law none but a party to the record or judgment could maintain the writ of certiorari, under a statute permitting any person who feel themselves aggrieved by the judgment of the board of police to appeal by certiorari to the circuit court, the corporate authorities of the town were proper parties to appeal by certiorari from an order of the board of police granting a license to retail spirituous liquors within the limits of the corporation.

It would seem almost naturally to follow that where the order granting one the privilege of selling intoxicating liquors causes some peculiar, individual injury, as was the case in *HEMMER v. BONSON*, such person injured would have the right to invoke the writ of certiorari to review the proceedings.

A case of this nature is *Dexter v. Cumberland*, 17 R. I. 222, 21 Atl. 347, reviewed and sufficiently set out in *HEMMER v. BONSON*.

In *Rhode Island Soc. v. Budlong* (R. I.) 25 Atl. 657, it was held that a society which had become a party to the proceedings by appearing in pursuance of the notice given by

protection of said statute. While enjoining some of the acts forbidden by the statute, it directly or inferentially permits others which are no less positively forbidden, even where the mulct law is in force. See Code, § 2448. For instance, it not only leaves the defendants at liberty to sell, but to continue the sales until 11 o'clock at night, to put up screens 5 feet high at the windows of the saloon, to provide the room with chairs, benches, and tables, to conduct the business without bond, and without the consent of the adjacent property owners, and in many other ways it ignores the express provisions of the statute. Thereafter, neither party named in said proceedings having appealed, and the time for such appeal having expired, the plaintiff herein, a citizen of the state and county, and owner of property adjoining the lot on which the business was being maintained, applied to this court for a writ of certiorari to review said decree. The writ being allowed and served, the judge presiding at the rendition of the decree made return and answer thereto as follows: "First, denies the jurisdiction of this court to consider and pass upon the validity of the decree; second, alleges that the writ is not sued out in good faith by the

petitioner, but to compel the defendants in the decree to purchase her property at an exorbitant price; third, that the decree was entered by the consent of the parties and counsel, and with the oral statement of the court, and the understanding by all persons concerned, that it was not to be regarded as a permit or license to violate the law of the state."

Other matters are averred having no relevancy to the complaint made, except to make clear the good faith of the respondent; but, his good faith not having been assailed by the petitioner, and not being questioned by this court, we shall not take time to recite them here.

The first and only serious question suggested relates to the right of the petitioner, or any other person than the plaintiff named in the injunction proceeding, to sue out a writ for a review of the decree. It may be conceded that, as a general rule, certiorari will not issue at the demand of one who is not named as a party to the proceedings in which the judgment or order sought to be reviewed was entered. But this is by no means universally true. If the petitioner for the writ is a party in substance, though not in form, he may have the writ. So,

the council, and filing its objection, and which owned land within 200 feet of the place for such a license for the sale of intoxicating liquor was requested, had such a special interest in the matter in issue as entitled it to file a petition for a writ of certiorari to review the proceedings of the city council in granting such license. At a later hearing of this case it was found that the petitioners in the above case did not own the land within 200 feet of the building for which the license was granted, and therefore, in *Rhode Island Soc. v. Cranston*, 21 R. I. 577, 44 Atl. 223, it was held the petitioner could not be regarded as a proper party any more than any other person who might see fit to object to the granting of the license.

Nor would there seem to be any question but that the person to whom the privilege for the sale of intoxicating liquors had been granted, had sufficient personal interest to institute certiorari to review a judgment or decree directly affecting his interests.

Thus, in *State v. Robbins*, 54 N. J. L. 566, 25 Atl. 471, it was held that the owner of an inn which had been licensed for several years at a nominal sum can prosecute a writ of certiorari to try the legality of an order for an election which is to determine whether or not a very much larger license fee is to be charged, since a direct private injury to his property is threatened by the proceedings attacked.

So, in *Miller v. Jones*, 80 Ala. 89, one to whom a license had been granted for the sale of intoxicating liquors was held to have sufficient individual interest in the subject-matter to permit him to apply to the circuit court for a writ of certiorari to review

an election in favor of prohibition, held valid by the probate court.

However, in *Lexington v. Sargent*, 64 Miss. 621, 1 So. 903, where a person commenced a suit by certiorari to review and annul an ordinance or resolution of record, made by the town council, to the effect that, in accordance with the petition of a majority of the voters against the issuance of a license, no such license would be issued for twelve months, and where, besides the illegality of the petition and the disqualification of the mayor and council, he alleged that, prior to the filing of such petition, he had himself filed a petition for a license, signed by a majority of the legal voters, and conforming in every respect to the requirements of the statute, but did not allege that any final action had been taken on such petition, it was held that, as he was not a party to the proceeding sought to be reviewed, he was not entitled to maintain a writ of certiorari.

It is probably well to note that in several cases the court, without expressly passing on the question as to whether or not they were proper parties, has allowed writs of certiorari to review the jurisdiction of local bodies exercising the power of licensing the sale of intoxicating liquors, at the instance of persons in the place where the license was to be operative; but, since it is impossible to tell from the cases who these persons were, or whether or not they had a special interest in the proceedings, the cases are of no practical value in this note, and have been expressly excluded.

also, if the matter to be reviewed is one which affects the public generally, an individual citizen may ordinarily invoke the remedy of certiorari. *Collins v. Davis*, 57 Iowa, 256, 10 N. W. 643; *Goetzman v. Whitaker*, 81 Iowa, 527, 46 N. W. 1058. For a still stronger reason it follows that the same remedy is open to the individual citizen who suffers peculiar injury by reason of a judgment or order entered in excess of jurisdiction. *People ex rel. Sheridan v. Andrews*, 52 N. Y. 445; *Dyer v. Lowell*, 30 Me. 217; *State ex rel. Enderlin State Bank v. Rose*, 4 N. D. 319, 26 L.R.A. 593, 58 N. W. 514; *Tallon v. Hoboken*, 60 N. J. L. 212, 37 Atl. 895; *State, Danforth, Prosecutor, v. Paterson*, 34 N. J. L. 163; *State, Avon-by-the-Sea Land & Improv. Co., Prosecutor, v. Neptune City*, 57 N. J. L. 362, 30 Atl. 529. While the injunction proceeding was brought in the name of an individual citizen, such plaintiff acted in a representative capacity only, and the decree rendered therein is primarily one for the protection of public interests. The plaintiff in such proceeding has neither the right nor the power to consent to the entry of a decree which shall operate as a license or permit for the maintenance of a nuisance for the abatement or prevention of which this remedy was created. The statute gives the right to maintain injunction proceedings to any citizen of the county. Code, § 2406. And if, having brought suit, the plaintiff permits an unauthorized decree to be entered to the prejudice of the public, and fails or refuses to seek its correction, we see no good reason why, under this provision, and under the principle we have approved in *Goetzman v. Whitaker*, supra, and other cases, any other citizen may not appear, and, upon proper showing of his qualifications, be permitted to have the same reviewed under a writ of certiorari.

Under the statute of Rhode Island making it necessary for an applicant for a liquor license to give notice of his application to the owners of land within 200 feet of the building where the business was to be carried on, it was held that an order granting license without the proper service of such notice could be reviewed upon certiorari at the suit of any owner within the prescribed limit, though not served with notice. In disposing of that case, the court says: "Certiorari lies not only to review the decisions of inferior courts, but also the determinations of special boards exercising a judicial power affecting the rights or property of citizens, when no other legal remedy is provided. It is not necessary that the applicant should be a party to the record, but only that he should be interested in the subject-matter upon which the record acts." 19 L.R.A. (N.S.)

Dexter v. Cumberland, 17 R. I. 222, 21 Atl. 347. Under our own statute (Code, § 2448), a liquor dealer wishing to avail himself of the benefits of the mulct law must, among other conditions, obtain a written statement of consent therefor from all the resident freeholders owning property within 50 feet of the building where the business is carried on. The petitioner herein is the resident owner of the property adjoining the place where the liquor nuisance is maintained, and therefore, in addition to her interest as a representative of the public, she also has a special interest in the question whether such business shall be permitted within the prescribed distance of her premises. She thus comes clearly within the rule of the Rhode Island case, the propriety and justice of which cannot well be questioned. See also *State ex rel. Campbell v. Heege*, 37 Mo. App. 338.

We are therefore disposed to hold that the petitioner shows herself entitled to maintain this proceeding. We are also very clear that the objection made by the respondent, denying the good faith of the petitioner, and alleging that her real interest in suing out the writ is to compel the purchase of her property by the defendants, is one we are not authorized to consider. The motive with which such an action is brought is a matter of no materiality. The simple question presented in such proceeding is, first, whether the plaintiff is a citizen of the county, and therefore has the qualification which the statute provides; and, second, whether the defendants, are, in fact, conducting the business of keeping or selling intoxicating liquors, contrary to law, at the place described in the petition. These facts being found to exist, it is the plain duty of the court to enter a decree for the relief demanded, without any consideration whatever as to the motive which may have actuated the plaintiff to bring the suit. Motive and self-interest on part of one who prosecutes another for violation of law may always be considered as bearing upon the veracity and credibility of the complainant as a witness in the case, but they can never operate to release or excuse the offender from the penalty which the law affixes to his act. Neither can we consider the oral statements of the respondent at the time of entering the decree, nor the construction placed upon such decree by the parties thereto. We must look to the decree alone, in the light of the pleadings upon which it was rendered, and give it construction according to the ordinary and usual significance of the language employed. When thus read, it is, in effect, a license or permission for the defendants therein named to continue the business complained of, sub-

ject only to the restrictions which are there prescribed.

It is too clear for argument that such a decree is unauthorized by law, and that the district court, in entering it, acted in excess of its jurisdiction. If we may read between the lines of this record, it is not unfair to say that the decree appears to have been the result of a compromise between the persons seeking to enforce the statutes of the state against the illegal sale of intoxicants and those resisting such enforcement. The persons engaged in such prosecution may have been, and doubtless were, acting in entire good faith, and yielded to the compromise believing that, under the peculiar circumstances, it was better to obtain this much relief than to further continue the litigation. It is equally possible and probable that the court adopted a similar view of the situation, and ratified the agreement of the parties by entering the decree. But neither good faith nor upright intention can give validity to a decree which the court has no jurisdiction to enter. If the defendants were selling liquor in violation of law, as charged by the plaintiff, there was but one thing which the court was at liberty to do, and that was to enjoin such parties absolutely from the further prosecution of the business in any manner or form. If they were not maintaining a nuisance, then no relief should have been granted, and the case should have been dismissed. We think it unnecessary to pursue the discussion any further.

The writ must be sustained, and the decree of the District Court is annulled and the cause is remanded to the said court for further proceedings in harmony with this opinion.

KANSAS SUPREME COURT.

STATE OF KANSAS, Appt.
v.
PHIL KEENER, Resp't.

(— Kan. —, 97 Pac. 860.)

Intoxicating liquor — police judge — notice.

Although the police judge of a city of the second class exercises judicial functions, he is not a repository of judicial power in the sense of article 3, § 1, Const., and the legislature has authority to require him to notify the county attorney of the fact of violations of the prohibitory liquor law which came to his notice or knowledge, and to furnish the county attorney the names of the witnesses by whom

such violations may be proved, under penalty of a fine and forfeiture of his office.

(October 10, 1908.)

APPEAL by the State from a judgment of the District Court for Cherokee County quashing an information charging defendant with having violated the prohibitory liquor law of Kansas. Reversed.

The facts are stated in the opinion.

Messrs. F. S. Jackson, Attorney General, and E. B. Morgan, for appellant:

Police judges are municipal officers, and do not come within the usual meaning of the term "judicial officers."

State v. Young, 3 Kan. 445.

Messrs. J. N. Dunbar and Jes. F. Wolfe, for respondent:

The law, so far as it relates to the duty of a police judge to report violations of the state prohibitory liquor law to the county attorney, requires a purely judicial officer to perform duties that are intrinsically executive in their character, and that have no connection with, or even remote relation to, the duties pertaining properly to his office.

State ex rel. Godard v. Johnson, 61 Kan. 803, 49 L.R.A. 662, 60 Pac. 1068; Cooley,

Case Note. — May judges of municipal or police courts be vested or burdened with powers or duties of a nonjudicial character?

The only case which has been found involving the specific question stated is that of *People ex rel. Atty. Gen. v. Provines*, 34 Cal. 520, in which it was held that a statute providing that the police judge of the city and county of San Francisco should act *ex officio* as police commissioner was not in contravention of a clause of the Constitution providing that "the powers of the government of the state . . . shall be divided into three separate departments, — the legislative, the executive, and judicial; and no person charged with the exercises of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted." The court held that such constitutional provision refers to a restrictive division of the powers of the state government, and not of the local governments thereafter to be created by the legislature. The argument in support of this view is drawn from internal evidence afforded by the provisions of the Constitution, from the order and arrangement of the several parts, and from the reason and policy by which the provision in question was manifestly dictated.

Instances of the recognition of the broad rule that constitutional provisions relating to the separation of the departments of government refer to departments of the state government, and not to departments

This argument derives the power of the legislature to organize police courts and to provide for police judges from article 3, § 1, Const., which reads as follows: "The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts, inferior to the supreme court, as may be provided by law." The section of the Constitution quoted is not the true source of the legislature's authority over the establishing of municipal courts. Such authority comes with the grant to the house of representatives and senate of all the legislative power of the state (Const. art. 2, § 1), which includes power to provide for the organization and government of cities. It is an elementary principle of constitutional law that restraints upon the power to organize and regulate municipal governments must be found in the Constitution or none exists, and the manner in which such power is exercised rests entirely in the discretion of the legislature. Cooley, Const. Lim. 7th ed. p. 268. The only limitations upon this power found in the Constitution of this state are that the legislature may not confer corporate power by special act, and must provide for the organization of cities, towns, and villages by general law. Const. art. 12, §§ 1, 5. There is, therefore, nothing to prevent the legislature from adopting any form of government for the cities of the state which it may deem wisest. In framing municipal charters, the legislature, itself a popular body, can scarcely escape the influence of the sentiments and settled habits, customs, and practices of the American people; but the problems of modern city government are novel and perplexing, and, so far as the Constitution is concerned, the legislature may vest all the executive, legislative, and judicial power of a city in a single person or body of persons if it should conclude that plan would best promote the public welfare, or it may apportion the various functions among different officials according to its own judgment of what the public good requires. Mayors' courts have been recognized by this court as lawful under the territorial government (*State v. Young*, 3 Kan. 445) and under the present Constitution (*Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423).

The principle involved has its foundation in the character and objects of municipal government which are essentially local. True, the government of a city is a matter which in a very important sense concerns the entire state, but the people of that city are the persons primarily affected, and their peculiar local needs and interests are ordinarily disconnected in legal thought from the needs and interests of the people of the 19 L.R.A. (N.S.)

whole state taken collectively. It is a settled rule of constitutional interpretation that the grant of legislative power to the legislature excludes all other bodies from the exercise of that power. The grant to cities of legislative power respecting their local affairs to be exercised by means of ordinances does not contravene this rule because the regulation of those affairs is not regarded as a part of the state's business. "It has already been seen that the legislature cannot delegate its power to make laws; but, fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the state." Cooley, Const. Lim. 7th ed. p. 264. Manifestly local courts erected to enforce local legislation and to carry out schemes of local government are to be regarded in the same manner. They are not a part of the state judicial system. To those courts the constitutional doctrine of the separation of powers applies, subject to the limitations which have been found to be necessary and unavoidable in the practical working out of our scheme of government. But a police court, organized for purposes of local municipal judicature, is not a repository of the judicial power referred to in the Constitution any more than a city council is a lawmaking body in the sense of the Constitution. The reasoning of Chief Justice Crozier in the case of *State v. Young*, supra, supports this view. He said: "But it is said that the enforcement of city ordinances is a judicial power, and that by the twenty-seventh section of the organic act the judicial power of the territory was vested exclusively in a supreme court, district courts, probate courts, and justices of the peace. It is true that the administration of municipal ordinances is the exercise of a sort of judicial power, but it is no part of the judicial power contemplated by the section referred to. That section refers to the enforcement of the laws of the territory at large, and to that only. The courts therein named were to have the exclusive cognizance of all subjects arising directly under the laws of the legislature, or at common law, and in chancery; but it was not intended that in them

alone could power to enforce city ordinances be deposited. Nor is the creation of municipal courts for the enforcement of municipal regulations inconsistent with this section, because the exercise of such power on the part of the legislature is not only not conferring judicial power within the meaning of this section, but is exercising authority over a rightful subject of legislation within the meaning of § 24." It may be true that the legislature has created city courts which are also state courts, but the court in question is not one of them and their status need now be discussed.

From what has been said it follows that the legislature had the right to impose upon the defendant the duties prescribed by the statute quoted, and the information was wrongfully quashed.

The defendant is much exercised over what his attitude might be if a complaint under a city ordinance were lodged with him for a violation of the liquor law which he had reported to the county attorney. It is sufficient to say that his conduct should be the same as in any other case in which he knows all the facts.

The judgment of the District Court is reversed, with direction to overrule the motion to quash.

All the Justices concur.

KANSAS SUPREME COURT.

CARRIE EDENS, Plff. in Err.,

v.

JOHN J. FLETCHER et al.

(—Kan.—, 98 Pac. 784.)

Joint wrongdoers — release — effect.

1. An acknowledgement by the plaintiff of satisfaction against two of several defendants, who are sued as joint wrongdoers, will not release the others, where the instrument offered to show such release shows that it was not intended to have such effect.

Same — construction.

2. Where such acknowledgment of satisfaction contains an express reservation of the right to proceed against the other joint wrongdoers, who are codefendants with those released, and other expressions in the instrument are not inconsistent with the retention of such right, the intention of the parties that the instrument should not operate as a release of such codefendants sufficiently appears.

(December 12, 1908.)

Headnotes by BENSON, J.
19 L.R.A. (N.S.)

ERROR to the Court of Common Pleas for Wyandotte County to review a judgment in defendants' favor in an action brought to recover damages alleged to have resulted from the sale by defendants of intoxicating liquors to plaintiff's husband. Reversed.

Statement by Benson, J.:

The plaintiff, Carrie Eden, sued John J. Fletcher and twelve other defendants, including the municipality of Kansas City, Kansas, and the mayor and chief of police of that city, for damages resulting from the intoxication of her husband by liquors sold to him by the defendants at a place where it is alleged they maintained a common nuisance; that the defendant brewing companies furnished the liquors for such unlawful purpose; that the city received a sum each month from its codefendants in consideration of its permission to carry on such business; that the mayor and chief of police participated in this corrupt arrangement; and that thereby and because of the intoxication of her husband thus caused by the defendants her home had been ruined, and she had lost the means of support for herself and family, to her damage in the sum of \$20,000. While a motion to set aside the service of summons upon the Val Blatz Brewing Company was pending, the plaintiff entered into a stipulation in this and other similar actions as follows: "It is hereby stipulated and agreed by and between

Case Note. — Effect, in release of one joint tortfeasor, of reservation of right as against others.

The earlier cases on this question are collected in the note to *Abb v. Northern P. R. Co.* 58 L.R.A. 293, referred to in the case reported, and therefore will not be herein reviewed in detail, but simply summarized with reference to the doctrines which they follow. The subsequently decided cases, however, are set forth more fully.

Some of such earlier cases hold that a release under seal of one joint tortfeasor will operate to discharge the others, although there is an express stipulation that such others shall not be thereby released. *De-long v. Curtis*, 35 Hun, 94; *Babcock & W. Co. v. Pioneer Iron Works*, 34 Fed. 338; *Bronson v. Fitzhugh*, 1 Hill, 185; *O'Shea v. New York, C. & St. L. R. Co.* 44 C. C. A. 601, 105 Fed. 563. The reasoning upon which this doctrine is based is that the reservation is simply void as being repugnant to the legal effect and operation of the lease itself, which, being under seal, is deemed a complete satisfaction. *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504.

A similar reason has been given for attributing a like effect to releases not under seal, and reserving the right to proceed against other joint tortfeasors. *Ruble v.*

the parties to the above-entitled causes that the said causes be and the same are dismissed as to the defendants the Val Blatz Brewing Company and John Kremer. The plaintiff hereby acknowledging full satisfaction and payment for all damages, and injuries arising out of or in any manner connected with the causes of action in the petitions in these causes alleged against said company and said John Kremer. And the plaintiff further acknowledging full satisfaction and payment of any injuries or damages arising out of the matter set out in said petitions against the United States Brewing Company the same as if said brewing company had been made a party in the said petitions and these causes. The plaintiff hereby reserving and not in any manner

waiving any rights or causes of action against any of the other defendants." Thereupon the plaintiff dismissed her action as to the Val Blatz Brewing Company and Kremer without prejudice. The defendant Fletcher then filed the following motion: "Comes now the defendant John J. Fletcher in each of the above-named actions, and moves the court to dismiss the said action and each of them for the following reasons, to wit: (1) Because, on or about the 15th day of September, A. D. 1906, the plaintiff in each of the above-entitled actions made a full accord, settlement, and satisfaction with defendants John Kremer and Val Blatz Brewing Company for all the injuries alleged and set forth in the petitions filed in said action, and received therefor the full

Turner, 2 Hen. & M. 38; Mitchell v. Allen, 25 Hun, 543.

And it has likewise been held that, since the party injured can have but one satisfaction, a release of one joint tortfeasor, though expressly reserving a right of action against the others, will operate to discharge all. Seither v. Philadelphia Traction Co. 125 Pa. 397, 4 L.R.A. 54, 11 Am. St. Rep. 905, 17 Atl. 338; Williams v. LeBar, 141 Pa. 149, 21 Atl. 525; Smith v. Consolidated Gas Co. 36 Misc. 131, 72 N. Y. Supp. 1084; Johanson v. New York, 71 App. Div. 561, 76 N. Y. Supp. 119; Abb v. Northern P. R. Co. 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954.

But other decisions attempt to carry out the evident intention of the parties in such agreements, by considering such a release as being merely executory, or a covenant not to sue. Matthews v. Chicopee Mfg. Co. 3 Robt. 711; Miller v. Fenton, 11 Paige, 20; Chamberlin v. Murphy, 41 Vt. 110; Duck v. Mayeu [1892] 2 Q. B. 511.

Since the compilation of the note above referred to, the following cases have been decided:

In Home Teleph. Co. v. Fields, 150 Ala. 306, 43 So. 711, it was held that, under §§ 1805 and 1806, Code 1896, providing that "all receipts, releases, and discharges in writing, whether of a debt of record, or a contract under seal, or otherwise, must have effect according to the intention of the parties thereto," and "all settlements in writing, made in good faith for the composition of debts, must be taken as evidence, and held to operate according to the intention of the parties," a release by which one of two joint tortfeasors paid a certain sum of money in partial satisfaction, and with the express understanding and agreement that it should not release the other joint tortfeasor did not do so, but operated only to release such other from liability *pro tanto*.

In Barnum v. Cochrane, 139 Cal. 494, 73 Pac. 242, a motion for an entry of satisfaction of a joint judgment rendered against two tortfeasors, based on an instrument releasing one of them, in consideration of a certain amount, from such judgment, "so 19 L.R.A. (N.S.)

far as the same can be done without releasing or discharging" the other "from the payment of the balance thereof," was held to have been properly denied, since, if the legal effect of a release of one would be to release the other, such agreement, by force of its own limitations, was not a release; and if, on the other hand, the release of one did not in law release the other also, then necessarily such other still remained liable for the balance, and was not entitled to satisfaction of the judgment.

In Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654, an agreement whereby a plaintiff, for a money consideration, dismissed a suit as to one joint tortfeasor, and wherein it was expressly agreed and understood that it should not be held or construed to be a release of any damages or right of action arising to the plaintiff by reason of any matters at that date existing, was held not to be a release, within the meaning of the rule that a release of one joint tortfeasor is a release of both, but to operate as a covenant not to sue.

In Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, it was held that the rule that a release of one joint tortfeasor operates as a release of all is founded upon a theory that a party is entitled to but one consideration for an injury sustained by him, and therefore does not apply where an instrument neither purposes nor is intended to be a full and complete settlement of the plaintiff's entire claim; so that, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and does not operate to discharge them.

This decision is followed in Hirschfeld v. Alsberg, 47 Misc. 141, 93 N. Y. Supp. 617, and Morris v. North American Mercantile Agency Co. 53 Misc. 574, 103 N. Y. Supp. 761; and in Walsh v. Hanan, 93 App. Div. 580, 87 N. Y. Supp. 930, it was held to warrant a like holding as to an instrument under seal.

In Robertson v. Trammell, 98 Tex. 364, 83 S. W. 1098, an agreement to dismiss an action as against one joint tortfeasor, and

sum of \$400, and therefore agreed to and did dismiss all of said actions against the said John Kremer and the said Val Blatz Brewing Company, and thereby the said accord and satisfaction as to the defendants John Kremer and the Val Blatz Brewing Company did operate as a bar to the further prosecution of each and all of the cases aforesaid." This motion was heard over the objection of the plaintiff, who contended that the matters referred to therein should be pleaded in defense and could not properly be decided upon a mere motion. The motion was sustained, and the action dismissed. The plaintiff excepted and brings the case here for review.

Messrs. James M. Mason and E. E. Chesney, for plaintiff in error:

The discharge of one joint tortfeasor does not necessarily discharge all, contrary to the intention of the party, where there is an express reservation of a right to sue the others in the instrument.

Missouri, K. & T. R. Co. v. McWherter, 59 Kan. 345, 53 Pac. 135; Johnson v. McCann, 61 Ill. App. 110; Barrett v. Third Ave. R. Co. 45 N. Y. 628; Sharpe v. Williams, 41 Kan. 56, 20 Pac. 497; Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88; Nagle v. Hake, 123 Wis. 256, 101 N. W. 409; Zimmerman v. Smiley, 62 Neb. 204, 86 N. W. 1059; Abb v. Northern P. R. Co. 58 L.R.A.

not to make the cause of action a basis in a suit against it, but that, in the event of the further prosecution of the suit against the other defendant, such agreement should operate as a contract that such defendant should not be successfully sued, and that it should be understood that the plaintiff did not release either defendant from liability on the cause of action alleged, but merely agreed to hold the one harmless from any legal responsibility, was held to be a covenant not to sue, and not a release.

In *El Paso & S. W. R. Co. v. Darr* (Tex. Civ. App.) 93 S. W. 166, it was held that a stipulation in a release given to one joint tortfeasor, that it shall in no wise affect any claim against the others, prevents it from operating to discharge such others.

In *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203, the court, after declaring its acceptance of the rule that a release wherein the right to proceed against joint tortfeasors is reserved does not operate to discharge them, as supported by the greater weight of authority and founded upon the better reasons, said: "Besides, we are not aware of any sufficient reason which should preclude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers, who desires to avoid litigation, to accept such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability, without releasing his cause of action as against the other wrongdoers. The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor."

On the other hand, in *McBride v. Scott*, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 A. & E. Ann. Cas. 61, a release containing a reservation of the right to proceed against other joint tortfeasors, and stipulating that the only benefit that they should receive by reason thereof would be by way of reduction *pro tanto* of the damages, was held to operate as a discharge of all. The court bases its decision less on the technical operation of the release than on the argument that to admit

of a settlement with one joint tortfeasor, and to hold that a reservation of the right to proceed against others saves such right, would open the door for the plaintiff in any case to acquire by successive settlements more than just compensation.

And in *Dulaney v. Buffum*, 173 Mo. 1, 73 S. W. 125, where a receipt had been given in full settlement and satisfaction of all claims and demands on account of the matters and things set up or referred to in a petition in an action pending against several alleged joint tortfeasors, so far as the persons making the payments were concerned, it being agreed to discontinue and dismiss said suit so far as such persons were concerned, it was held that a verbal understanding that such instrument should not operate as a release of the other joint tortfeasors would not prevent it from operating to discharge them.

In *Gilbert v. Timms*, 28 Ohio C. C. 107, it was held that a settlement with one joint tortfeasor, in making which the plaintiff expressly stipulated that he reserved all rights to prosecute his action against the other and recover such damages as he might be able to show had accrued to him in excess of the amount so received, nevertheless operated as a release of the other joint tortfeasor, where the action was for unliquidated damages, although it was suggested that there may be a distinction where the damages are measurable under fixed rules of law rather than by the discretion of the jury, so that it may readily be determined whether or not the amount paid by one is full compensation and satisfaction for the injury complained of.

For discussion of questions closely related to the subject of this note, see case note to *Snyder v. Mutual Teleph. Co.* 14 L.R.A. (N.S.) 322, on Effect of release of one person from liability for a tort to release another, where former was not in fact or law liable; and case note to *Ryan v. Becker*, 14 L.R.A. (N.S.) 330, on Right to show by extrinsic evidence that payment of judgment against, or consideration for release of, alleged joint tortfeasor, was not a satisfaction of claim.

306, note. 92 Am. St. Rep. 882, note; Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; Matthews v. Chicopee Mfg. Co. 3 Robt. 711; Commercial Nat. Bank v. Taylor, 64 Hun, 499, 19 N. Y. Supp. 533; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Long v. Long, 57 Iowa, 497, 10 N. W. 875; Turner v. Hitchcock, 20 Iowa, 310; Miller v. Beck, 108 Iowa, 575, 79 N. W. 344; Carey v. Bilby, 63 C. C. A. 361, 129 Fed. 203; Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140; McCrillis v. Hawes, 38 Me. 568; Spencer v. Williams, 2 Vt. 209, 19 Am. Dec. 711; Chamberlin v. Murphy, 41 Vt. 110; Sloan v. Herrick, 49 Vt. 328; Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Shaw v. Pratt, 22 Pick. 307; Pond v. Williams, 1 Gray, 630; Line v. Nelson, 38 N. J. L. 358; Cooley, Torts, §§ 160, 161 & notes; 7 Am. & Eng. Enc. Law, p. 446; Kirby v. Taylor, 6 Johns. Ch. 242; Hirschfield v. Alsberg, 47 Misc. 141, 83 N. Y. Supp. 617; Pecos & N. T. R. Co. v. Lovelady, 39 Tex. Civ. App. 239, 87 S. W. 710; Robertson v. Trammell, 98 Tex. 364, 83 S. W. 258; Galveston, H. & S. A. R. Co. v. Cade (Tex. Civ. App.) 93 S. W. 124; Thompson v. Bay Circuit Judge, 138 Mich. 81, 101 N. W. 61; Louisville & E. Mail Co. v. Barnes, 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 273, 79 S. W. 261; Bailey v. Delta Electric Light, Power & Mfg. Co. 86 Miss. 634, 38 So. 354; Ceraline Mfg. Co. v. Anthracite Beer Co. 25 Pa. Super. Ct. 94; Thomas v. Central R. Co. 194 Pa. 511, 45 Atl. 344; Kolb v. National Surety Co. 176 N. Y. 233, 68 N. E. 247; Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140; Bank of Catskill v. Messenger, 9 Cow. 37; Irvine v. Milbank, 15 Abb. Pr. N. S. 378; Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504.

Messrs. Harkless, Cryster, & Histed, for defendants in error:

The release of two of the alleged joint tortfeasors was a complete settlement of the cause of action as to all of the defendants.

Westbrook v. Mize, 35 Kan. 299, 10 Pac. 881; Missouri, K. & T. R. Co. v. McWhorter, 59 Kan. 345, 53 Pac. 135; McBride v. Scott, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 A. & E. Ann. Cas. 61; Dulaney v. Buffum, 173 Mo. 1, 73 S. W. 125; Jones v. Allen, 38 Colo. 512, 88 Pac. 387; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504.

Messrs. Enright & Screechfield also for defendants in error.
19 L.R.A. (N.S.)

Benson, J., delivered the opinion of the court:

The plaintiff alleges that the court erred in hearing the motion over her objection and in holding that, upon the stipulation and the payment therein acknowledged, the motion should be sustained. The defendant Fletcher, who alone made the motion and obtained the order of dismissal, contends that the remaining defendants, having been sued as joint wrongdoers with the brewing company and Kremer, were released by the settlement so made with them, upon the principle that the release of one or more of several joint wrongdoers releases all. Westbrook v. Mize, 35 Kan. 299, 10 Pac. 881. It was said, in Missouri, K. & T. R. Co. v. McWhorter, 59 Kan. 351, 53 Pac. 137, that "the soundness of the general rule that a settlement with one of two joint tortfeasors ordinarily discharges both is recognized." That there are exceptions to, or limitations upon, the application of the rule, must also be conceded, for in the case last cited it was held not to apply where the proof did not show that the defendant released was liable for the tort, although charged with its commission. It was held in Nebraska, in an action for damages under the civil liability provisions of the intoxicating liquor laws of that state, that "the rule is that, where the damages are uncertain, accord and satisfaction before judgment by one of several joint wrongdoers is satisfaction as to all; but the discharge of a party not shown to be a joint wrongdoer will not operate as a discharge of the other defendants." (Syllabus.) "In the case at bar, there being no proof that Huber was jointly a wrongdoer in the sale of liquors to J. B. McConnell, the receipt of the money by Mrs. McC. and dismissal of the action as to Huber did not release the plaintiffs in this action. The judgment of the district court is right, and is affirmed." Wardell v. McConnell, 25 Neb. 558, 41 N. W. 548. A similar result was reached in Thomas v. Central R. Co. 194 Pa. 511, 45 Atl. 344. It is also held in many jurisdictions that the rule invoked by the defendants does not apply to cases where the instrument offered as a release contains a reservation of the right to sue the other codefendants. Other courts hold that such reservation does not prevent the application of the principle, and that all joint wrongdoers are discharged from liability by the release of one because of the supposed indivisibility of a single tort, where there can be no apportionment of the damages among the tortfeasors, and because the reservation is repugnant to the release. A recent and leading case supporting this doctrine, Abb. v. Northern P. R. Co. (28 Wash. 428, 68 Pac. 954), is report-

ed in 58 L.R.A. 293, and in 92 Am. St. Rep. 882, with elaborate notes in each reviewing the authorities on this subject. In *McBride v. Scott*, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 A. & E. Ann. Cas. 61, the same rule is declared.

The decisions to the contrary, while conceding the general rule as stated in *Westbrook v. Mize*, supra, deny its application to cases where the instrument shows that it was not the intention to release all the wrongdoers, and that such intention appears where the instrument reserves the right to proceed against those who are not by its express terms released. This is the rule finally adopted in New York after an exhaustive review of the earlier decisions in that state and elsewhere. In *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, that court said: "The instrument given to the Maine incorporators upon the settlement of the plaintiff's suit against them released and discharged them from all further claims or demands, so far as the plaintiff was concerned; but it was expressly provided in the instrument that it should not affect any cause of action on behalf of the receiver against any other person. The purpose of this reservation is very evident. The receiver, doubtless, intended to pursue the defendants for the balance of the claim. The instrument therefore does not purport, neither was it intended, to be a full and complete settlement of the plaintiff's entire claim. . . . In England the modern authorities appear to be quite uniform upon the question. They are to the effect that, as between joint debtors and joint tort feors, a release given to one releases all; but, if the instrument contains a reservation of a right to sue the other joint debtor or tort-feors, it is not a release, but in effect is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tort feor;" and concludes thus: "Where the release contains no reservation it operates to discharge all the joint tort feors; but, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged. It follows that the release, so called, did not operate to discharge the defendants."

In *Duck v. Mayen* [1892] 2 Q. B. 511, it was held that a release of one of two joint tort feors, containing a clause that it was made without prejudice to the claim against the other, was a covenant not to sue, and that it did not operate as a release in favor of the defendant not included in its terms. The decision is based upon the principle that the intention of the parties, as de-

duced from the whole instrument, must be carried out. The court said: "If it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release." Page 514. The same rule appears to be approved in the following cases, among others: *Bell v. Perry*, 43 Iowa, 368; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Sloan v. Herrick*, 49 Vt. 327; *Matthews v. Chicopee Mfg. Co.* 3 Robt. 711. In the case last cited the release of one joint wrongdoer was pleaded as a defense by the other. The alleged release contained a reservation similar to the one in the instrument under consideration here. The court said: "It is plain that full effect cannot be given to all parts of such an instrument literally. If it is an absolute release, it is a satisfaction of the claim, and necessarily discharges the liability of any other person, either jointly or as surety therefor. If it reserve the liability of that other, it cannot be a release. At first courts were inclined to reject the latter reservation as repugnant to the first, or releasing it; but subsequently, on the principle of attempting to reconcile all parts, so as to carry out the apparent object of the parties, '*ut res magis valeat*,' etc., they have given effect to the words of present release as being merely executory or a covenant. The sole ground of the effect of a release to one of several joint contractors or wrongdoers, in discharging all, is that it was, in presumption of law, a satisfaction, . . . and wherever the release was in such a form, or accompanied by such restrictions, as to repel such presumption, it did not necessarily discharge all." This opinion was the subject of much judicial consideration in New York and other states, followed in some cases and rejected in others, until by the decision in *Gilbert v. Finch*, supra, it was adopted as the settled rule in New York.

The court of appeals of the eighth Federal circuit has adopted the same view. The late Judge Thayer, in *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203, said: "We are of opinion that the doctrine enunciated in the cases last cited is supported by the greater weight of authority, and is founded upon the better reasons. It has the merit of giving effect to the intention of the party who executes such an instrument which should always be done when the intention is manifest and it can be given effect without violating any rule of law, morals, or public policy. Besides, we are not aware of any sufficient reason which should pre-

clude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers, who desires to avoid litigation, to accept such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability without releasing his cause of action as against the other wrongdoers. The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which they had sustained, that it was not in fact full compensation for the injury, and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey."

In the note following the report of Abb. v. Northern P. R. Co. supra, in 92 Am. St. Rep. 882, the annotator said: "In our opinion, however, the intention of the parties in such cases should be given effect; and, if the instrument releasing one joint tortfeasor expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged." In closing a note upon the same case in 58 L.R.A. 307, a summary is given in which it is said: "But in releases not under seal the courts are coming to a more reasonable and equitable doctrine, allowing the intentions of the parties to the agreement to regulate the extent to which it shall be given effect, and attempting to treat it the same as any other unsealed contract between the parties, not unlawful in itself, and plain and express in its terms." This was the rule in equity in the case of the release of one of two or more joint obligors upon contract. (Kirby v. Taylor, 6 Johns. Ch. 242), and it is now made the rule by statute in this state (Gen. Stat. 1901, § 1194). In Bell v. Perry, supra, it was stated that the foundation of the rule rests in both cases on the joint liability whether arising out of tort or contract; and this is also referred to in the Gilbert Case in New York, where there is a similar statute. The court said: "It thus appears that the decisions of this court are in accord with the English rule and in harmony with our statute in reference to joint debtors."

The provisions of this instrument, aside from the clause reserving the right to pursue L.R.A. (N.S.)

sue those not expressly released, indicate the same intention. The clause acknowledging satisfaction in general terms concludes with the words "against said company and said John Kremer," which were improperly used if the intention was to release all the defendants. The further clause releasing another corporation, not a party to the suit, was also unnecessary if the view of the defendants is correct. When we consider with these clauses the express reservation with which the instrument closes, the intention not to release any of the defendants except the brewing company and Kremer is clear. This conclusion is not opposed to the principle decided in Westbrook v. Mize, 35 Kan. 299, 10 Pac. 881. The facts of that case did not include a reservation such as this. It is not perceived how the defendants, who were not parties to the stipulation, can justly complain if the plaintiff is allowed to proceed with her action against them. The receipt of partial satisfaction by the plaintiff will not operate to their prejudice. Robertson v. Trammell, 37 Tex. Civ. App. 53, 83 S. W. 258, Id. 98 Tex. 364, 83 S. W. 1098.

It is not necessary to decide whether the court erred in passing upon the merits of the proposed defense upon a motion, for in any event the motion should have been overruled for the reasons already stated.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

All the Justices concur.

LOUISIANA SUPREME COURT.

HENRY J. DOLE

v.

NEW ORLEANS RAILWAY & LIGHT COMPANY, Appt.

(121 La. 945, 46 So. 929.)

Highway — fire apparatus — right of way — street car.

1. It being important that the apparatus for its extinguishment should reach a fire promptly, and the men and horses of the fire department being expected and trained to use the utmost expedition for the ac-

Headnotes by MONROE, J.

Case Note. — Liability of street railway company for injuries caused by collision with fire apparatus.

That the driver of a fire department supply wagon approaches a street crossing where there is a street car track, at a rapid rate of speed, and the trolley pole and top of an approaching street car would be visi-

complishment of that purpose, the requirement that individuals and vehicles engaged upon less pressing missions shall not only accord them the right of way, but shall hold themselves in readiness to do so when they have reason to anticipate that fire apparatus may appear, is not unreasonable, and that condition may be said to exist when a vehicle, and more particularly a street car, which is confined to its track, approaches a fire engine house situated in close proximity to such track.

Same — negligence of motorman.

2. The motorman of an electric car which passes immediately in front of a fire engine house is guilty of double negligence when he drives the car at full speed in approaching such house, and fails to see, in time to enable him to stop the car and avoid collision with an outcoming hose wagon, a

signal given whilst his car is 144 feet distant from the engine house.

(Provosty, J., dissents.)

(April 27, 1908.)

A PPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have resulted from the negligence of the motorman of one of defendant's street cars. Affirmed.

Statement by Monroe, J.:

Plaintiff sues for damages for personal injuries resulting from the alleged negligence of the motorman of one of defendant's

ble to him 100 feet from the crossing, although, by reason of a high board fence, the motorman would be unable to see the wagon's approach, and whether the gongs on the wagon and car were sounded, as well as the speed of the car, is in dispute, will warrant an instruction that whether the operator of the car gave signals or not, it was the driver's duty to exercise ordinary care to make use of his faculties on approaching a crossing of a track, and to look and listen before driving thereon; and, if the jury believe he failed to exercise ordinary care, and failed to look and listen, and thereby contributed to the collision with the car, which resulted in his death, their verdict should be for the defendant. *Guiney v. Southern Electric R. Co.* 167 Mo. 595, 69 S. W. 296.

Nor is such an instruction open to the objection that it declares a failure to look and listen under all circumstances to be negligence. *Ibid.*

So, an instruction is unobjectionable which informs the jury that if, from the evidence, they believe that the motorman had no warning of the approach of the supply wagon, and could not have known thereof by keeping a vigilant watch, regard being had to the circumstances and surroundings, until the car and the wagon had reached the street intersection, and that the wagon and car were both going at such a speed that it was impossible for the motorman to avoid the collision, then they should find a verdict for the defendant. *Ibid.*

Where a motorman had shut off the power, and had his car well under control as he approached a street crossing, and it does not appear that he saw a fire engine cross the street, or heard the gong of a following hose wagon, with which he collided, no negligence is shown upon his part. *Wood v. New Orleans R. & Light Co.* 117 La. 119, 41 So. 436, 8 A. & E. Ann. Cas. 983.

Even though the plaintiff may have been guilty of contributory negligence, the question of the defendant's negligence is for the jury in an action by a fireman for injury received in a collision between a rapidly-driven hose wagon and a street car, at an intersecting street, where there is evidence

warranting the inference that the car, which had been stopped, was suddenly started by the motorman, who might have known of the wagon's approach, with a wanton or reckless disregard of the duty resting on him to prevent the collision. *Birmingham R. & Electric Co. v. Baker*, 132 Ala. 507, 31 So. 618.

A prima facie case of negligence is established by a showing that a fireman was injured in a collision between the truck on which he was riding, when returning from a fire, and a street car running in excess of the speed permitted by ordinance, which the motorman was unable to check after discovering the truck, which he might have seen when the car was 250 feet from the point of collision. *Burleigh v. St. Louis Transit Co.* 124 Mo. App. 724, 102 S. W. 621.

While it was the duty of the plaintiff, in some measure, to look to his own safety, it was not incumbent upon him to keep that vigilant watch for approaching cars which would be expected of the driver, where the collision occurred late in the evening of a winter night, and the plaintiff stood upon the running board of the truck, on the side opposite from which the car approached, and he had a poor chance to discover it. *Ibid.*

The court cannot take a case from the jury where it appears that a rapidly-driven fire engine, with gong sounding, approached an intersecting street, and was struck by a street car running at a high rate of speed, the motorman of which was signaled by bystanders to stop, to which he paid no attention. *Chicago City R. Co. v. McDonough*, 221 Ill. 69, 77 N. E. 577.

So, a prima facie case of negligence is shown where the driver of a hose cart saw bystanders apparently waving their hands at a street car on an intersecting street, and, seeing the car stop, started across the track, ahead of the car, which, at that instant, shot suddenly ahead, and, in attempting to avoid a collision with the car, the cart struck a lamp post, and a fireman on the wagon was injured. *O'Neill v. St. Louis Transit Co.* 108 Mo. App. 453, 83 S. W. 990.

And, under such circumstance, the plain-

street cars. Defendant denies the negligence charged, and alleges that plaintiff's injuries are attributable to his own want of care. There was a trial before a jury, resulting in a verdict for plaintiff in the sum of \$15,000, which was made the judgment of the court. Defendant has appealed, and plaintiff has answered, praying for an increase in the award. The facts, as we find them from the evidence in the record, are as follows: Plaintiff, at the date of the accident, was thirty-eight years old, and for about two years had been driver of steam fire engine No. 19, which has its house on the river side of Maple, 212 feet below Fern, and about 61 feet above Burdette, street. The house is set back about 5 feet from the property line, and has two front openings,

provided with double doors, each door being 5 feet wide, and swinging outward. The upper opening is used for the engine and the lower for the hose wagon, which latter is a heavy, four-wheeled, two-horse vehicle, carrying about 1,000 feet of hose. Defendant has two tracks on Maple street; the one nearer to the engine house being used by the down, and the other by the up, going cars. The distance between the house and the nearer track is, say, 21 feet, 10 inches; the banquette being 9 feet, 6½ inches wide, and the distance between the curb and the track being 7 feet, 6½ inches. There is a slight down grade between the engine house and the track, and the space is covered with planking to a width at the house and on the banquette of, say, 29 feet,

tiff was not guilty of contributory negligence in driving ahead of the car. *Ibid.*

Where the facts are disputed, it is error for the court to charge the jury that it would be negligence for a motorman to fail to stop his car in time to avoid colliding with a hose wagon on the way to a fire, where there was no question of his ability to do so had he used the means at his command; as it was for the jury to determine whether, under all the circumstances, a failure to stop his car constituted negligence. *McBride v. Des Moines City R. Co.* 134 Iowa, 398. 109 N. W. 618.

And the doctrine of last clear chance is not applicable upon the theory that the driver of the hose wagon saw the approaching car in time to avoid a collision, notwithstanding the negligence of the motorman, as the driver's negligence is not imputable to the plaintiff. *Ibid.*

Where there is testimony which warrants the jury in finding that if a motorman had had his car under proper control when approaching an intersecting street, or had been keeping a proper lookout, he would have discovered the approach of a fire truck in time to avoid a collision with it, and to permit it to pass first, a verdict in favor of an injured fireman who was riding upon the truck will not be disturbed. *Geary v. Metropolitan Street R. Co.* 73 App. Div. 441, 77 N. Y. Supp. 54, affirmed without opinion in 177 N. Y. 535, 69 N. E. 1123.

Whether a motorman is guilty of negligence, and a fireman guilty of contributory negligence, is a question for the jury, where a fire truck, going at the rate of 7½ miles an hour, along an asphalt paved street, was struck at an intersecting street crossing by a street car which was going from 25 to 30 miles an hour, it being disputed whether the gong of the street car was rung, so that it might have been heard if ordinary care had been exercised by plaintiff and others upon the truck. *Toledo R. & Light Co. v. Ward*, 25 Ohio C. C. 399.

The question of the plaintiff's want of care is for the jury where he was riding to a fire, standing upon the foot board, upon the north side of a hook-and-ladder truck, 19 L.R.A. (N.S.)

looking south, and an approaching car came from the north, without ringing its gong, the first warning the plaintiff had of its approach being a signal given by a woman upon the sidewalk, when he immediately jumped from the truck, but was struck by the car. *Quinn v. Dubuque Street R. Co.* (Iowa) 94 N. W. 476.

As the men upon the opposite side of the truck were in position to see the approach of such car, it cannot be said as a matter of law, that the plaintiff was negligent in not turning around and observing the car in time to leave the truck so as to avoid being struck by it. *Ibid.*

So, it is a question for the jury, where the evidence is such that it might have been found that the motorman, in the exercise of ordinary care, ought to have stopped the car in time to avoid a collision with the truck, notwithstanding he testified he did the best he could in order to avoid a collision. *Ibid.*

Whether the driver of a truck weighing 9,000 pounds, and carrying 10 or 12 men, was at fault, is a question for the jury, where a high building obstructed his view of the intersecting street, and, by reason of his position upon the truck, he did not see the approaching car until it was 50 or more feet away, although he looked and listened until he was about to go upon the track, and then urged his horses forward, but could not cross in time to avoid the collision. *Ibid.*

And so, whether the driver of a hook-and-ladder truck, who was injured in a collision with a street car, exercised ordinary care and prudence in giving notice of his approach, is a question for the jury, where, with gong ringing, he drove slowly into an intersecting street, with which he was familiar, and was unable to see a street car rapidly approaching about 150 feet away, the gong of which was not sounded until his horses were nearly upon the track, and the momentum of the heavy truck was such that it was impossible to stop, so he attempted, by urging his horses to greater speed, to swing the truck away from the car, but failed to do so. *Consolidated Trac-*

widening between the curb and the track to 36 feet. When the doors of the engine house are thrown open, they can readily be seen from a point 150 feet above, and from a like distance below, by the motormen of approaching cars, and, as they are usually closed in winter, the fact of their being open at that season is fair warning that some movement of the engine or hose wagon may be expected; and especially is that the case when the approaching motorman sees them thrown open. The rule of the defendant company requires its motormen to give the right of way to vehicles of the fire department, and to stop their cars when such vehicles are approaching, and plaintiff offered to prove that defendant's instructions were and are that the motormen shall keep

their cars under control in passing the engine house in question, for the reason that the engine or hose wagon may be expected to emerge at any time; but the testimony on that subject was objected to and excluded as irrelevant. At about 8 o'clock on the morning of February 6, 1906, plaintiff, having been ordered to hitch the engine horses to the hose wagon and take them to be shod, complied with the order to the extent that (he and the pipeman), having hitched up the horses, he took his position and strapped himself on the driver's seat. The pipeman pushed open the doors, and, following them as they opened, went forward to the track, and raised his arms as a signal to the approaching car, whereupon plaintiff, whose view of the car was

tion Co. v. Chenowith, 61 N. J. L. 554, 35 Atl. 1067.

So, it is for the jury to determine whether the failure of the motorman to give notice of the approach of his car by the ringing of his gong was the proximate cause of the collision. *Ibid*. The court said it deemed the necessity of giving audible signals to be so plain and constant a requirement of care and prudence that it would be held a legal duty.

And the trial court did not err in refusing to direct a verdict for the defendant, as, from the facts shown, two conclusions could be reasonably reached,—one favorable to the plaintiff, and the other to the defendant; hence, a question for the jury was presented. *Ibid*.

It was held in *Consolidated Traction Co. v. Chenowith*, *supra*, that the trial court properly refused to instruct the jury specifically, first, that if a permanent obstacle intervened to prevent observation, reasonable care required the driver of the truck to so regulate the speed of his horses as to be in a position to stop before going upon the street car track, if it were not safe to do so; second, that similar prudence would require delay in going upon the track until the driver could assure himself of his safety; third, that reasonable prudence required that the judgment to be formed by the driver should have been formed while it was possible for him to act prudently, in view of the then conditions, and not get himself into a position where peril was to be incurred,—as such requested instructions did not ask the court to declare a legal principle, but to make application of the principle it had already declared in its previous charge; and the determination of these questions was for the jury; the court having already charged the jury that the measure of the duty of the driver in crossing the track was to use such care as a reasonably prudent man would use under like circumstances.

And the jury is justified in finding that the plaintiff, who was riding upon the running board of a truck in answering an alarm of fire, was free from contributory negli-

gence, where, upon discovering the approach of a street car, and the liability of a collision, he jumped for safety, and the truck was struck by the car and tipped over upon him. *Geary v. Metropolitan Street R. Co. supra*.

A street railway company is liable where, upon approaching a fire house, the motorman heard an alarm of fire, and saw the horses of the engine just as they were coming out of the house, and, as the engine was nearly across the track, the car struck it with great violence, and injured the plaintiff, and the car was running in violation of a rule of the company requiring cars to pass engine houses at not more than 4 miles an hour, which rule is not limited to the time the car is actually in front of such house, but includes the approach as well. *McKernan v. Detroit Citizens' Street R. Co.* 138 Mich. 519, 68 L.R.A. 347, 101 N. W. 812.

And, if the plaintiff had knowledge of the existence of such rule, it might have a distinct bearing upon the question of his contributory negligence. *Ibid*.

Effect of law, rule, or custom giving fire apparatus right of way.

A law or ordinance giving fire apparatus, when responding to an alarm of fire, the right of way in the public streets, has a material bearing upon the question of the contributory negligence of a fireman riding thereon, as he is justified in assuming that such rule will be observed by a street car motorman upon discovering the approach of fire apparatus. *New York v. Metropolitan Street R. Co.* 90 App. Div. 66, 85 N. Y. Supp. 693, affirmed without opinion in 182 N. Y. 536, 75 N. E. 1128; *Geary v. Metropolitan Street R. Co.* 84 App. Div. 514, 82 N. Y. Supp. 1016; *Warren v. Mendenhall*, 77 Minn. 145, 79 N. W. 661. See *Garrity v. Detroit Citizens' Street R. Co.* 112 Mich. 369, 37 L.R.A. 529, 70 N. W. 1018.

And a fireman will be presumed to be familiar with such a law, and his conduct must be judged in the light thereof. *Geary v. Metropolitan Street R. Co.* 84 App. Div. 514,

cut off by the open door upon his left, assuming that the car or any approaching vehicle would thereby be stopped, allowed the horses, which were prancing or jumping, to move forward, obliquing them slightly to the left as they cleared the doors, with a view of reaching the blacksmith shop by going in that direction. He then discovered that a car was coming very rapidly on the down track, and was threatening a collision, to avoid which he pulled the horses to the right in the hope of being able to get the wagon on the street between the track and the curb, and had partly succeeded in so doing when the car struck the left hind wheel of the wagon (one of the horses being then on the banquette and the other on the street), and drove the wagon for-

ward some 15 or 20 feet, until it collided with a post situated on the edge of the banquette at a point about 39 feet below the engine house, and between which and the seat of the wagon plaintiff's left leg was jammed and badly mashed. It is admitted that, after passing Fern street, the car moved at full speed, with all the power on, until the motorman became aware, from the opening of the doors of the engine house or the signal of the pipeman, or both, that a vehicle was about to come out of the house. The motorman testifies that, when he got about 75 feet from the house, these doors were thrown open from the inside of the house, and drew his attention as he saw a man jump to the door and throw up his hand, and that just then a pair of

82 N. Y. Supp. 1016, affirmed without opinion in 177 N. Y. 535, 69 N. E. 1123.

And such an ordinance also has a material bearing upon the question of the negligence of the motorman of the car with which a collision occurs. *Ibid*.

Thus, where by statute fire apparatus is given the right of way in public streets over all vehicles excepting those carrying United States mail, a street railway company will be liable for injuries sustained by a fire truck in a collision with street car which approached a street crossing at a high rate of speed, the motorman not being on the lookout to discover approaching fire apparatus or signals thereof. *New York v. Metropolitan Street R. Co.* 90 App. Div. 66, 85 N. Y. Supp. 693, affirmed without opinion in 182 N. Y. 536, 75 N. E. 1128.

And, as an abstract proposition, such a law imposes upon a motorman the duty to yield the right of way, irrespective of any requirement as to reasonable care, if he has the opportunity to do so. *Duffghe v. Metropolitan Street R. Co.* 109 App. Div. 603, 96 N. Y. Supp. 324, affirmed without opinion in 187 N. Y. 522, 79 N. E. 1104; See *Geary v. Metropolitan Street R. Co.* 84 App. Div. 514, 82 N. Y. Supp. 1016, affirmed without opinion in 177 N. Y. 535, 69 N. E. 1123.

So, the fact that, by ordinance, fire apparatus is given the right of way, will justify a finding of freedom from contributory negligence of the driver of a hook-and-ladder truck, who was injured in a collision with a slowly-moving street car, in driving down an incline, with his gong, as well as those of other apparatus, ringing, although the truck was not under control, and he saw the car when the truck was 140 feet from the point of collision, and the motorman testified he did not see the car, which was visible 35 feet from the point of collision, until the horses were almost in front of the car, and that he did not hear the shouts or observe the warning signals of bystanders. *Warren v. Mendenhall*, supra. The court observed that it was the duty of firemen, in responding to alarms of fire, to act regardless of a considerable degree of danger to themselves, and, as their duties are of a public character of 19 L.R.A. (N.S.)

importance, it is the duty of everyone to be alert to give them the right of way; and even though a private individual, as a matter of law, would be guilty of negligence in attempting to pass in front of a car as the plaintiff did, yet, under the circumstances, the question of his contributory negligence was for the jury.

So, where, by law, the wagon of a salvage corps, moving from 15 to 20 miles an hour, was given the right of way in responding to fire alarms, and a member thereof was injured in a collision with a street car which approached an intersecting street at a speed of 20 miles an hour, and the motorman who was engaged in conversation with another person, failed to observe the wagon's approach on the intersecting street, a verdict will not be directed for the defendant street railway company. *Flynn v. Louisville R. Co.* 110 Ky. 662, 62 S. W. 490.

And the plaintiff is entitled to recover, even though guilty of some negligence, if the motorman knew, or, by the exercise of ordinary care, could have known, of the approach of the wagon, and could have avoided the collision by the exercise of ordinary care. *Ibid*.

And under such an ordinance, the driver of the vehicle would proceed on the theory that he had the prior right of way at a crossing; and while such ordinance does not require a higher degree of care on the part of a motorman with reference to fireman than toward any other person, yet it would charge the motorman with knowledge of a fact very material in determining whether he exercised the care required under the circumstances. *McBride v. Des Moines City R. Co.* 134 Iowa, 398, 109 N. W. 618.

So, such an ordinance is admissible as bearing upon the question of the duty of a motorman to assume that a hose wagon about to cross the street car tracks at an intersecting street would not be stopped in order to permit the car to pass in front of it. *Ibid*.

But the fact that, by law, the driver of a hose wagon was entitled to the right of way, will not excuse his failure to exercise due care and prudence in attempting to pass in

horses shot out in front of him. The driver, he says, "had no chance to get over the track with the horses, but turned down, and, as he turned down, the car struck the wagon right up in the hind wheel, and hit it a glance blow." He also testifies that just as soon as the doors attracted his attention he threw off the power, pulled the reverse back, fed the (reverse) power, and, as quickly as he could, applied the air brake; and he explains the fact that the car did not stop until it (the front end, which is 43 feet from the rear end) had reached a point, say, 100 feet below Burdette street, or more than 240 feet below the point at which the collision occurred, by saying that, after the wagon had been forced out of the way, the horses were frightened,

and the situation was precarious, and he thought it wiser to allow the car to roll on (meaning that the brake was released, but that no power was applied), in order to open, or clear, the street.

The pipeman testifies that, when he reached the track and raised his hands in warning, the car was opposite the first house below Fern street, a point ascertained by subsequent measurement to be 144 feet above the engine house; that the motorman was then looking off to his left, and did not see him; that he ran forward until he was opposite the upper door of the engine house (thereby becoming obscured from the view of the plaintiff, who had not as yet emerged from behind the open, lower, doors), and attracted the attention of the motorman by

a narrow space in front of a street car with his horses going at full speed, so as to permit a recovery by a fireman who was riding beside him, whose duty it was to watch for obstructions, and who was injured in a collision with the car, although the defendant's evidence tended to prove that the car was at a standstill, and the wagon ran into it, while that of the plaintiff was to the effect that the started forward when the wagon was about 30 feet from the track, and collided with it. *Birmingham R. & Electric Co. v. Baker*, 126 Ala. 135, 28 So. 87.

However, as it appeared upon a second appeal of the last case (132 Ala. 507, 31 So. 618) that the plaintiff was seated on the wagon, back of the driver, and not on the seat with him, the question of the defendant's negligence was held to be for the jury, even though the plaintiff may have been guilty of contributory negligence, where the street car had been stopped, and the motorman might have known of the wagon's approach, and the evidence justified a finding that the latter's conduct in suddenly starting the car showed wanton and reckless disregard of his duty to avoid a collision with the wagon.

And it was held in *Garrity v. Detroit Citizens' Street R. Co.* 112 Mich. 369, 37 L.R.A. 529, 70 N. W. 1018, that the fact that, by ordinance, fire apparatus had the right of way, will not relieve the driver of a hook-and-ladder truck of the duty of approaching a street crossing where there are street car tracks with his horses under control.

But it is a case for the jury where the driver of a fire truck is injured by a collision with a street car at an intersecting street crossing, although he was negligent in approaching the crossing without having his horses under control, where the evidence is conflicting as to whether or not the car could have been stopped in time to avoid the collision, or a prudent man would have been justified in expecting that it would stop, in view of the fact that the fire truck had the right of way. *Ibid.*

So, negligence in approaching a crossing of an electric street car track, without having his horses under control, will not pre-

clude a recovery for injuries which the driver of a fire truck receives by collision with a street car, in attempting to cross in front of a car, if, at the time he discovered the car, the circumstances were such as to justify a prudent man in attempting to make the crossing. *Ibid.*

But, in the absence of allegation or proof of a law or custom giving fire apparatus the right of way over other vehicles,—as, under the general rule of the road, that a vehicle which reaches a street crossing first, going at a reasonable speed, has the right of way, the driver of a hook-and-ladder truck cannot recover for injuries sustained in a collision with a street car, which reached the intersection first, and, after slowing down almost to a stop, proceeded over the crossing at a slightly increased speed, it appearing that the truck was going only about 4 or 5 miles an hour as it approached the crossing, but the driver immediately increased its speed, and, although he endeavored to avoid a collision by swinging his horses to the right, he was unable, owing to the length of the truck, to turn sharply enough to clear the car. *Knox v. New Jersey Street R. Co.* 70 N. J. L. 347, 57 Atl. 423, 1 A. & E. Ann. Cas. 164.

So, rules of a street railway company, requiring its cars to give the right of way at street crossings to fire apparatus, are admissible as bearing upon the question of a fireman's contributory negligence, as he has the right to assume, when approaching street car tracks upon intersecting streets, that such rules will be obeyed by the motormen of approaching cars. *Chicago City R. Co. v. McDonough*, 221 Ill. 69, 77 N. E. 577; *Toledo R. & Light Co. v. Ward*, 25 Ohio C. C. 399.

The violation of a rule of a street railway company, requiring street cars to give the fire department right of way at all crossings, and, if necessary, to stop and let the fire apparatus go by, is evidence of negligence. *Toledo R. & Light Co. v. Ward*, *supra*.

Where, for many years, it has been a uniform custom of a street railway company to slacken the speed of, or stop, its cars, so

hallooing to him, and that it was only then, when he was within 90 feet of the engine house, that the motorman made any movement to stop the car. The witness further says (referring to the motorman): "He shut off his power, and, when he got in front of the door where the steamer is supposed to come out, he put on again his power, and he stepped back to the door, and then it struck the hose wagon and jammed it up against the post, and then the car stopped 127 feet from the post. That was the end of the car after the man was jammed against the post."

Speyerer, a witness called by plaintiff, had alighted from an up-going car at the corner of Burdette street, and, having crossed over to the river side of Maple (and

upper side of Burdette), observed through the side window of the engine house (only about 40 feet distant) that the apparatus was ready to go out. His attention was then attracted by the pipeman coming out and waving his hands and hallooing to the motorman of the down-coming car, who, as he testifies, was then (when the pipeman waved his hands) about half a square (say 150 feet) above the engine house. The witnesses thus mentioned are the only ones examined whose testimony, as to the more material facts immediately connected with the accident we find worth considering.

The captain of fire company No. 19 was in the rear of the engine house at the moment of the accident, and his testimony is unimportant, save in so far as it relates

as to give fire apparatus the right of way, it was held, in *Hanlon v. Milwaukee Electric R. & Light Co.* 118 Wis. 210, 95 N. W. 100, that the driver of a hose wagon, responding to an alarm of fire, might reasonably presume that the usual and customary efforts to avoid a collision with his wagon would be observed, and hence the question of his contributory negligence was for the jury, where, upon approaching an intersecting street crossing, he continuously rang his gong, which could be heard from two to eight blocks away, and assumed that an approaching street car would stop, and immediately urged forward his galloping horses, and, as he got within a few feet of the street car track, he saw that the car had not slowed up, and although he attempted to turn his vehicle so as to avoid a collision, it was struck by the car, and he was injured.

And the driver may assume that those in charge of the street car, if the approach of the apparatus is known, or, in the exercise of ordinary care, should be known, will stop it or slacken its speed so as to permit the apparatus to pass in front of the car. *Ibid.*

And the fact that plaintiff had been a member of the fire department for twenty-five years creates a presumption that he had knowledge of the custom of a street railway company to slacken the speed of its cars at a particular crossing. *Toledo R. & Light Co. v. Ward, supra.*

And such a custom, if known to the plaintiff, is proper to be considered by the jury in determining whether he might rightfully consider it in attempting to cross the street car track. *Ibid.*

As a city fire department is not subject to an ordinance limiting the speed of vehicles in the city streets, such ordinance is not admissible, for the purpose of establishing the plaintiff's negligence in driving the truck at a speed in excess of that permitted by the ordinance. *Ibid.*

An ordinance giving street cars the right of way over vehicles, adopted prior to the adoption of an ordinance giving fire apparatus the right of way, has no application to vehicles belonging to the fire department. *McBride v. Des Moines City R. Co. supra.* 19 L.R.A. (N.S.)

Imputation of driver's negligence to fireman.

The negligence of the driver of a fire truck will not be imputed to a fireman riding upon it, who has no control over the actions of the driver. *McBride v. Des Moines City R. Co. supra*; *McKernan v. Detroit Citizen's Street R. Co.* 138 Mich. 519, 68 L.R.A. 347, 101 N. W. 812; *Burleigh v. St. Louis Transit Co.* 124 Mo. App. 724, 102 S. W. 621; *Birmingham R. & Electric Co. v. Baker, supra*; *Geary v. Metropolitan Street R. Co.* 84 App. Div. 514, 82 N. Y. Supp. 1016, affirmed without opinion in 177 N. Y. 535, 69 N. E. 1123.

The reason for the rule just stated is aptly expressed in *McBride v. Des Moines City R. Co. supra*, as well as in other cases cited, where the court said that "the general rule that, where several persons are engaged in a common enterprise in the carrying on of which each is participating, the negligence of one of them may be imputed to the others, . . . [does not apply]. We are satisfied, however, that the facts do not afford the slightest occasion for applying or even discussing the common-enterprise rule. The deceased was not riding on the hose wagon in the prosecution of any common enterprise in which he and the other members of the fire department had voluntarily engaged, but in pursuance of his individual duty as a member of the fire department, and, in that capacity, a servant of the city. He had nothing to do with selection of the driver, and he had no control over his acts. Under such circumstances, it has been frequently held by other courts that there is no relation of common enterprise which would justify the imputation to the deceased of any negligence on the part of the driver of the hose wagon."

Although the case of *Birmingham R. & Electric Co. v. Baker*, 126 Ala. 135, 28 So. 87, apparently imputes the negligence of the driver of a hose wagon to a fireman riding upon the seat with him, whose duty it was to watch for obstructions, yet, upon a second appeal of the case (see 132 Ala. 507, 31 So. 618), it appearing that the plaintiff was not in fact riding on the seat at the

to the condition of the rails of the car track. On that subject he says: That he observed the condition of the track and told the motorman of car No. 316, "You have got no excuse. Look at the condition of the track." Being asked: "What was the condition of the track?" he replied, "Dry." The motorman thus referred to was not called to deny that such a conversation took place, though he says that the rails were wet and slippery, which he attributes to dew. On the other

hand, he testifies that the day was cloudy, that the accident occurred at 8:02, and he denies that there had been any fog. The conductor of car 316 had left the city when the case was tried, and was not examined. The motorman and the conductor of car 301 (which was approaching at the moment when the doors of the engine house were thrown open, on the uptown track, and had reached a point probably 60 feet below the corner of Burdette street, or from 275 to 344 feet from car 316) undertake to testify as to

time the collision occurred, and had nothing to do with driving the wagon, therefore this court refused to impute the driver's negligence to him.

A rule of the fire department relative to the conduct of drivers of fire apparatus, which does not purport to authorize any fireman upon the vehicle to exercise any control over the driver, is inadmissible on behalf of the railway company. *McBride v. Des Moines City R. Co. supra.*

Standing on moving vehicle as negligence.

It is not contributory negligence, as a matter of law, for a fireman, while riding to a fire on a hose wagon, to stand upon his feet to put his coat on, where, before starting to the fire, he did not have time to do so, and, in order to avoid getting wet, and to be in readiness for service upon arrival at the fire, the men were allowed to put on their coats while on the way to the fire. *Birmingham R. & Electric Co. v. Baker*, 132 Ala. 507, 31 So. 618.

So, it is not contributory negligence, as a matter of law, for a fireman, not having time to dress completely before starting to a fire, to do so while standing with one foot upon the running board of a hook-and-ladder truck, with his other leg over the side piece of a ladder, in order to steady himself while dressing, and, as the truck was driven sharply around a corner, the forward end of the ladder struck a street car, and was pushed back with such force as to cut off his leg. *Magee v. West End Street R. Co.* 161 Mass. 240, 23 N. E. 1102.

Injuries to street car passenger.

A prima facie case of negligence is established when a passenger on a street car shows he was injured in consequence of a collision between the car and a rapidly-moving piece of fire apparatus, together with his freedom from negligence, which casts upon the defendant the burden of showing that the collision was the sole fault of those in charge of the fire department wagon. *Olsen v. Citizens' R. Co.* 152 Mo. 426, 54 S. W. 470.

And such a showing establishes a case within the doctrine of *res ipsa loquitur*, as street cars, when managed with prudence, do not ordinarily collide with other vehicles; and it then devolves upon the defendant to overcome the presumption of negligence with evidence of due care upon its part. *Williamson v. St. Louis & M. R. Co.* (Mo. App.) 113 S. W. 239.

A case for the jury is presented, from 10 L.R.A. (N.S.)

which negligence may be inferred, where a bystander ran into the street and tried to signal the motorman to stop, which the latter failed to observe, and he might have heard the ringing of the gong upon the approaching hose wagon had he been giving slight attention to his duties, and there was evidence that he might have stopped his car in time to avert the collision; also, that, by ordinance, fire apparatus has the right of way in the streets. *Ibid.*

So, a case for the jury is presented where the gong upon the approaching fire truck could be heard several blocks distant, and was heard by the plaintiff, a passenger on a street car, and people on the sidewalk shouted at the motorman, and made gestures and signs for him to stop, which, however, was disputed by the defendant. *Olsen v. Citizens' R. Co. supra.*

Where there is ample evidence to justify a finding that a street car driver, by the exercise of proper care, might have avoided colliding with a rapidly moving hook-and-ladder truck by which a passenger was injured, the question of the defendant's negligence is for the jury. *Heucke v. Milwaukee City R. Co.* 69 Wis. 401, 34 N. W. 243.

It being the duty of the defendant to exercise the utmost care and prudence in carrying its passengers, it is responsible for a slight want of such care as a careful and vigilant man would observe under like circumstances, and a street railway company will not be relieved from liability by reason of the negligence of the driver of the truck. *Ibid.*

The unreasonable overloading of a street car, and its unlawful speed, which makes it impossible to stop the car as soon as may be necessary to avert a collision with a fire truck, moving quite rapidly, constitute gross negligence, which will render a street railway company liable to a passenger for injury sustained in a resulting collision. *Richmond R. & Electric Co. v. Garthright*, 92 Va. 627, 32 L.R.A. 220, 53 Am. St. Rep. 839, 24 S. E. 267.

And the defendant railway company is responsible for the negligence of either the conductor or motorman under such circumstances, as it is the duty of the conductor as well as the motorman if either hears the sound of the gong, or, by the exercise of ordinary care, may discover the danger in time to avert it, to use all means at hand to that end. *Williamson v. St. Louis & M. R. Co.* and *Olsen v. Citizens' R. Co. supra.*

the distance at that moment between car 316 and the engine house, and as to the exact movements of the motorman of car 316, but, as they labored under the disadvantage of being a block, more or less, away, and of having, in the case of the motorman, to see through the vestibule glasses of both cars, and for some purposes through the woodwork of the vestibule of car 316, and, in the case of the conductor, who was at the rear end of car 301, of having also to see through the glass in the front door of his car, their testimony may be taken with some allowance. Moreover, the motorman testifies that car 316 struck the hose wagon between the front and hind wheels; whereas, the one absolutely certain fact in the case is that it struck the left hind wheel of the wagon, which was broken by the blow. He testifies that the rails were wet, because the morning had been foggy, but the motorman of car 316, as we have seen, swears that there had been no fog. He testifies that the motorman of car 316 kept his air brake applied until his car stopped on the lower side of Burdette street, and that he did well, using his best efforts, to stop when he did, but the motorman of car 316 swears that he "could have stopped right in the street, and blocked the street up," but that, as soon as the accident had occurred, he released the air brake and allowed the car to roll on purposely, in order to open the street. He testified, without qualification, that a car, moving at full speed, cannot be stopped in less than 125 or 150 feet, and it was only after some cross-examination by defendant's counsel that he was brought to admit that the question may be affected by the speed at which the car is moving; the last question and answer being:

Q. Under what circumstances could you stop under 120 feet?

A. I would have to be going very slow.

The motorman of car 316, however, says that a car going at full speed can be stopped within 90 feet on a dry track. The conductor of car 301 testifies that, when the pipeman came out of the engine house and threw up his hands, his (the conductor's) car was between 60 and 70 feet below Burdette street, and that it stopped with the rear end on the lower side of the street, from which, as the car was 43 feet long, it would appear that the stop was made in from 103 to 113 feet. Both he and the motorman testify that, when the engine house doors were thrown open, car 316 was from 60 to 70 feet above the engine house, and they, as well as the motorman of car 316, agree that the vestibule glasses were free of moisture, and that the air was cold.

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Messrs. Dart & Kernan and Henry Plauché Dart, Jr., for appellant.

Messrs. Woodville & Woodville for appellee.

Monroe, J., delivered the opinion of the court:

From the facts stated, we conclude that the competent witnesses as to what took place just before and at the moment of the accident were Pinero, motorman, Ziemer, pipeman, Speyerer, spectator, and Dole, the plaintiff. Ziemer and Speyerer testify that, when the former first signaled, the car (316) was 144 or "about 150" feet above the engine house, and we think, all the circumstances considered, that we must accept their testimony as true, since Dole, plaintiff, corroborates them by testifying that, when he emerged from the engine house and first saw the car, it was about 120 feet away, and the motorman "was paying no attention,"—from which we conclude that the motorman did not at first see the open doors or the signal. We also accept as true the statement of Pinero that, when his attention was attracted, he shut off and reversed the power, and applied the air brake. We think he was mistaken in supposing that he saw the doors "opening" or the signal when first given.

Zierner, as we have seen, testifies that Pinero, when about 90 feet from the wagon, shut off the power, but that he turned it on again, and stepped back into the door of the car, just as the car was about to strike the wagon. And Speyerer, testifying on that subject, says: "If he shut it off altogether, I can't say, but he made a motion with his hands on the controller to shut it off, and he might have started and thrown it back again. The power couldn't have been shut off the car from the distance it went."

Ferran, the motorman of car 301, testifies that, as the doors of the engine house were opened, he saw Pinero applying his air brake; that, when he got near the hose wagon, he "pulled his reverse and threw his power on, and, by so doing, that his overhead flew off, and he was still using his air all the while, until he landed on the other side of the street." But, according to his own statement, at the moment that the doors were opened, he was occupied with stopping his own car, and we attach no importance to his testimony as to what Pinero was doing, 240 feet away, with two vestibule glasses intervening.

It is, however, quite possible—even probable—that Ferran may have observed him as car 316 approached and passed car 301, and, if his testimony is to be believed, Pinero was unable, notwithstanding his best

APPPEAL by plaintiff from a judgment of the Superior Court for Bristol County in defendant's favor in an action brought to recover damages for defendant's breach of contract to furnish professional services to plaintiff's wife. Reversed.

The facts are stated in the opinion.

Mr. Frank A. Pease, for appellant:

The failure of a physician to perform his contract to exercise reasonable care and exert his best judgment to bring about a good result renders him liable for injuries caused to the patient thereby.

Force v. Gregory, 63 Conn. 167, 22 L.R.A. 343, 38 Am. St. Rep. 371, 27 Atl. 1116; Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363; Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992; Whitesell v. Hill, 101 Iowa, 629, 37 L.R.A. 830, 70 N. W. 750; Rev. Laws, chap. 173.

The loss of services and *consortium* is but one of the elements of damage, and the

plaintiff can recover back whatever he may have paid the defendant, relying upon his possessing the skill he contracted to have, as well as any other resulting expenditures.

Hyatt v. Adams, 16 Mich. 195.

The fact that the wife died as a result of the defendant's want of skill cannot preclude the plaintiff from recovery for loss of services and *consortium* while she yet lived.

Baker v. Bolton, 1 Campb. 493; approved in Carey v. Berkshire R. Co. 1 Cush. 478, 48 Am. Dec. 616; Long v. Morrison, 14 Ind. 596, 77 Am. Dec. 72; Hyatt v. Adams, 16 Mich. 180.

Mr. Hugo A. Dubuque for appellee.

Knowlton, Ch. J., delivered the opinion of the court:

The question intended to be raised by the defendant's demurrer to the declaration, and the question principally discussed at

the plaintiff's wife must stop with the period of her existence."

Christiancy, J., in Hyatt v. Adams, supra, in explaining the rule applied in Baker v. Bolton, supra, said: "For myself I think . . . that the reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard,—a repugnance which seems to have been strong and prevalent among nations in proportion as they have been or become more enlightened and refined, and especially so where the Christian religion has exercised its most beneficent influence, and where human life has been held most sacred. . . . To the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting."

In Green v. Hudson River R. Co. 28 Barb. 9, in holding that a husband could not recover for the instant death of his wife, who, while traveling on one of defendant's passenger trains, under a contract to carry her safely, was killed in a wreck caused by the negligence of defendant's servants, the court said: "If it was necessary at this day to give a reason for this doctrine, I should think it more natural and obvious to refer to the old maxim which has obtained from the earliest days of the common law: *Actio personalis moritur cum persona*." And the court also further said: "Where death is the concomitant of the collision, and life departs at the instant the shock is received, no action for loss of service can be sustained, because there is no time during her life when it can be said that the husband has lost the service and society of his wife in consequence of the injury complained of. This may be thought a narrow ground on which to place any right of recovery, but there is no other on which the common-law rule can be 19 L.R.A. (N.S.)

overcome, which declares that the mere death of a human being cannot be complained of as a civil injury, to be compensated in damages."

In Higgins v. Butcher, supra, the plaintiff declared that the defendant assaulted and beat his wife, of which she died on the following day; and it was held that such act was a personal tort to the wife, and died with her.

So, in Smith v. Sykes, Freem. C. L. Rep. 224, it was held that no action will lie on the part of the husband against one who beats his wife so that she dies, as the matter is criminal and of a higher nature.

So, a widow may not recover at common law for the loss of services and *consortium* of her husband, who was feloniously shot, and his death occurred the same day. Wyatt v. Williams, supra.

And in Grosso v. Delaware, L. & W. R. Co. supra, it was held that the husband could not recover for the negligent killing of his wife, whose death was instantaneous or for the loss of her society and assistance in his domestic affairs.

And it was said in Womack v. Central R. & Bkg. Co. supra, where the wife's death was instantaneous, that the husband could not recover for loss of her society and companionship, or for the value of her services, nor for his sufferings and mental anguish caused by her death.

So, it was held in Duncan v. St. Luke's Hospital, 113 App. Div. 68, 98 N. Y. Supp. 867, affirmed without opinion in 192 N. Y. 580, 85 N. E. 1109, that a husband could not recover for the death of his insane wife, caused by jumping from a window of a hospital where she was confined, by reason of the negligence of her attendant in not watching her, the case being based upon the breach of an express agreement between the husband and the defendant that, for a designated sum, a constant watch was to be

the argument, is whether, under an action of contract brought upon the implied agreement of a physician with a husband to render necessary and proper medical care and service to his wife in her illness, a recovery can be had for the husband's loss of her society, care, and comfort, resulting from her death, caused by the defendant's failure to perform his contract.

For many years it has been held in this commonwealth that, without a statutory provision, no recovery can be had for the death of a person, however wrongfully caused by another. This has been decided in cases where the plaintiff was in such relations to the deceased person that, by reason of the death, he was deprived of valuable legal rights, as in the case of a husband suing for loss of the services and *consortium* of his wife, whose death was caused by the defendant's negligence (*Carey v. Berkshire R. Co.* 1 Cush. 476, 48 Am. Dec. 616),

and, in a similar case, where the action was brought by a father for loss of services of his minor son (*Skinner v. Housatonic R. Co.* 1 Cush. 475, 48 Am. Dec. 616). So it was held that a promise to pay an annuity to a widow, on account of the death of her husband through the defendant's negligence, and upon her agreement to forbear to sue, could not be enforced, although she was deprived of her husband's support and of his *consortium*. (*Palfrey v. Portland, S. & P. R. Co.* 4 Allen, 55. See *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658. It was recognized that, in some countries, under different systems of jurisprudence, the law was different. *Carey v. Berkshire R. Co.* supra. But, except as changed by statute, this doctrine is firmly established in the law of this commonwealth. *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456; *Richardson v. New York*

maintained over the wife, as the cause of action is *ex delicto*, and not *ex contractu*.

However, it was said in *Lynch v. Davis*, 12 How. Pr. 323, although clearly *obiter*, that a husband might, at common law, recover the pecuniary damages, including loss of society and aid of his wife, sustained by him by the breach of a physician's contract of employment in negligently treating the wife so as to cause her death.

A widow cannot recover upon an agreement made with her by a railway company for compensation for negligently causing her husband's death, as to permit a recovery in such a case would violate the common-law rule. (*Palfrey v. Portland, S. & P. R. Co.* 4 Allen, 55.

So, it was held in *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140, that a suit *in rem* could not be maintained in admiralty by a widow to recover for the negligent killing of her husband upon the high seas, as no statute conferred such right and none existed at common law. Ch. J. Waite said: "We know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land; and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. . . . The argument everywhere in support of such suits in admiralty has been not that the maritime law, as actually administered in common-law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established that, in the courts of the United States, no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty." 19 L.R.A.(N.S.)

ralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule." A similar decision was had in *The E. B. Ward, Jr.* 4 Woods, 145, 16 Fed. 255, and in *Seward v. The Vera Cruz*, L. R. 10 App. 59.

And although the following decisions of the lower Federal courts have held that, in admiralty, following the civil-law rule, a husband or wife might recover, in the absence of statute, for the negligent killing of the other, they are expressly disapproved in *The Harrisburg*, supra. *The Sea Gull*, Chase, Dec. 146, Fed. Cas. No. 12,578; *The Highland Light*, Chase, Dec. 150, Fed. Cas. No. 6,477; *Holmes v. Oregon & C. R. Co.* 6 Sawy. 262, 5 Fed. 75; *The Tonawanda*, 13 Phila. 464, Fed. Cas. No. 14,109; *The Charles Morgan*, 2 Flipp. 274, Fed. Cas. No. 2,618.

But it was held in *St. Louis Southwestern R. Co. v. Henson*, 7 C. C. A. 349, 19 U. S. App. 169, 58 Fed. 531, that a recovery by a husband for the negligent death of his wife would be sustained where the question of his legal capacity to sue therefor in his own name was raised for the first time in the appellate court.

The earliest case upon this subject in this country is *Cross v. Guthery*, 2 Root, 90, 1 Am. Dec. 61, decided in 1794, where it was held that a husband might maintain an action for damages against a surgeon for unskillfully performing an operation upon his wife, which resulted in her death; the damages alleged being that he had been put to great cost and expense and had been deprived of

C. R. Co. 98 Mass. 85-89; Worcester & Suburban Street R. Co. v. Travelers' Ins. Co. 180 Mass. 263-265, 57 L.R.A. 629, 91 Am. St. Rep. 275, 62 N. E. 364. The decisions exclude, as a ground of recovery, all elements of damage which arise solely from death, and as to such damage, they are as applicable to actions of contract as to actions of tort.

the wife's services, company, and *consortium*. In answer to the contention that the offense charge appeared to be a felony, and that, by the laws of England, the private injury was merged in the public offense, the court said that such rule was applicable in England only to capital crimes, where, from necessity, the offender must go unpunished or the injured individual go unredressed. However, the force of this decision is probably destroyed by Connecticut Mut. L. Ins. Co. v. New York, N. H. & H. R. Co. 25 Conn. 265, 65 Am. Dec. 571, where it is held that at common law there can be no recovery for a death resulting from negligence.

And in *Kake v. Horton*, 2 Haw. 209, even though the common law, as ascertained by English and American decisions, is the adopted law of Hawaii, the court, under power to proceed and decide according to equity where there is no express law, refused to follow the common-law rule that an action will not lie for negligently causing the death of a husband or wife, and permitted a recovery in such a case. This doctrine was followed and applied in *The Robert Lewers Co. v. Kekauoha*. 52 C. C. A. 483. 114 Fed. 849.

Where death is not instantaneous.

However, the husband may, at common law, recover for the loss of services of his wife, and expenses incurred in her care between the time of her negligent injury and death, where death is not instantaneous. *Nixon v. Ludlam*, 50 Ill. App. 274; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Mowry v. Chaney*, 43 Iowa, 609; *Wyatt v. Williams*, 43 N. H. 102; *Eden v. Lexington & F. R. Co.* 14 B. Mon. 204; *Hyatt v. Adams*, 16 Mich. 180; *Green v. Hudson River R. Co.* 28 Barb. 21, affirmed in 2 Keyes, 94; *Philippi v. Wolff*, 14 Abb. Pr. N. S. 196; *Baker v. Bolton*, 1 Campb. 493.

So, in *Baker v. Bolton*, *supra*, Lord Ellenborough held that, upon the death of the wife by the negligent act of another, the husband might recover for the loss of her society, together with his distress of mind, suffered on account of her injury, from the time of the accident until the moment of her dissolution.

But in *Hyatt v. Adams*, *supra*, it was held that he may not recover for his mental sufferings during that period, where the injuries inflicted upon the wife were not wilfully caused.

In *Hyatt v. Adams*, *supra*, while the common-law right of the husband to recover 19 L.R.A. (N.S.)

The whole subject is now covered by statutes, of which some apply only to deaths caused by certain corporations or classes of persons, as railroad and street railway corporations, common carriers and employers of labor, and one is general (Rev. Laws, chap. 171, § 2, amended by Stat. 1907, p. 324, chap. 375), applying to all other corporations and persons. This last statute cov-

damages sustained by his wife by reason of an unskilful surgical operation, which resulted in her death, was denied, yet, it was held he might recover the damages he sustained and which accrued prior to, and not in consequence of, the wife's death.

And, in *Green v. Hudson River R. Co.* 28 Barb. 21, Bacon, J., said that, at common law, "an action by a husband for the loss of his wife by the careless and negligent act of a third party can only be sustained where some period intervenes between the time of the injury and the time of dissolution, during which he could be said to have suffered the loss of her service and society, and incurred expense and undergone anxiety and distress on her account."

So, the husband may recover for being deprived of the society and assistance of his wife between the date of her negligent injury and her death. *Philippi v. Wolff*, *supra*.

And it was held in *Mowry v. Chaney*, *supra*, that the husband might also recover for the loss of the wife's society between the time of her injury and her death.

So, in *Long v. Morrison*, *supra*, it was held that where the wife's death resulted from the negligence of a physician at common law the husband might recover for the loss of her services between the time of injury and her death; and, if the action grew out of a breach of the contract upon the surgeon's part for skilful services, it survived the wife's death. See also *SHERLAG v. KELLEY*.

A husband may recover compensation for his loss of time as well as the funeral expenses of his wife, who was killed by defendant's negligence, although at common law he cannot recover for her death. *Philby v. Northern P. R. Co.* 46 Wash. 173, 9 L.R.A. (N.S.) 1193, 123 Am. St. Rep. 926, 89 Pac. 468.

But the right of the husband, where the death of the wife was instantaneous, to recover for money expended in her burial, was denied in *Grosso v. Delaware, L. & W. R. Co.* 50 N. J. L. 317, 13 Atl. 233.

As to the common-law right of the husband to recover for loss of time and funeral expenses necessitated by the negligent killing of his wife, see the case note to *Philby v. Northern P. R. Co.* 9 L.R.A. (N.S.) 1193.

As to the right of a parent, at common law, to recover damages for the negligent death of a minor child, see the note to *Gulf, C. & S. F. R. Co. v. Beall*, 41 L.R.A. 807, and *Stevenson v. W. M. Ritter Lumber Co.* 18 L.R.A. (N.S.) 316.

ers dead by negligence, whether the relations of the parties are such that there is a breach of an express or implied contract, or whether the duty neglected arises outside of any contract. The remedy given by it is exclusive of any other in the cases to which it applies; and, if the present plaintiff had brought his action seasonably, he would have been entitled to a recovery under it. So far as the plaintiff claims damages growing out of the death of his wife, we are of opinion that the first and second grounds of demurrer are a bar to his recovery.

The third ground of demurrer is as follows: "For that the plaintiff cannot recover in an action of contract for alleged injury to his wife, resulting in her death, as stated in the declaration." If, through a breach of the defendant's contract, there was an injury to the plaintiff's wife that caused him damage, he can recover for it in an action of contract, notwithstanding that it finally resulted in her death. If he was caused additional expenses for her nursing, care, and treatment by the defendant's failure to perform his contract, he is entitled to damages. The fact that his wife subsequently died from the same cause is immaterial. As to this part of the case the declaration may be considered as if the allegation of death and the consequences of the death were omitted.

The demurrer does not distinctly raise the question whether the declaration is insufficient to permit a recovery of nominal damages or of actual general damages, if any were suffered previous to her death. If the question were raised, we should be obliged to answer it adversely to the defendant. The implied contract is set out, and the defendant's failure to perform it. In *Hagan v. Riley*, 13 Gray, 515, Chief Justice Shaw says: "For every breach of a promise made on good consideration the law awards some damage."

The breach is sufficiently alleged. It is a general rule in pleading that a breach of a contract may be assigned in the negative of the words of the contract. The exception is when such a negative does not plainly show that there is a breach. *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Bacon v. Lincoln*, 4 Cush. 210, 50 Am. Dec. 765; *Fisk v. Hicks*, 31 N. H. 535-541; *Randel v. Chesapeake & D. Canal Co.* 1 Harr. (Del.) 151-175; *Karthauss v. Owings*, 2 Gill & J. 430-441; *Poirier v. Gravel*, 88 Cal. 79-82, 25 Pac. 962; *Westbrook v. Schmaus*, 51 Kan. 558-561, 33 Pac. 306.

The only averment of damages is general in the *ad damnum*. Where there are previous averments that show a liability, this is enough, unless special damages are claimed. 19 L.R.A. (N.S.)

The forms of pleading previously used in this commonwealth are authorized by Rev. Laws, chap. 173, § 130. In Pub. Stat. 1882, chap. 167, § 94, under the forms of declarations in actions of tort, is this language: "The *ad damnum* is a sufficient allegation of damage in all cases in which special damages are not claimed." In the form of declaration for breach of promise of marriage, there is no reference to the subject of damages, but the claim is left to the *ad damnum*. This is also true of some of the other forms in actions of contract in the same section. The principle is recognized in many cases. *Baldwin v. Western R. Corp.* 4 Gray, 333; *Prentiss v. Barnea*, 6 Allen, 410; *Warner v. Bacon*, 8 Gray, 397, 69 Am. Dec. 253; *Postlewaite v. Wise*, 17 W. Va. 1-24; *Hoffman v. Dickinson*, 31 W. Va. 142-146, 6 S. E. 53; *Louisville, N. A. & C. R. Co. v. Smith*, 58 Ind. 575; *Laraway v. Perkins*, 10 N. Y. 371; *Peters v. Cooper*, 95 Mich. 191, 54 N. W. 694; *McCarty v. Beach*, 10 Cal. 462; *Mitchell v. Clarke*, 71 Cal. 163-167, 60 Am. Rep. 529, 11 Pac. 882; *Packard v. Slack*, 32 Vt. 9; *Wilson v. Clarke*, 20 Minn. 367, Gil. 318; *Hadley v. Prather*, 64 Ind. 137. The declaration is sufficient to entitle the plaintiff to recover nominal damages, and general damages if any resulted to the husband from a breach of such a contract as is set out. There being no other averment than the statement of the contract and an allegation of a breach of it, it does not appear whether there will be a claim of general damage to the plaintiff in his wife's lifetime, and we need not consider whether further averments would be necessary to entitle him to anything more than nominal damages.

Because the declaration states a cause of action in the plaintiff, without reference to the averments of the death of his wife and the damages resulting from it, the judgment is reversed and the demurrer is overruled.

So ordered.

MISSISSIPPI SUPREME COURT.

A. L. JOHNSON, Appt.,
v.

TOWN OF PHILADELPHIA.

(— Miss. —, 47 So. 526.)

Nuisance — skating rink.

1. A skating rink is not a nuisance *per se*, and cannot be made so by municipal ordinance.

Municipal corporation — authority — closing rink.

2. Charter authority to regulate, sup-

press, and impose taxes on skating rinks does not empower a municipality to require such rinks as are not in fact nuisances to close at 6 o'clock P. M.

(November 24, 1908.)

APPEAL by complainant from a decree of the Chancery Court for Neshoba County denying an injunction against the enforcement of an ordinance which would result in the closing of the complainant's skating rink and destruction of his business. Reversed.

The facts are stated in the opinion.

Messrs. G. E. Wilson and E. S. Richardson for appellant.

Messrs. S. L. Dobbs and May, Flowers, & Whitfield for appellee.

Mayes, J., delivered the opinion of the court:

The town of Philadelphia derives its power as a municipal corporation from the Code chapter on municipalities. On January 24, 1907, its mayor and board of aldermen passed the following ordinance, viz.:

"Be it ordained by the board of mayor and aldermen of the town of Philadelphia, Mississippi, that the pool rooms, billiard parlors, dance halls, and skating rinks, doing business at this time, or hereafter, in said town, shall close at 6 o'clock P. M., and remain closed until 6 o'clock A. M., and that any person managing or operating any such pool room, dance hall or skating rink after 6 o'clock P. M., and before 6 o'clock A. M., or any person found playing pool or billiards, dancing, or skating in any public hall or place herein, between such hours, shall be fined not less than \$5.00 nor more than \$100.00, nor be imprisoned more than thirty days, or both.

"Sec. 2. Be it further ordained that, the necessities and interest of the town demanding this ordinance be in full force and effect after this date."

At the time the above ordinance was passed, Johnson was conducting a skating rink in the town of Philadelphia, having previously paid all state and municipal taxes, and, after the passage of the ordinance procured an injunction against the town of Philadelphia enjoining the enforcement of the ordinance on the ground that it destroyed his business, was unreasonable, and void.

The great preponderance of testimony shows that Mr. Johnson conducted his busi-

ness in an orderly manner, and that he allowed no such conduct in his place of business as would warrant the board of mayor and aldermen in suppressing it. But, if this were not true, the ordinance plainly shows that it was enacted under § 3340, Code 1906, giving municipalities the power "to regulate, suppress, and impose a privilege tax on all circuses, shows, theaters," etc., "skating rinks, . . . and other like things." If it were disposed to consider this ordinance as an ordinance suppressing a nuisance, it could have no validity, as a skating rink is not a nuisance *per se*, and no general declaration of the mayor and board of aldermen, through the medium of an ordinance declaring it to be a nuisance, without any notice to the party conducting the business and without reference to the fact of whether it is in fact a nuisance, can make it so.

Into every charter power given a municipality to pass by-laws or ordinances there is an implied restriction that the ordinances shall be reasonable, consistent with the general law, and not destructive of a lawful business. It is manifest that, if Johnson is not allowed to operate his skating rink except between the hours of 6 A. M. and 6 P. M., business will be destroyed. His is a place of amusement, and, so far as this record shows, a place of innocent amusement, the main business of which is done after 6 P. M. Under pretense of regulating a business, the business attempted to be regulated cannot be destroyed. This was not the intention of the legislature. If the legislature had intended that amusements of this character could be prohibited by a municipality, they would have said so in unequivocal terms.

In *Freund on Police Power*, § 63, it is said: "There is implied in every delegation of power to a municipal corporation a condition that the power must be exercised reasonably, and that therefore every unreasonable ordinance is *ultra vires*, and the court, in treating it as null and void, merely enforces the legislative will and principles of policy embodied in it."

And, again, in § 158 it is further said: "The requirement of reasonableness is so general in its nature that it allows the courts to exercise a very efficient control over ordinances without being under the necessity of formulating in each case a principle which would be a guide for other cases."

The section of the Code giving a municipality the power to regulate and suppress gives no power to prohibit. Skating rinks and such like can be suppressed only when as a fact they become nuisances, and when they are regulated it must be in a reason-

Note. — A painstaking search has brought to light no other cases in which the question has been raised as to the power of a municipal corporation to pass ordinances controlling or otherwise regulating skating rinks.

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able way. In *McQuillin on Municipal Ordinances*, p. 79, it is said: "The power 'to regulate' will not be construed to include the power to prohibit. 'A power simply to regulate does not embrace a power to prohibit or destroy a trade or occupation.' Therefore ordinances to be valid cannot interfere with lawful employment."

The fact that the state law authorizes the conducting of the business is evidence that it was in contemplation of the law that the places should exist. *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Dill. Mun. Corp.* § 325.

In the case of *Crittenden v. Booneville* (Miss.) 45 So. 723, the court said that the power given the municipality, under § 3340, "to regulate, suppress, and impose a privilege tax on all circuses, shows," etc. . . . does not carry with it the power to prohibit, unless it is in the exercise of the police power to suppress a nuisance. The municipality may regulate; that is to say, it may provide the hours during which these places may keep open, etc., and, if the conduct of the owner is such as to warrant it, or if it is conducted in a boisterous or immoral way, so as to become a nuisance, they may suppress altogether. But the power to regulate and suppress when the business has become a nuisance is one thing and the power to pass a general ordinance prohibiting the operation of a pool room, which has been legalized by the statute, is another thing. The first they have the power to exercise. The second they are without power."

We can establish no fixed and permanent guide to settle in future cases what is and what is not a reasonable exercise of the power of regulation. Each case must largely be determined by its own facts. In the *Crittenden Case* we held that the municipality may provide the hours during which a place of business of the character under discussion may be kept open, etc., yet, when the hours prescribed ruin the business under the guise of regulating, such a regulation is unreasonable.

The nature of the business being conducted forms an element for the consideration of the court in determining whether or not an ordinance is unreasonable as an ordinance regulating a business. It is unreasonable to say that a skating rink shall be kept open only between the hours of 6 A. M. and 6 P. M., and such ordinance cannot be upheld. Rights cannot be stealthily taken away under the power to regulate. The power to regulate is given for a wholesome purpose. It is a defensive power of municipality, and not a weapon of destruction.

Reversed and remanded.
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MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. ANTON SCHAEFER, Public Examiner,
v.

MINNESOTA TITLE INSURANCE & TRUST COMPANY.

RE WILLIAM BROS. BOILER & MANUFACTURING COMPANY, Claimant.

(104 Minn. 447, 116 N. W. 944.)

Title insurance — insolvency — recovery of premium.

1. The holder of a policy of insurance issued by a real-estate title-insurance company is, upon a cancellation or annulment of the policy by a judicial decree declaring the company insolvent and appointing a receiver to wind up its affairs, entitled to a return of a proportionate part of the premium paid therefor, measured by the time elapsing between the date of the policy and the date on which the company was so adjudged insolvent.

Same — contract stipulations — retention of premiums.

2. The policy holder is not entitled to the return of that part of the premium which the application for insurance stipulated might be retained by the company for its services in investigating the title insured.

(June 19, 1908.)

Headnotes by BROWN, J.

Case Note. — *Right to return of premiums on adjudication of insolvency of insurer.*

It is not intended in this note to include cases which pass upon the right of the insured to recover the present value of an insurance policy upon the dissolution of the insurer, unless the present value is treated as the unearned premium. Neither will cases be included which pass upon the measure of damages of an insured because of the dissolution of the insurer, unless the measure of damages is limited to the unearned premiums.

As to stock insurance companies, the courts are in harmony in holding that the insured, upon the dissolution of the company, is a creditor to the amount of the unearned premium on the policy or policies he holds. This statement is, of course, limited to cases passing upon the right to unearned premiums. It is not intended to assert this as a proposition of law applying to insurance policies generally, where there may be some other value to the policy than the unearned premium.

The foregoing doctrine was applied as to credit insurance in *Gray v. Reynolds*, 55 N. J. Eq. 501, 37 Atl. 461, wherein it is said that, where there is no reserve value to the policy, and no method of obtaining reinsurance, the only practical mode of deter-

CROSS APPEALS from a judgment of the District Court for Hennepin County allowing a claim in intervention in insolvency proceedings; the claimant appealing from so much of the decree as allowed the defendant company to retain a part of an unearned premium, and the receiver appealing from so much as allowed the claim. Affirmed.

The facts are stated in the opinion.

Mr. Jay W. Crane, for claimant:

The adjudication of insolvency and the appointment of a receiver in effect canceled the policy of title insurance; and claimant is entitled to repayment of the unearned premium on said policy.

Taylor v. North Star Mut. Ins. Co. 46 Minn. 198, 48 N. W. 772; Re Minneapolis

mining the compensation to be made to the insured, where no provable loss had occurred at the time of the insolvency, would be by a rebate of that portion of the premium which represented the unexpired term of the policy. This case cites as authority for this position Smith v. National Credit Ins. Co. 65 Minn. 283, 33 L.R.A. 511, 68 N. W. 28, which is cited in STATE EX REL. SCHAEFER v. MINNESOTA TITLE INS. & T. Co.

The doctrine was applied as to casualty insurance in American Casualty Ins. Co.'s Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.) 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778, wherein it was held that, as soon as the insolvency of the insurer was judicially established by the decree appointing receivers, every holder of an existing policy had a claim to have a *pro rata* portion of his premium returned to him, where he had paid for a period extending beyond the date of insolvency.

The doctrine was also applied to fire-insurance policies, in Relfe v. Commercial Ins. Co. 10 Mo. App. 393. The policy in this case contained a provision authorizing the assured to surrender the same and recover the unearned premiums at his pleasure. In this case, however, it was held that the mere taking of dissolution proceedings or the insolvency of the company did not *ipso facto* cancel the policy so as to entitle the policy holders to their unearned premiums from that date; and, unless advantage of the provision already mentioned was taken by the policy holders to cancel the same, the policy would not be considered as canceled until an adjudication of dissolution and insolvency had been had.

That question is now regulated by statute in Missouri, the superintendent of insurance, as to companies of insurance other than life insurance, being required to ascertain and allow the amount of premium unearned on each policy outstanding and in force at the time of the decree dissolving the company. Carr v. Union Mut. F. Ins. Co. 28 Mo. App. 215.

In Insurance Commissioner v. People's F. Ins. Co. 68 N. H. 51, 44 Atl. 82, a policy holder was held entitled to take advantage 19 L.R.A. (N.S.)

Mut. F. Ins. Co. 49 Minn. 291, 51 N. W. 921; Smith v. National Credit Ins. Co. 65 Minn. 283, 33 L.R.A. 511, 68 N. W. 28; McCallum v. National Credit Ins. Co. 84 Minn. 134, 86 N. W. 892.

Messrs. Belden, Jamison, & Shearer for defendant.

Brown, J., delivered the opinion of the court:

The facts in this case, as disclosed by a stipulation of the parties, are as follows: The Minnesota Title Insurance & Trust Company was organized under the laws of the state for the purpose, among other things, of insuring titles to real property and issuing policies therefor. In February, 1907, claimant applied to the com-

pany for a clause in a fire-insurance policy permitting him to terminate the same and recover the unearned premium by surrendering the policy, although receivership proceedings were pending against the insurance company at the time such policy holders sought to take advantage of this clause. It is said that the amount to be repaid by the company on the cancellation of the policy is to be determined by the contract to the same extent as it would have been if receivership proceedings had not been begun. That these proceedings introduced no new element into the contract, and did not deprive a policy holder of his right to be paid a *pro rata* part of the premium when his policy was canceled by the dissolution of the company.

In Franzen v. Hutchinson, 94 Iowa, 95, 62 N. W. 698, it was held that local policy holders of a foreign insurance company, which had made an assignment for creditors in a different state could avail themselves of a clause in their policies authorizing them to cancel the same and demand the unearned portions of premiums which they had paid; and that they could enforce these demands against any property of the company within the state.

In Fogerty v. Philadelphia Trust, S. D. & Ins. Co. 75 Pa. 125, while the right of a policy holder to file his claim as a creditor of an insolvent fire insurance company because of the unearned premium on a policy issued by such company was recognized, his right to set off such claim in an action against him in behalf of the company, for a loan made to him by the company, was denied.

A statutory provision that policy holders of subsisting policies in a company dissolved are entitled to the *pro rata* portion of the premium paid by them was held in People v. Security Life Ins. & Annuity Co. 78 N. Y. 114, 34 Am. Rep. 522, not to apply to policies in life insurance companies, but only to policies of other classes which have a definite term to run.

In Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390, the holder of a life-insurance policy was

pany for a policy insuring the title to certain property it then owned, upon which, after due investigation, a policy was issued in due form insuring the title for the period of twenty-five years from its date, and claimant paid the premium charged therefor, amounting to \$45. Thereafter, on March 26, 1907, about two months after the issuance of the policy, the insurance company, in proceedings instituted by the attorney general, was duly adjudged insolvent, and a receiver appointed to wind up its affairs. In June, 1907, claimant filed with the receiver as a demand against the company a claim for the return of the premium so paid. The question whether the claim should be allowed came up for hearing before the court below, where judg-

ment was ordered for claimant for the unearned part of the premium less \$10, which the court held the company was entitled to retain for services rendered in the examination of the title preparatory to the issuance of the policy. Both parties appealed.

We have found no case involving the right of a policy holder in an insurance company like the one before us, an insurer of title to real property, to a return of the unearned part of the premium, where, before the expiration of the policy, the insurance company became insolvent and retired from business. The question is entirely new and one of first impressions. We discover no reason, however, for not applying the rule applicable to the, in a measure, analogous case of a fire in-

held entitled to his *pro rata* share of unearned premiums upon the consolidation of such life insurance company with another company. It is to be noted, however, in this case, that the insured canceled his policy because of the consolidation, and demanded as the measure of his damages all premiums paid by him. The court, however, held that he had had the benefit of protection for five years under his policy, and the value of that protection should be deducted from the premiums paid.

But *Hone v. Boyd*, 1 Sandf. 481, denied the right of the holder of a policy of marine insurance to have the ratable proportion of the premium for the period remaining unexpired at the time the insurer became insolvent abated from the amount of his premium note in an action thereon by the receivers. This decision appears not to be in accord with the other decisions.

Mutual companies.

Where a company authorized to insure either upon the customary mutual plan, taking deposit notes subject to assessments from time to time in proportion to losses, or for a term of years at a fixed annual premium, receiving the first year's premiums in advance and taking notes payable in instalments at the commencement of each of the years during which the policy is to run, issues a policy in the latter form, the holder does not thereby become a stockholder; and his obligation to continue payment of the notes terminates upon the insolvency of the company, the note for that year having been paid. *Farmers' & M. Ins. Co. v. Smith*, 63 Ill. 187.

So, a policy, issued by a mutual fire insurance company but in the form of policies issued by stock insurance companies, was held, in *Re Minneapolis Mut. F. Ins. Co.* 49 Minn. 291, 51 N. W. 921, not to make the holder a member of the company; and his right, upon the termination of the policy by insolvency proceedings, to repayment of the unearned premium, was not inferior to the claims of other policy holders who had suffered loss by fire.

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And one who, under a statute providing that a cash premium, when paid to a mutual insurance company, is to be received in lieu of a deposit note, pays the premium in cash, is entitled, upon the cancellation of the policy, to receive back a proportion thereof, to be determined upon the same basis as the rebate on a deposit note; and such obligation to repay is a liability of the corporation which must be discharged by its receiver. *Raegener v. Willard*, 44 App. Div. 41, 60 N. Y. Supp. 478.

In *Carr v. Union Mut. F. Ins. Co.* 33 Mo. App. 291, the statute relating to recovery of unearned premiums (see 28 Mo. App. 215, *supra*) upon the dissolution of an insurance company was held to apply to policies in mutual fire insurance companies containing a clause authorizing their surrender by the policy holder at any time, and the recovery by him of the unearned premium thereon.

But, where a policy of a mutual insurance company contained a clause that, in the event of the dissolution of the company because of its insolvency, the insured, in addition to the cash premium paid by him, should pay a sum equal thereto, if necessary, to meet the liabilities of the company, it was held, in *Hammond v. Knox*, 125 App. Div. 9, 109 N. Y. Supp. 367, that, where the liability of the company was such as to require the entire premium paid, and also the full additional amount which the policy holder had obligated himself to pay, he could not avail himself of another clause in the policy permitting policy holders to cancel their policies at any time and recover the unearned premium.

In *Dewey v. Davis*, 82 Wis. 500, 52 N. W. 774, and *Atlas Paper Co. v. Seamans*, 82 Wis. 504, 52 N. W. 775, it was held that, to entitle the holder of a policy of a mutual insurance company, whether issued on the "cash plan" or the "mutual plan," to the return of unearned premiums, he must bring himself within the terms of a statute declaring that, at the request of the insured, the company shall cancel the policy and return the unearned premium, or of the provision of the by-laws giving the company

insurance company. It has been held in respect to such companies that the adjudication of insolvency and the appointment of a receiver to close the affairs of the company in effect annuls the policy and entitles the holder thereof to a return of the unearned premium. *Taylor v. North Star Mut. Ins. Co.* 46 Minn. 198, 48 N. W. 772; *Re Minneapolis Mut. F. Ins. Co.* 49 Minn. 291, 51 N. W. 921; *Smith v. National Credit Ins. Co.* 65 Minn. 283, 33 L.R.A. 511, 68 N. W. 28; *McCallum v. National Credit Ins. Co.* 84 Minn. 134, 86 N. W. 892. In the case of fire, hail, storm, or other like insurance, the indemnity is against loss which may occur at some time in the future during the life of the policy, and the contract serves as a protection to the policy holder during that time. In the title insurance the situation is the same, save that the loss suffered must arise from some defect in the title existing at the time of or before the policy was issued, and is subsequently successfully asserted to the damage of the policy holder. So that, substantially, the indemnity in either case is against future loss or damage; the loss arising in the one case from the happening of a future event, and in the other from a loss subsequent to the date of the policy by reason of the successful assertion of an adverse title or interest in the land insured which existed at the time or before the contract was made. That a loss of this kind might arise in the future, though the chances in this class of insurance are strongly against such a result, brings the case, by analogy, within the rule applicable to other insur-

ance contracts, and the trial court was correct in applying it. The difference in probable or possible loss in the two classes of insurance is practically one of degree only; the probability of loss in this class being materially less than in the case of fire insurance.

We are also of opinion, and so hold, that the court adopted the correct rule of damages. The court held that the claimant was entitled to the return of the premium less a proportionate amount, which it may be said the company earned up to the time of its insolvency, and the sum of \$10, allowed for the examination of the title before issuing the policy. The allowance of this item is fully justified by the terms of the contract, by which claimant agreed to pay for the insurance the sum of \$45, with the understanding that \$10 thereof, which was paid at the time of the application, should be retained by the company, whether the policy was issued or not, as compensation for services rendered in the investigation of the title. The company fully performed this service. If a policy had not been issued, the applicant could not demand its return; and if, under such circumstances, it could be retained by the company, the fact that it issued the policy should not forfeit its right to retain it for the same service. The court adopted the rule of time in measuring the earned portion of the premium. It is urged that this was incorrect, and that some other more equitable rule should have been applied. We are unable to concur in this contention. While it is true that the risk of loss under a contract

the right to cancel any policy, and requiring it, in case it does so, to return the unearned premium, which were the only provisions on the subject; and that the cancellation of the policy by operation of law, in consequence of proceedings to wind up the company, did not bring him within either provision. The court gave as an equally conclusive reason why the policy holder could not recover the unearned premium that the premium notes constituted the only funds in the hands of the receiver out of which to pay the claims against the insolvent company, and that there was no law authorizing an assessment of those notes to pay unearned premiums on policies, whether the premium was paid in cash or by note, the statute only authorizing assessments to pay "losses and expenses" accruing during the period of the insurance.

In reaching the same conclusion upon a very similar state of facts, the court said, in *Com. v. Massachusetts Mut. F. Ins. Co.* 112 Mass. 116: "Claims for return premium stand upon footings varied according to the terms of the particular contract, and the time and circumstances of the cancellation. Assuming that such a claim, when the cancellation is made necessary by insolvency, or 19 L.R.A. (N.S.)

by losses resulting in suspension and settlement through a receiver of the court, is to be regarded as belonging to the same period with the losses themselves, yet, in the absence of particular agreements, the foundation of such a claim is not obvious. The appropriation of the fund is contemplated by the nature of the association; its exhaustion results from the limit fixed by statute, which becomes an element in the contract, even when not expressly contained therein. No 'just claim' against the company arises from the fact that all future indemnity is thus practically rendered ineffectual. In that condition of things, if the party would be entitled, on any ground, to maintain an action, or prove a claim, for the loss of his unexpired term by the cancellation of his policy, it would seem that the measure of his damages must be reduced to a minimum." The court added, however, that these suggestions did not apply to the case of a cancellation effected before the occurrence of losses, whereby the party is relieved from liability to assessment, and his claim has already become fixed as a debt against the solvent company.

of this kind, unlike other insurance, diminishes with the lapse of time, and as the end of the period covered by the policy approaches there is less and less likelihood of loss, yet to attempt to say from this basis what proportion of the premium has been earned would involve the matter in arbitrary speculation, and bring up at an exceedingly unsatisfactory result, since no certain or definite rule could be evolved from that process of reasoning; whereas, on the other hand, to apportion the time during which the policy was in force to that of the unexpired period leaves no room for speculation or conjecture, does not involve an effort to measure the value of the possibility or probability of a loss, and fixes a rule which, if not wholly satisfactory, is at least definite and certain.

Our conclusions, therefore, are in harmony with those reached by the learned trial judge, and his order in the premises is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WADE H. BRONSON, Trustee, etc., of Columbia Distilling Company, Plff. in Err.,
v.

NEW YORK FIRE INSURANCE COMPANY.
NY.

(— W. Va. —, 63 S. E. 283.)

Fire insurance — possession of property — receiver — forfeiture.

A fire-insurance policy on personal property provides that, if any change takes place in the interest, title, or possession of

Headnote by BRANNON, J.

Case Note. — Effect of appointment of receiver for insured on fire insurance.

The appointment of a receiver for a mortgagee to whom a policy of insurance was expressly payable, after the destruction of the insured property, does not violate a condition of the policy that, if any change shall take place in the title or possession of the property, whether by sale, transfer, or conveyance, in whole or in part, by legal process, or judicial decree, the policy shall be void. *Small v. Westchester F. Ins. Co.* 51 Fed. 789. The court said that, as the receiver was appointed after the loss occurred and a right of action therefor had accrued, no forfeiture thereby occurred.

So, the appointment of a receiver to take possession of insured property pending a proceeding to foreclose a mortgage thereon, where the policy was expressly payable to the mortgagee, does not violate a condition of the policy rendering it void if any change takes place in the title or possession by legal

the property, "whether by legal process or judgment, or otherwise," the policy shall be wholly void. The appointment of a receiver in a suit to take possession and control of the property, who takes actual possession of it, prevents recovery of loss under it.

(December 9, 1908.)

ERROR to the Circuit Court for Mingo County to review a judgment in defendant's favor in an action brought to recover upon a fire-insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Stokes & Bronson and Sheppard, Koodykoonts, & Scherr for plaintiff in error.

Messrs. Vinson & Thompson and Brown & Wiles, for defendant in error:

The provision of the insurance policy is a material one, and the taking of possession by the trustee avoids the policy.

Northam v. Dutchess County Mut. F. Ins. Co. 166 N. Y. 319, 82 Am. St. Rep. 655, 59 N. E. 912; *Carey v. German American Ins. Co.* 84 Wis. 80, 20 L.R.A. 267, 36 Am. St. Rep. 907, 54 N. W. 18; *Burr v. German Ins. Co.* 84 Wis. 76, 36 Am. St. Rep. 905, 54 N. W. 22; *St. Paul F. & M. Ins. Co. v. Archibold* (Tex. App.) 16 Ins. Law J. 153.

Brannon, J., delivered the opinion of the court:

The New York Fire Insurance Company issued a policy to the Columbia Distilling Company insuring a stock of liquors and other personal property. The policy contained the provision that "this entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be

process, judicial decree, or voluntary transfer or conveyance, as the possession of the receiver, as an officer of the court, being for the benefit of all parties concerned, does not, as between the mortgagee and the insurer, impair or diminish the interest of the latter in the insured property. *Lancashire Ins. Co. v. Boardman*, 58 Kan. 339, 62 Am. St. Rep. 621, 49 Pac. 92.

The taking possession, by a receiver, of insured property at the instance of a mortgagee, to whom the loss was expressly payable, in order to preserve the value of the insured property as security, is not a violation of a condition of a policy providing that it shall be void if the insured property be levied on or taken into possession or custody under any proceeding in law or equity, whether there is any change of possession or not. *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545, 51 Atl. 184. The court observed that such a condition did not mean a taking into custody as the result of the appointment of a receiver for the insured property under

void if . . . any change other than by death of the insured takes place in the interest, title, or possession of the subject of insured (except change of occupancy without increased hazard) whether by legal process, or judgment, or by voluntary act of the insured, or otherwise, or if this policy be assigned before loss." A suit was brought to dissolve the insured corporation, and in it a receiver was appointed to operate the distillery and take possession and control of the company's property, including the personality insured, and the receiver did take actual possession of such property. Later a proceeding in bankruptcy was instituted against the distilling company to adjudge it a bankrupt, and in this bankruptcy proceeding another receiver was appointed to take possession of the said property, and he did take possession of it. Later a fire destroyed the property insured. We have in hand a writ of error in an action brought by Bronson, trustee in bankruptcy, against the insurance company, to recover from it the loss arising from the fire. The judge of the circuit court of Mingo county, upon

such circumstances, as such appointment was an incident growing out of the particular situation, and could not have, and was not intended to have, any ultimate effect upon the title or possession, being merely an expedient devised to meet the exigency, the intention and effect being merely to make temporary provisions for the care and protection of the property in the interest of all concerned.

So, the appointment of one copartner, in a dissolution proceeding, as a receiver *pendente lite* of the insured copartnership property, the receiver continuing the business, does not constitute such a change in the actual custody of the property as will violate a condition of a policy that, if, the insured property is sold or transferred, or any change takes place in title or possession; whether by legal process, or judicial decree, or voluntary transfer or conveyance, the policy shall be void; as his appointment works no change in the possession of the partnership, the legal title to the property remaining in the latter and it is a change in legal title only that will avoid the policy. *Keeney v. Home Ins. Co.* 71 N. Y. 396, 27 Am. Rep. 60, reversing 3 Thomp. & C. 478.

In *Herman Bros. v. Katz Bros.* 101 Tenn. 118, 41 L.R.A. 700, 47 S. W. 86, the court denied the contention that the destruction of insured personality between the seizure thereof upon attachment and the appointment of a receiver constituted an increase of risk, and violated a provision rendering a policy void if any change takes place in the title or possession of the subject-matter of insurance, whether by legal process, or judgment, or by the voluntary act of the insured, or otherwise.

The appointment of a receiver to take

agreed facts, rendered judgment for the insurance company.

The sole question here is whether the change of possession into the hands of the said receivers avoids the policy, and bars recovery because of the clause in the policy above quoted. We think no recovery can be had upon it. By the appointment of the receiver and his taking actual possession of the property, the distilling company, which was in possession when the policy issued, was deprived of the possession. When an insurance company insures property for one person, it has inquired into his carefulness and character, and it trusts him to provide for the safety of his own property, while he has it in possession; but it does not trust everybody into whose hands it may come, whether he be receiver or not. The very thing against which that policy provided had taken place before the fire,—a total change of possession. The distilling company no longer guarded the property. It was in the hands of one not moved by the same interest to care for the property as would be the distilling company when solvent and operating. Its interest had

charge of and collect the rents from leased property, which was insured in the name of a trustee, for the benefit of the property owner's creditors, whom the receiver succeeded, does not violate a condition of a policy rendering it void if any change takes place in title or possession of the property, whether by sale or judicial decree, without notice to the company and its consent indorsed thereon, as the appointment of a receiver did not work such a change in the possession or title of the property as the policy contemplated, or render the insured less watchful in guarding and preserving the property from destruction. *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 50 Am. St. Rep. 832, 21 S. E. 476.

Where a policy of fire insurance runs to a receiver in a designated suit, a mere change of receivers does not involve a change of title or possession. *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019.

No condition of a fire-insurance policy against change of possession or title is violated by the appointment of a receiver in bankruptcy for the insured after the destruction of the insured property. *Gordon v. Mechanics' & T. Ins. Co.* 120 La. 441, 15 L.R.A. (N.S.) 827, 124 Am. St. Rep. 434, 45 So. 384; *Fuller v. Jameson*, 98 App. Div. 53, 90 N. Y. Supp. 456, affirmed without opinion in 184 N. Y. 605, 77 N. E. 1187; *Fuller v. New York F. Ins. Co.* 184 Mass. 12, 67 N. E. 879.

As to the effect of bankruptcy or insolvency proceedings or assignment for benefit of creditors, on fire insurance, see case note to *Gordon v. Mechanics' & T. Ins. Co.* 15 L.R.A. (N.S.) 827.

practically ceased. It was bankrupt. Kerr, Ins. § 151, says that a condition of a policy that, if any change of title or possession takes place, "whether by sale, transfer, conveyance, legal process, or judicial decree, then and in every such case the policy shall be void, includes an involuntary as well as a voluntary change of possession. A writ of attachment is process, and the fact that an officer levied upon property insured under a writ of attachment, and took possession thereunder, shows a change of possession, avoiding the policy." The case cited by Kerr—*Carey v. German American Ins. Co.* 84 Wis. 80, 20 L.R.A. 267, 36 Am. St. Rep. 907, 54 N. W. 18—so holds. The mere delivery to a sheriff of an execution for levy is not a change of title or possession under such a policy, nor even is its levy, unless the officer takes actual possession, though the levy gives him constructive possession; but it is different if he takes actual possession. A sale under decree does not change interest, so long as the insured remains in possession and retains right of redemption. *Vance, Ins.* 454. It is the actual change of possession, physical possession, that violates the policy. In this case there was such change of possession. It will be found on reading the authorities that actual change of possession under legal procedure so operates. *Walradt v. Phoenix Ins. Co.* 136 N. Y. 375, 32 Am. St. Rep. 752, 32 N. E. 1063; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521; *Wood v. American F. Ins. Co.* 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; *McClelland v. Greenwich Ins. Co.* 107 La. 124, 31 So. 691. *Cleavenger v. Franklin F. Ins. Co.* 47 W. Va. 595, 35 S. E. 998, does not militate against this position, but supports it. It holds that a decree of sale which is not executed until after the fire does not avoid a policy such as is involved in this case because there was no change of title or possession until after the fire; that is, if there had been such change of possession, it would be different. The case of *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 50 Am. St. Rep. 832, 21 S. E. 476, would not support a recovery in this case. A corporation owned the property, and gave a deed to trustees to secure its creditors. The trustees took out insurance for the corporation in its name and leased the property. The property was in the possession of the corporation. The trustees never took actual possession. The receiver was appointed on the resignation of the trustees, and left the same lessee in possession. It was held the policy was not avoided. The court said that the mere appointment of a receiver did not work any such change in the possession or title of the property as contemplated by the clause of 19 L.R.A. (N.S.)

the policy. No change of possession took place. The same lessee in possession under the corporation before the trustees resigned remained in possession after the substitution of a receiver in their place, and was in possession at the time of the fire. The court said: "The only change that had taken place was that the court had appointed J. Kemp Bartlett, Jr., as the hand to receive and sign receipts for rent arising from the Luray inn, in the room and stead of H. J. Smoot and others, trustees, resigned. The only act performed by J. Kemp Bartlett, Jr., as receiver after his qualification on the 16th of October, 1891, disclosed by the record, was to make an indorsement thereon extending for a further time the same lease that was on the property when the policy was executed; thus continuing the property in the actual possession of the same lessee." The case of *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019, was where property insured in the name of a receiver was in the hands of the court by its receivers at the date of the policy, and the fire occurred while the property was in the hands of the receiver who took out the policy. Before the fire, that receiver resigned, and a new one was appointed, but had not qualified or taken possession when the fire occurred. There was no change of actual possession. It was still in the hands of the first receiver. The court held that the mere name of the receiver or the personnel of the officer did not change the possession of the property as it was in the possession of the same party at the date of the fire as when the policy was written. The point of the decision is that a mere change of the receiver, not changing possession, is not a change of title or possession under the policy. But this admits that, if there were a change of possession, it would be different. Counsel asks: "Did the appointment of a receiver increase hazard or risk? We say 'Yes,' or might have done so. The company did not choose the receiver, or consent to his selection. It provided against it. It is the letter and plain meaning and spirit of the contract, and it has been said over and again, that 'contracts of insurance, like other contracts, are to be considered according to the sense and meaning of the terms, and, if clear and unambiguous, the terms are to be taken in their plain, ordinary, and popular sense.' *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379. The clause is nothing but the usual in policies made for the protection of the company, and has been often recognized by the courts as valid.

We affirm the judgment.

ARKANSAS SUPREME COURT.

J. W. JOHNSON, Appt.,
v.
MAMMOTH VEIN COAL COMPANY.

(— Ark. —, 114 S. W. 722.)

Master — statutory duty — assumption of risk.

1. A miner does not, by continuing his work after the master has refused to comply with its statutory duty to furnish necessary props to make the room in which he is working safe, assume the risk of injury from such breach of duty.

Same — contributory negligence.

2. It is not negligence *per se* for a miner, knowing that a portion of his room is in need of props which the master refuses to

furnish, to continue to work in another portion, the roof of which he has tested, where the fall of the unprotected portion of the roof may affect the portion in which he is working, or may not.

(McCulloch, J., dissenta.)

(November 9, 1908.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Sebastian County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Hill, Ch. J.:

Johnson brought suit against the Mam-

Case Note. — Servant's assumption of risk of the master's breach of a statutory duty.

This subject is treated in a case note to *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A. (N.S.) 981. The cases subsequently decided are characterized by the same conflict that was disclosed in that note.

The present note does not cover the question whether assumption of risk is available as a defense to an action based on the employment of a child under statutory age. (see on that subject case note to *Lenahan v. Pittston Coal Min. Co.* 12 L.R.A. (N.S.) 461); nor the question whether the doctrine of assumed risk is available under a statute abolishing or modifying the fellow-servant rule; nor the question whether the defense of contributory negligence is available as a defense to an action based upon a breach of the master's statutory duty. Upon the question whether contributory negligence is a defense where the statute excludes the defense of assumption of risk, see case note to *Dumphy v. New York, N. H. & H. R. Co.* 13 L.R.A. (N.S.) 1152.

By the decision in *Denver & R. G. R. Co. v. Gannon*, 40 Colo. 195, 11 L.R.A. (N.S.) 216, 90 Pac. 853, Colorado aligns itself with those jurisdictions which permit the defense of assumption of risk of a master's neglect of duty, even though the duty was imposed by statute, it being specifically held in that case that a switchman might assume the risk of the failure of the railroad company to block switches, as required by a statute which also declares that the failure to do so shall be *prima facie* evidence of negligence.

In *Sutton v. Des Moines Bakery Co.* 135 Iowa, 390, 112 N. W. 836, the Iowa supreme court, following the previous decisions in that state, also holds that a servant may assume the risk of the absence of a guard required by statute.

To the same effect is *Seely v. Tennant*, 104 Minn. 354, 116 N. W. 648, following the previous decision in *Starr v. Great Northern R. Co.* 67 Minn. 18, 69 N. W. 632.

And the New Jersey court of errors and appeals, after a review of the cases, adopts this side of the question in *Mika v. Passaic* 9 L.R.A. (N.S.)

Print Works (N. J.) 70 Atl. 327. The court emphasizes the fact that there is no provision in the statute expressly excluding such defense, and that it provides a penalty alone for violation, and makes no reference to civil liability.

As shown in the previous note, New York is committed to this side of the question; and it is held in the recent case of *Bushtis v. Catskill Cement Co.* 128 App. Div. 780, 113 N. Y. Supp. 294, that the New York doctrine was not affected by an amendment of the factory act making failure to comply with its provisions a crime.

When, however, an action is brought under the New York employers' liability act (Laws 1902, chap. 600, § 3) based upon the violation of a specific statutory duty on the part of the master, assumption of risk is made a question for the jury rather than for the court by the provisions of § 3 of that act, to the effect that an employee, as a matter of law, shall be deemed to have assumed only the necessary risks inherent in the nature of the business which remain after the employer has exercised due care and has complied with the laws for the protection of employees; and that, in an action for an injury for which the employer would otherwise be liable, the question whether he understood and assumed the risk shall be submitted to the jury, subject to the usual powers of the court, in a proper case, to set aside a verdict contrary to the evidence. *Kierman v. Eidlitz*, 109 App. Div. 726, 96 N. Y. Supp. 387, S. C. on subsequent appeal, 115 App. Div. 141, 100 N. Y. Supp. 731.

It was at one time held by the appellate division of the first department (*Ward v. Manhattan R. Co.* 95 App. Div. 437, 88 N. Y. Supp. 758) that the provisions of § 3 of the employers' liability act applied whether the action was brought under that act or at common law; but in the subsequent case of *Curran v. Manhattan R. Co.* 118 App. Div. 347, 103 N. Y. Supp. 351, that court changed its ruling on this point, and held that the section applied only to an action brought under the act; and it is also held by the appellate division of the third department in *O'Neil v. Karr*, 110 App. Div. 571, 97 N. Y. Supp. 148 (af-

moth Vein Coal Company for a personal injury received in its mine; and, after hearing the evidence adduced, the circuit judge directed a verdict to be returned in favor of the defendant. The sole question on this appeal is whether the plaintiff's testimony presented such facts as would justify the case going to the jury. Johnson's testimony was to the following effect. He was an experienced miner, working in room No. 2, east entry, of the mine of the Mammoth Vein Coal Company on the 5th of March, 1906. The room was approximately 150 feet long by 20 wide. It was properly propped on both sides to within 15 or 20 feet of the face of the coal, the props being on both sides and in the middle. On the west side there were no props for 15 or

20 feet of the face of the coal, and on the east side there were props to within 8 or 10 feet of it. Johnson was injured on Wednesday, and on the preceding Monday, when he finished his work, he called upon the boss driver for props to be placed in his room by the next morning. The boss driver was the proper person upon whom to make this demand, as it was his business to furnish props to the miners upon demand. Johnson wanted these props to place under the west side of his roof, as he had discovered that that side was drummy for a space of 4 to 8 feet. A drummy condition of a roof is where the rock is loosened to some extent, and such condition is dangerous, and this fact was known to him. Johnson had placed two shots, one on the

firmed by the court of appeals), and *Bush-tis v. Catskill Cement Co.* supra, that the provisions of the section on this point are not applicable in an action at common law.

In *Perrotta v. Richmond Brick Co.* 123 App. Div. 626, 108 N. Y. Supp. 10, it was held by the appellate division of the second department that the question of the assumption of risk from the failure of the master to provide a proper guard for machinery was for the jury, under § 3 of the employers' liability act. It does not appear in this case, however, whether the action was brought under that act or at common law, nor whether it was based upon breach of a common-law duty of the master, or upon his violation of a specific statutory duty.

It will be observed that the modification, indicated by these cases, of the New York rule as to assumption of risk in case of the master's violation of a statutory duty, is not due to any change of opinion as to the effect of a statute imposing specific duties upon the master, but is attributable solely to the express provisions of the employers' liability act already referred to.

As shown in the earlier note, Indiana is committed to the doctrine that a statute imposing specific duties upon the master, by implication excludes the defense of assumption of risk in an action based on the violation of such statute. This view is sustained, and applied in the subsequent case of *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060, to an action based on the violation of the master's statutory duty concerning coal mines; in *United States Cement Co. v. Cooper* (Ind. App.) 82 N. E. 981, to an action based on the violation of provisions of the factory act requiring machinery to be guarded.

And in *Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768, it was held that a switchman does not assume the risk from failure to comply with an ordinance requiring locomotives running backward in the nighttime to keep a conspicuous light at the rear; which ordinance was adopted pursuant to a statute authorizing cities to provide for security of citizens from running trains.

The general proposition that a master

may not invoke assumption of risk to defeat an action for injuries caused by his violation of a specific statutory mandate or duty is also declared in *Inland Steel Co. v. Yedinak* (Ind.) 87 N. E. 229, and is there applied in an action based on the employment of a child over hours in violation of statute. (The application of the principle to this class of cases, however, is not within the scope of this note. See, on this question, note to *Lenahan v. Pittston Coal Min. Co.* 12 L.R.A.(N.S.) 461.

The view, however, that assumed risk is not available as a defense to an action based on the violation of a statutory duty is limited in Indiana to the violation of a statute imposing a positive and specific duty upon the employer; and *Monteith v. Kokomo Wood Enameling Co.* 159 Ind. 149, 58 L.R.A. 944, 64 N. E. 610, noted a distinction on this point between statutes which require of the employer the performance of a specific duty *e. g.*, to guard or fence dangerous machinery, and statutes such as the employers' liability act which do little more than declare the rule of common law; and intimated that assumed risk might be a defense to an action based on a statute of the latter class.

And, recognizing this distinction, *Whiteley Malleable Castings Co. v. Wishon* (Ind. App.) 85 N. E. 832, and *Cleveland, C. C. & St. L. R. Co. v. Bossert* (Ind. App.) 87 N. E. 158, hold that the doctrine of assumed risk is read into the statute modifying the fellow-servant rule. (This specific question, however, is not within the scope of this note, and these cases are referred to merely as illustrating the limitation of the Indiana doctrine.)

In *Antioch Coal Co. v. Rockey*, 169 Ind. 247, 82 N. E. 76, it was held that a miner did not assume the risk from the failure to comply with a statute making it the duty of the mining boss to see that all loose coal, slate, or rock overhead was carefully secured, and, if for any reason such security could not be had, to see that such loose coal, slate, or rock was removed before the miners were permitted to resume work. The decision, however does not seem to rest upon the general doctrine that the statute impliedly ex-

west side and one on the east side, of the room, and they had been fired, evidently after he had ceased work on Monday. He did not work on Tuesday, principally because he did not have the props. He demanded of the boss driver props again on Tuesday for Wednesday, and they were promised for that time. He also saw the pit boss, and had a promise from the pit boss that he would have the props on Wednesday, and, according to the custom of the mine, they should have been taken to him Wednesday morning on the first trip of the driver. The driver failed to bring them to him on that trip, and told him he had been unable to get them. After this default of the boss driver and the pit boss

to furnish him props as demanded and as promised, Johnson continued to work on Wednesday until he was injured, which occurred some time after the failure to bring props. He worked on the east side of his room, under that part of the roof which was not drummy and which he regarded as properly propped. He tested the roof on Monday, and again on Wednesday after the shots had been fired, and found it in the same condition that it was on Monday before the shots were fired. Four or 5 feet of the coal had been shot out on the west side by the firing of the shot there, and this would have some tendency to loosen the roof, but on sounding it, in his opinion, its condition had not been changed. Had he

cludes the assumption of risk, but upon the ground that the facts did not bring the case within the scope of the general rule that a servant assumes the risk of danger incident to working in a place where the character or conditions for safety are constantly changing.

The question whether assumed risk is available as a defense to an action based on the violation of a statute was mooted, but not decided, in *Madison v. Clippinger*, 74 Kan. 700, 88 Pac. 260; but the negative side of that question is expressly taken in *Western Furniture & Mfg. Co. v. Bloom*, 76 Kan. 127, 11 L.R.A.(N.S.) 225, 123 Am. St. Rep. 123, 90 Pac. 821, specifically holding that assumed risk is not available as a defense to an action founded on a violation of the provision of the factory act. This decision was a deduction from the positions previously taken in Kansas that assumption of risk is one of the terms of the contract of employment, and that the protection to employees designed by statute cannot be contracted away. *Kansas Buff Brick & Mfg. Co. v. Stark*, 77 Kan. 648, 95 Pac. 1047, is to the same effect.

Upon the same reasoning the doctrine that assumption of risk is not available as a defense to an action based on the violation of a statutory duty of the master, *e. g.*, his failure to guard an elevator shaft, is also adopted by the Michigan supreme court in *Murphy v. Grand Rapids Veneer Works*, 142 Mich. 677, 106 N. W. 211.

And two of the judges expressed an opinion to the same effect in *Swick v. Aetna Portland Cement Co.* 147 Mich. 454, 111 N. W. 110. The other three judges concurred in the result only; but it does not necessarily follow, that they entertained any doubt on this point, as their refusal to assent to the opinion may have been due to other points considered therein.

The Oregon supreme court, in *Hill v. Saugestad* (Or.) 98 Pac. 524, also aligns itself with the courts holding that assumption of risk is not available as a defense to an action based on the violation of the master's statutory duty.

And the Washington doctrine that, in the absence of provisions to the contrary, the statute prescribing specific duties on the 19 L.R.A.(N.S.)

part of the master by implication precludes the defense of assumption of risk was followed in the subsequent case of *Gustafson v. A. J. West Lumber Co.* (Wash.) 97 Pac. 1094 (failure to guard saw.)

And it was held that the repeal of the factory act of 1903 after an injury sustained by an employee did not restore the right to rely on the assumption of risk, as to an injury occurring before the repeal, although the trial of the action took place after the repeal. *Miller v. Union Mill Co.* 45 Wash. 199, 88 Pac. 130.

In *Johnston v. Northern Lumber Co.* 42 Wash. 230, 84 Pac. 627, however, where the master had attempted to comply with the requirement of the factory act of 1903 to provide a "proper guard" by furnishing a guard of the kind approved by experienced mill men, it was held that the doctrine precluding defense of assumption of risk was not applicable. It is not clear, however, how the question of assumption of risk could be involved here as the court seems to have been of the opinion that, under the circumstances, there was no violation of the master's statutory duty.

In *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956, the court said that it was unnecessary to consider whether defendant can be allowed recourse to the doctrine of the employee's assumption of obvious risk as distinguished from ordinary risk, since, if such defense was allowable, the defendant had the benefit of it.

And *Kirby v. Manufacturers' Coal & Coke Co.* 127 Mo. App. 588, 106 S. W. 1069, declares in general terms that the doctrine of assumed risk has no application where the master was negligent, without making any reference in this connection to the statute, though as a matter of fact the plaintiff's action was based on the master's violation of a statutory duty.

Federal cases.

As indicated in the note to *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A.(N.S.) 981, there appears to be some uncertainty whether the Federal courts, in actions based on a violation of a state statute, are bound by the decisions of the courts of the state in which the statute was enacted, upon the

received the props he would have placed two or three on the west side 6 or 8 feet from the face of the coal, and he would have considered that sufficient to have made that side safe. He did not consider that any were needed on the east side to make that side safe, as the props extended to within 8 or 10 feet of the coal on that side. When a drummy part of a roof falls, it may fall without affecting the other part, or it might possibly bring down some of the adjoining roof with it. While mining on the east side, close to his shot, the drummy part on the west side fell and brought down some of the roof over him, which hit him on the head and shoulders and knocked him

down, and in falling he stumbled over a pick handle which struck him in the groin. This fall over the pick handle ruptured him, and he has been permanently disabled thereby. When he fell his light was put out, and he does not know how much of the roof fell. At the conclusion of the evidence the trial judge granted the motion of the defendant for a peremptory instruction, on the ground that under the decision of *Patterson Coal Co. v. Poe*, 81 Ark. 343, 99 S. W. 538, the plaintiff assumed the risk, and is not entitled to recover in the action. The plaintiff has properly brought the case here.

question under consideration. It would seem, however, that the question is clearly one of statutory construction, as to which the decisions of the state courts, of last resort at least, would be binding. This seems to be assumed in *Federal Lead Co. v. Swyers*, 161 Fed. 687, which, however, relying on *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 405, and *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A. (N.S.) 981, 72 C. C. A. 635, 141 Fed. 247, 5 A. & E. Ann. Cas. 448, held that assumption of risk was available as a defense, whether the case was predicated upon the provisions of the Missouri statute requiring the belting, shafting, gearing and drums in all manufacturing establishments, when so placed as to be dangerous to persons employed thereby, to be securely guarded, or on the statutory provision that no minor or woman shall be "required" to work between the "fixed or traversing" part of a machine. The court apparently assumed that the decision of a Missouri supreme court on the subject would be binding upon it, but refused to follow the decisions on this point of the Kansas City court of appeals, which were promulgated after the Federal decisions already referred to, upon the ground that they were not the decisions of the highest judicial tribunal of the state. The court makes no reference to the decision of the Missouri supreme court in *Durant v. Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484, cited in the earlier note, holding that a miner did not assume the risk of the violation of the employer's duty to have an iron cover on the cage used in the mining shaft. While this decision was not based on the specific statutory provisions that were involved in the *Swyers* Case, it would seem that the principle on which the decision rests was broad enough to cover them, and therefore to afford a binding precedent for a case arising under them.

And in *Inland Steel Co. v. Kachwinski*, 80 C. C. A. 571, 151 Fed. 219, the Federal court apparently regarded the doctrine announced by the Indiana supreme court, with respect to the "mining act," that the act impliedly precludes the defense of "assumption of risk," as binding upon it with respect to the factory act, although it also al-

ludes to the fact that the same doctrine had been applied by the state supreme court to the factory act.

The Oregon statute, which expressly creates a cause of action in behalf of those injured by its violation, is held in *Welsh v. Barber Asphalt Paving Co.* 167 Fed. 465, to preclude the defense of assumed risk. The court inclined to that opinion, even treating the question as one of general law, but said that the question is one as to which the Federal courts are bound by the decision of the highest court of the state in which the action arises, and, in the absence of a decision of the Oregon supreme court on the point, was of the opinion that the decision of the supreme court of the state of Washington, from which the Oregon statute was borrowed, holding such defense precluded, was binding upon it.

The defense of assumption of risk from injury from an unboxed saw was held, in *Malloy v. Northern P. R. Co.* 151 Fed. 1019, to be precluded by the congressional employers' liability act of 1906, which expressly provides that "no contract of employment, . . . entered into by or on behalf of any employee, . . . shall constitute any bar or defense to an action brought to recover damages for personal injuries to, or death of, such employee."

And it was held in *Bolan-Darnell Coal Co. v. Williams* (Ind. Terr.) 104 S. W. 867, that assumed risk is not available as a defense to violation of an act of Congress requiring owners and managers of coal mines to furnish miners with pure air, which shall be forced through the mines by proper machinery, and to expel therefrom noxious or poisonous gases.

Summary.

The review of the decisions since the note in 6 L.R.A. (N.S.) 981, shows that there has been in the meantime no change of position on this subject by the courts which had then passed upon the point; but that Colorado and New Jersey have been added to the list of states in which it is held that the doctrine of assumed risk is not precluded; and Arkansas, Kansas, and Oregon to those which hold that the statute, by implication, abolishes that defense.

Mr. C. T. Wetherby, for appellant:

Wilful violation must be alleged when the benefit of the statute is invoked.

Cole v. Mayne, 122 Fed. 836.

The servant did not assume the risk in going to work.

Union Mfg. Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Bailey, Personal Injuries relating to Master & Servant, § 3073; McFarlan Carriage Co. v. Potter, 153 Ind. 107, 53 N. E. 465; Green v. Western American Co. 30 Wash. 87, 70 Pac. 310; McDaniels v. Royle Min. Co. 110 Mo. App. 706, 85 S. W. 679; Wojtylak v. Kansas & T. Coal Co. 188 Mo. 260, 87 S. W. 506; Western Anthracite Coal & Coke Co. v. Beaver, 192 Ill. 333, 61 N. E. 335; Hamman v. Central Coal & Coke Co. 156 Mo. 232, 56 S. W. 1091; Donk Bros. Coal & Coke Co. v. Stroff, 200 Ill. 483, 66 N. E. 29; Riverton Coal Co. v. Shepherd, 111 Ill. App. 294; Kellyville Coal Co. v. Yehnika, 94 Ill. App. 74; Donk Bros. Coal & Coke Co. v. Peton, 192 Ill. 41, 61 N. E. 330; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Labatt, Mast. & S. chap. 22, §§ 423-425, 429, 430.

Messrs. Read & McDonough for appellee.

Hill, Ch. J., delivered the opinion of the court:

This case is predicated upon § 5352, Kirby's Dig., and upon § 5350 as amended by the Acts of 1905, which sections are as follows:

"Sec. 5352. The owner, agent, or operator of any mine shall keep a sufficient amount of timber when required to be used as props, so that the workmen can at all times be able to properly secure the said workings from caving in; and it shall be the duty of the owner, agent or operator to send down all such props when required, and deliver said props to the place where cars are delivered."

"Sec. 5350. For any injury to persons or property occasioned by the wilful violation of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to any party injured, for any direct damages sustained thereby; Provided, that should death ensue from any such injury, a cause of action shall survive in favor, first, of the widow and minor children of such deceased; if there be no widow or minor children, then to the father if living, then to the mother; if no mother, then to the brothers and sisters and their descendants." Acts 1905, p. 569.

Briefly stated, the facts are: Johnson found part of his room needed props. He thrice demanded them. The company failed

to furnish them. With knowledge that they would not be furnished at that time he continued to work, and was injured by a falling roof. As will be seen from an examination of the foregoing statement, the facts of the case bring it within Patterson Coal Co. v. Poe, 81 Ark. 343, 99 S. W. 538. In that case, as in this one, the miner proceeded with his work without waiting for the props which he had requested, and which the mining company had failed to furnish him; and it was there held that he was aware of the risk which, to some extent, attended the situation, but his continuance of the work manifested his willingness to assume that risk. In the case of Mammoth Vein Coal Co. v. Bubliss, 83 Ark. 567, 104 S. W. 210, the facts were essentially the same as in Patterson Coal Co. v. Poe, but the court preferred placing the ground of the decision upon the contributory negligence of the miner in working in an obviously dangerous place rather than to follow Patterson Coal Co. v. Poe, in placing it upon the assumption of risk, and pointed out in cases like those two, where the plaintiff exposes himself to a danger that is obvious and imminent, it is not of much practical importance whether the case is disposed of on the ground of assumed risk or contributory negligence. This case is memorable in the court as the last judicial work of the late Mr. Justice Riddick. Since the subject was reviewed in the Bubliss Case, the soundness of the decision in the Patterson-Poe Case has been questioned in the consultation room; and now it has been questioned at the bar in the instant case. The circuit judge properly directed a verdict for the defendant company on its authority. In view of this doubt, the subject has been carefully examined and fully discussed, in order to determine whether to follow this case or disapprove it. Assumption of risk and contributory negligence are separate defenses: and, while it frequently happens that there is no practical importance in distinguishing the two where the same state of facts would make out a defense whether called by the one name or by the other, striking instances of which are found in the Bubliss and Poe Cases, yet they rest upon different bases, and each should be approached from a different viewpoint. However, where the danger is obvious, the two defenses are tested by the same standard in that particular, and then the differences are more theoretical than practical. This is pointed out in Choctaw O. & G. R. Co. v. Jones, 77 Ark. 367, 4 L.R.A. (N.S.) 837, 92 S. W. 244; 7 A. & E. Ann. Cas. 430; St. Louis, I. M. & S. R. Co. v. Mangan, 86 Ark. 507, 112 S. W. 168, and by Judge Taft in the Narramore

Case, hereinafter referred to. There is a class of cases where the distinction is vital, and this case happens to be such an one; for, as will be seen in the discussion later on, it presents a question of fact as to whether the plaintiff was guilty of contributory negligence. Hence the case cannot be turned, as a matter of law, upon contributory negligence. But the facts make out a case of assumption of risk for the master's breach of the statute above quoted if such breach is the subject-matter of an assumption of a risk by the servant in continuing in the service with knowledge of the master's breach of said statute.

In the beginning of this discussion, it may be well to point out the differences between the two defenses. In *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, Judge Sanborn, speaking for the circuit court of appeals for this circuit, said: "Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. Contributory negligence is the causal action or omission of the servant without ordinary care of consequences. The one rests in contract, the other in tort." Mr. Justice Holmes, speaking for the Supreme Court of the United States in the case of *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, said: "An early, if not the earliest, application of the phrase 'assumption of risk' was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well-known case of *Farwell v. Boston & W. R. Co.* 4 Met. 49, 57, 58, 38 Am. Dec. 339. But at the present time the motion is not confined to risks of such negligence. . . . Assumption of risk in this broad sense obviously shades into negligence as commonly understood, . . . [and] apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of de- 19 L.R.A. (N.S.)

gree rather than of kind; and, when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master,—a matter upon which we express no opinion,—then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name." In *Choctaw, O. & G. R. Co. v. Jones*, supra, the court said: "The defense of contributory negligence rests on some fault or omission of duty on the part of the plaintiff, and is maintainable when, though the defendant has been guilty of negligence, yet the direct or proximate cause of the injury is the negligence of the plaintiff but for which the injury would not have happened. . . . On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid." The object of this statute is the protection of men engaged in the dangerous occupation of mining. In considering a statute for a similar purpose, passed by Congress, regulating the operation of coal mines, where said act was in force in New Mexico, the court said: "The act of Congress does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation, or leave to their judgment the amount of ventilation that is sufficient for the protection of miners. . . . This is an imperative duty, and the consequence of neglecting it cannot be excused because some workman may disregard instructions. Congress has prescribed that duty, and it cannot be omitted, and the lives of the miners committed to the chance that the care or duty of someone else will counteract the neglect and disregard of the legislative mandate." *Deserant v. Cerillos Coal R. Co.* 178 U. S. 409, 44 L. ed. 1127, 20 Sup. Ct. Rep. 967. In *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, the safety appliance act of Congress was before the court, and it was said: "Where an injury happens through the absence of a safe drawbar, there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the com-

munity resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard."

Applying the principles above quoted, it follows that the statute is imperative; that the company which fails to comply with it is guilty of negligence *per se*, and is liable for all actions which proximately flow from such failure to perform this statutory duty, unless the negligence of the employee concurs with that of the master. The authorities are practically uniform in holding that contributory negligence is a defense to a breach of statutory duty. This was directly ruled in *Kansas & T. Coal Co. v. Chandler*, 71 Ark. 518, 77 S. W. 912, under this same statute, and again in *Mammoth Vein Coal Co. v. Bubliss*, 83 Ark. 567, 104 S. W. 210. Whether it is open to the master, when he violates the statutory duty where the statute is one which the state, in a kind of paternalism, passes for the protection of persons who are deemed incapable of properly protecting themselves, to avail himself of the defense of assumed risk, is quite another question. These statutes are more frequent in dangerous employments, like railroad service, mining, and work around dangerous and complicated machinery. The question above stated has been before the courts many times, and the decisions are in hopeless conflict upon it. The confusion is worse confounded because of many erroneous applications of the one doctrine when, under the facts, the other doctrine should have been applied. A learned writer on the subject calls attention to this, and gives many illustrations of it from courts of great learning and distinction (1 *Labatt, Mast. & S.* § 310), and of it he says: "The inexactness of terminology which has been discussed above is doubtless responsible, principally, if not altogether, for the doctrinal confusion between the two defenses which is frequently found in the arguments of judges." The continuance of Johnson to work in his room after the company had refused to give him props was clearly an assumption of the risk of working without the props, if such risk was capable of being assumed in the face of this statute. Whether his continuance without the props was negligence depends upon the obviousness of the danger he encountered in so doing. His conduct measures the one defense, and his relation to the master measures the other. That relation rests in contract, and the assumption of risks impliedly grows out of the contract, and is contractual in its nature.

Proceeding to the exact question; that is, whether there can be an assumption of risk 19 L.R.A. (N.S.)

against a violation of a statutory duty where the statute is for the protection of the safety of the employee. A summary of the decisions is found in a note to *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A. (N.S.) 981, in which it is stated that the Alabama, Massachusetts, Iowa, Rhode Island, Minnesota, New York, Ohio, and Wisconsin courts have held that the risk of noncompliance with these statutory duties may be assumed, while the courts of Illinois, Indiana, Louisiana, Michigan, Missouri, Vermont, and Washington have held to the contrary. All these cases have not been examined in this investigation, but all of the leading ones have been.

In the Federal courts, the situation is not bettered. The circuit court of appeals of the sixth circuit, in *Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298, held that an assumption of risk is not a valid defense where the statute is for the protection of employees. On the other hand, the court of appeals of this circuit, in two cases, *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, and *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A. (N.S.) 981, 72 C. C. A. 365, 141 Fed. 247, 5 A. & E. Ann. Cas. 448, holds to the contrary. In the latter case Judge Carland says: "It is, however, conceded that there is nothing in the terms of the law which expressly repeals the law of assumption of risk; but it is contended that, if the defense of assumption of risk is allowed in actions like the one at bar, then the servant can contract the master out of the statute, and thereby render the statute of no force or effect. In other words, it is contended that, as the law of assumption of risk is a term of the contract between the master and servant, to allow the master the defense of assumption of risk in the case at bar would be to allow private parties to render nugatory by their contracts a public statute of the state of Colorado. The error in this contention is in assuming that the law of assumption of risk is created by the contract between master and servant. This error, we believe, has led some courts to enunciate a false doctrine in regard to the question under discussion. A representative case among those which hold that statutes imposing a positive duty upon the master by implication repeal the law of the assumption of risk is the case of *Narramore v. Cleveland, C. C. & St. L. R. Co.* supra. As this case has been followed by at least one of the state supreme courts (*Green v. Western American Co.* 30 Wash. 87, 70 Pac. 310), we propose to show wherein we think the reasoning of the learned court in the *Narramore* Case is not only faulty, but

that, so far as the decision is based upon the decisions in England, a wrong conclusion was drawn as to what those decisions hold the law to be." *Denver & R. G. R. Co. v. Norgate*, supra. And the court of appeals of the second circuit has held to the same effect in *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900. It seems strange that the court of appeals of this (eighth) circuit should repudiate the doctrine of contract being the basis of assumption of risks, for in the earlier decision of *St. Louis Cordage Co. v. Miller*, supra, where the same conclusion was reached as to the assumption of the risk for a violation of a statutory duty, that court had, in the language heretofore quoted, through Judge Sanborn, stated that assumption of risk is based upon contract. In that case Judge Thayer delivered a dissenting opinion which well states the reasoning on the other side of the question, as will be seen from the following excerpt: "I do not concur in the foregoing opinion. The laws of Missouri (Rev. Stat. 1899, § 6433 [Anno. Stat. 1906, p. 3217]) required the defendant company to keep the gearing which occasioned the plaintiff's injury 'safely and securely guarded when possible' for the protection of its employees. This statute was enacted in pursuance of a sound public policy; that is to say, to insure, as far as possible, the safety of the many thousand artisans and laborers who are daily employed in mills and factories throughout the state, and while so employed are exposed to unnecessary risks of getting hurt if belting, gearing, drums, etc., in the establishments where they work are left uncovered, when so situated that they may be covered readily. The act was inspired by the same motives which induced the Congress of the United States (act March 2, 1893, chap. 196, 27 Stat. at L. 531 [U. S. Comp. Stat. 1901, p. 3174]) to require cars to be equipped with automatic coupling appliances when it was discovered that hundreds of brakemen were annually killed or made cripples for life by the use of the old-fashioned couplers that do not couple by impact. A wise public policy demands that, as far as possible, human life shall be preserved, and that there shall not be in any community a large class of persons who are unable to earn a livelihood because they have become maimed and crippled through exposure to unnecessary risks. The statute in question is not only 'a wise measure of legislation, but was prompted by a humane spirit. For these reasons it should not be so applied or construed by the courts as to defeat the objects which the legislature had in view, nor in such a way as to render it less efficient than it was in-

tended to be in the promotion of such objects."

In the *Narramore Case*, the reasoning of Judge Taft is as follows: "If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize, as against a servant, an agreement, express or implied, on his part, to waive the performance of a statutory duty of the master, imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that." *Narramore v. Cleveland, C. C. & St. L. R. Co.* supra. This case has been approved by this court in the *Jones, Bubliss, and Mangan Cases* elsewhere cited.

This question was before the Indiana supreme court, under a statute requiring, as this one, the mine owner to furnish timber for the miners to prop their working places when demanded. The court said: "If a statute is a mere affirmation of the common-law duty of the employer with respect to providing safe working places and tools, the rule as to assumption of risk remains in force. The standard of care continues to be the conduct of the reasonably prudent person under like circumstances; and the means of measuring up to it may still be the subject for the joint judgment and agreement of the employer and the employee. If, however, the statute, as in this case, sets up a definite standard, and requires specific measures to be taken by the employer in providing safe working places and appliances, other considerations come into view. The very fact of such legislation indicates that the lawmakers believed that the operation of the common-law rules did not afford the employee sufficient protection; that, under the development of the modern industrial system, tending to centralization of capital and impersonal management, the employee did not stand

upon a footing of equality with the employer in contracting for his safety; and that the necessity of earning the daily wage frequently constrained the employee to put up with defective place and tools, without complaint, by reason of his fear of the consequences of complaining." And again the court said: "If the legislature has clearly expressed the public policy of the state on a matter within its right to speak upon authoritatively, and if that public policy would be subverted by allowing the employee to waive in advance his statutory protection, the contract is void as unmistakably as if the statute in direct words forbade the making of it." *Davis Coal Co. v. Pollard*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492.

The state of Missouri passed a statute providing that it should be no defense to an insurance company that the insured committed suicide, unless it should be shown, to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy; and any stipulation in the policy to the contrary should be void. In a case wherein there was a contract containing stipulations contrary to the terms of the statute, the effect of the statute and the stipulation came before the Supreme Court of the United States, and that court, through Mr. Justice Harlan, said: "An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt. . . . The contract between the parties, evidenced by the policy, is, we think, an evasion of the statute, and tends to defeat the objects for which it was enacted. . . . Looking at the object of the statute, and giving effect to its words, according to their ordinary, natural meaning, the legislative intent was to cut up by the roots any defense, as to the whole and every part of the sum insured, which was grounded upon the fact of suicide." And the court approved this language from the St. Louis court of appeals: "This was, in effect, a legislative declaration of the public policy of this state." *Whitfield v. Aetna L. Ins. Co.* 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578.

In *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808, it was attempted by contract to avoid a master's liability for negligence to a servant, and this court said: "If he can supply an unsafe machine, or defective instruments, and then excuse himself against the consequences of his own negli-

gence by the terms of his contract with his servant, he is enabled to evade a most salutary rule;" and it was held contrary to public policy to permit it.

A fortiori, if the parties could not directly contract, there could be no implied contract for the assumption of the risk by the mere continuance in the employ in the face of the violation of the statutory duty by the master. It would not be profitable to review further the decisions upon this subject. That has been well done by Judge Taft in the *Narramore Case* and by Judge Carland in the *Norgate Case*, on opposite sides of the question, and in the opinion of the court by Judge Sanborn in *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, and on the other side by Judge Thayer in his dissenting opinion in that case, and also by the editors of the *Lawyers' Reports Annotated*, in the note to the *Norgate Case*, 6 L.R.A. (N.S.) 981. A recent compilation says: "There is some conflict of authority as to whether a master may avail himself of the defense of assumption of risk where the injury complained of resulted from his neglect of a duty imposed by statute. Where the defense is forbidden by the statute itself, he cannot, of course, rely upon it; and, where there is no such inhibition, the weight of authority seems to be to the same effect, although there are decisions which maintain a contrary doctrine. If the object of the statute is other than the protection of the servant, the master's neglect of the duty imposed will not prevent his relying on the servant's assumption of risk." 28 Cyc. Law & Proc. p. 1180. It is the duty of this court to decide which is the sounder reasoning; and, in pursuance of this duty, the court decides that this statute is of that class referred to by the Supreme Court of the United States, where the duty is imperative on the master to furnish these props in order to enable the employee to make safe his working place, and it is for the protection of a large class of laborers engaged in a dangerous occupation who are, by such legislation, not deemed capable of properly safeguarding themselves. The general assembly has deemed it proper in this act to require protection in this particular, as in many others reaching to the safety of the men engaged in this hazardous work, and has thereby evinced the public policy of the state in this regard. And for a breach of such statutes the defense of assumption of risk is not applicable to the violator of the statute.

These statutes usually provide for a safe working place for the employee, or safe appliances with which to do his work; and it has been said in argument that cases hold-

ing that there cannot be an assumption of risk for a violation of such statutes would not apply here, because this statute does not reach to the safety of the working place of the miner, as he makes his own room safe. It is true that, according to the mining custom, as developed from the evidence here, as in the preceding similar cases, the duty rests upon the miner himself to examine the roof and determine when it needs props; but it is for the company to furnish him the props with which to make his room safe when he discovers the need of props and demands them. The relation of the master's duty in this regard to the working place was explained in *Kansas & T. Coal Co. v. Chandler*, 71 Ark. 518, 77 S. W. 912, where the court said: "The duty of the master to use due care to furnish a safe place for the servant to work would, under the circumstances here, be discharged by furnishing the servant an ample supply of suitable timbers with which to make the room safe." Thus the court recognized, and properly so, that the furnishing of props rested upon the master in order to provide a safe place for the servant to work. While it is true that the immediate act of making safe the room is in the hands of the miner himself, yet he cannot make brick without straw. *Exodus V.*: 6-19. If this statute was a single enactment, there would be more force in the contention that it is a matter left open to contract, directly or impliedly, between master and employee, as the duty of discovering the need of props is placed upon the employee, and he must determine when his room is to be safeguarded; but it is a part of a statute containing many other provisions for the safety of miners, and the whole purpose of the legislation is to put an imperative duty upon the master engaged in this dangerous occupation to protect a class deemed incapable of properly protecting themselves without this legislation.

In the *Patterson-Poe Case* the attention of the court was not called to the difference between violations of statutory duties and common-law duties nor the class of statutes involved, and the court merely applied the general doctrine of assumption of risks without looking into the effect of this statute upon that general doctrine. Since examining this question, however, the court has come to the conclusion that it would not do to follow *Patterson Coal Co. v. Poe*, and so much of the language of it as indicates that there could be an assumption of risks as therein mentioned is disapproved. The case was correctly decided, as pointed out in the *Bubliss Case*, but the decision should have been on the ground that the 19 L.R.A. (N.S.)

undisputed evidence showed contributory negligence.

2. That leaves for consideration the question of whether Johnson was guilty of contributory negligence in working in the mine after the company was in default in its duty to furnish him props. Had he been working under the drummy side of his room, which needed propping, then his case would have been exactly parallel with the *Patterson-Poe Case* and the *Bubliss Case*, and the court should have given a peremptory instruction upon the ground of contributory negligence. But this case differs from them in this: Instead of working in the dangerous part of the room, he worked upon the other side of the room, which he considered to be safe. He says that part of the roof was sufficiently propped; and, as near as can be gathered from the evidence, he was not nearer than 12 feet from the drummy part of the roof which was insufficiently propped. He was an experienced miner, and had tested the roof that morning. His evidence shows, also, that it might occur that the drummy part of the roof would fall without affecting the adjacent roof, but it might bring down other parts, as it did in this instance.

The question remains whether his working in the room, a part of which was apparently secure and part of which was dangerous, must be declared, as a matter of law, negligence *per se*. The court cannot say that, under these facts, the danger was so obvious and imminent that no man of ordinary prudence and care would work there. The exact question is fully discussed in both the *Chandler* and *Bubliss Cases* (71 Ark. 518, 77 S. W. 912, and 83 Ark. 567, 104 S. W. 210, respectively), and in *Hamman v. Central Coal & Coke Co.* 156 Mo. 232, 56 S. W. 1091, and *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060. This question should have gone to the jury under proper instructions.

Judgment reversed, and cause remanded.

McCulloch, J., dissents.

Petition for rehearing denied.

COLORADO SUPREME COURT.

MYRTLE HENDERSON, Appt.,

v.

LOUIS F. SPRATLEN.

(— Colo. —, 98 Pac. 14.)

Contract — support — termination.

1. One who is released from his promise to marry a woman, whom he has induced to submit to surgical operations to such an extent that she is unable to support her-

self, upon consideration that he will support her during life, is not absolved from his promise by her marriage to another person, after the latter's obligation to support her is terminated.

Same — consideration — release from engagement — validity.

2. A contract by one, who, after agreeing to marry a woman, induces her to submit to surgical operations which render her unable to support herself, to support her in consideration of release from his engagement is valid and enforceable.

Same — indefiniteness.

3. A contract to support a woman in consideration of a release from a promise to marry her is not too indefinite and uncertain to be enforceable.

(July 6, 1908.)

APPEAL by plaintiff from a judgment of the District Court for the City and County of Denver in defendant's favor in an action brought to enforce a promise of support. Reversed.

The facts are stated in the opinion.

Mr. Caesar A. Roberts, with Messrs. Clay B. Whitford, Henry E. May, and O. N. Hilton, for appellant:

The contract to care for and support complainant was based upon a sufficient consideration.

Jones v. Jones, 1 Colo. App. 28, 27 Pac. 85; Snell v. Bray, 56 Wis. 156, 14 N. W. 15; Brown v. Everhard, 52 Wis. 205, 8 N. W. 925; Stead v. Dawber, 10 Ad. & El. 57; Cutter v. Cochrane, 116 Mass. 408; McCreery v. Day, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; Taylor v. Seaboard & R. R. Co. 99 N. C. 185, 6 Am. St. Rep. 509, 5 S. E. 750; Connelly v. Devoe, 37 Conn. 570; Spann v. Baltzell, 1 Fla. 338, 46 Am. Dec. 346; Montgomery v. Morris, 32 Ga. 173; Carruthers v. McMurray, 75 Iowa, 173, 39 N. W. 255; Rollins v. Marsh, 128 Mass. 116; Scott v. McKinney, 98 Mass. 344; Calhoun v. Calhoun, 37 Miss. 668; Perry v. Buckman, 33 Vt. 7; Sykes v. Lafferty, 27 Ark. 407; Farmer v. Stewart, 2 N. H. 97; Doe ex dem. Hutch-

inson v. Horn, 1 Ind. 364, 50 Am. Dec. 470; Toledo, W. & W. R. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Crusselle v. Pugh, 71 Ga. 744; Beckley v. Clark, 8 La. Ann. 8; Spaulding v. Crawford, 27 Tex. 155; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Phillips v. Pullen, 50 N. J. L. 439, 14 Atl. 222, 15 Am. & Eng. Enc. Law, 2d ed. p. 932, div. II.

Messrs. George P. Steele and C. F. Clay, for appellee:

The contract to support in consideration of a release from the contract to marry is void as against public policy and good morals.

15 Am. & Eng. Enc. Law, 2d ed. p. 933, § 4; Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420; Fearnley v. DeMainville, 5 Colo. App. 441, 39 Pac. 73; Boardman v. Thompson, 25 Iowa. 487; McNamara v. Gargett, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; Davies v. Davies, L. R. 36 Ch. Div. 364; Hanks v. Naglee, 54 Cal. 51, 35 Am. Rep. 67; Steinfeld v. Levy, 16 Abb. Pr. N. S. 26; Burke v. Shaver, 92 Va. 345, 23 S. E. 749; Boigneres v. Boulon, 54 Cal. 146; Goodall v. Thurman, 1 Head, 208.

There is no valid consideration for the contract.

15 Am. & Eng. Enc. Law, 2d ed. p. 961, B; 1 Parsons. Contr. 8th ed. p. 449; 1 Chitty, Contr. 11th Am. ed. p. 57; Beaumont v. Reeve, 8 Q. B. 483; Binnington v. Wallis, 4 Barn. & Ald. 650; Jennings v. Brown, 9 Mees. & W. 496; Holloway v. Rudy (Trimble v. Rudy) 22 Ky. L. Rep. 1406, 53 L.R.A. 353, 60 S. W. 650; Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95; Drennan v. Douglas, 102 Ill. 345, 40 Am. Rep. 595; Wallace v. Rappleye, 103 Ill. 249; Nine v. Starr, 8 Or. 51; Easley v. Gordon, 51 Mo. App. 637.

There can be no novation of a void contract.

Kountz v. Price, 40 Miss. 341; Ledoux v. Buhler, 21 La. Ann. 130; Ludlow v. Hardy, 38 Mich. 690; Puckett v. Alexander, 102 N. C. 95, 3 L.R.A. 43, 8 S. E. 767; Singleton v. Bremar, 1 Harp. L. 201.

Steele, Ch. J., delivered the opinion of the court:

The plaintiff alleged in her complaint, and proved, that the defendant promised to marry her, and at divers and innumerable times thereafter, avowing his sincerity of purpose to marry her, he procured her to cohabit with him; that said cohabitation began in the winter of 1889, and continued up to the month of July, 1893. She also alleges and proves that at the request of the defendant she submitted to several surgical operations, by reason of which she

Case Note. — Release of promise to marry as consideration for contract.

The only other case that has been found on this subject is Snell v. Bray, 56 Wis. 156, 14 N. W. 14, in which it was held that the release of a party to a valid marriage contract by the other party thereto is a sufficient consideration for a promise by the party released to pay to such other party a sum of money, or to do any other lawful act; that such a transaction amounts to a substitution of one contract for another, the consideration of the original contract being the consideration for the substituted contract.
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sustained very serious and painful injuries to her person, and that by reason of the said operations she has been sick, sore, and lame, and will continue so to be, and she has also received great and prolonged nervous shocks, and that the said operations and injuries have resulted in shattering and ruining her nervous system, and have rendered her, and still render her, and will always render her, weak, sickly, and wholly unable and unfit to earn a livelihood and to maintain and support herself, and unfit to marry and to perform domestic and wifely duties, that, by reason of the operations aforesaid, and as a result of her being unable to procure proper attention, through the failure of the defendant to perform the terms of his agreement to have her properly taken care of, it will be necessary to have one of her legs amputated. It also appears that in the year 1893 the defendant visited plaintiff at her home in St. Joseph, Missouri, and then and there informed her that he could not marry her because his parents objected to the marriage, and that he then and there promised her, as stated by the plaintiff: "If I would release him from his promise of marriage, he would take care of me and support me just so long as I suffered from this limb or any injuries,"—which said promise on the part of the defendant the plaintiff then and there accepted, although the plaintiff was at that time, and at all times previous thereto, ready and willing to marry the defendant. It developed upon the trial that in the year 1897 the plaintiff had married a man by the name of Lee, and had lived with him for two or three years as his wife, when he procured a divorce. The court instructed the jury to return a verdict in favor of the defendant, which it did, and thereupon judgment in favor of the defendant was duly entered. From this judgment the plaintiff took an appeal to the court of appeals.

The allegations of the complaint are sustained by the evidence, and it appeared from the testimony that the defendant had paid to the plaintiff certain sums of money upon account of his contract to maintain and support plaintiff as late as the year 1902. The defendant claims in support of the judgment: (1) That the alleged contract is void as against public policy and good morals; (2) that there is no valid consideration for the contract; (3) that there could be no novation of a void contract; (4) that the contract is too indefinite and uncertain. In support of the defendant's contention that the alleged contract is void as against public policy and good morals, counsel claim that the testimony shows that the promises of marriage as made were in

consideration of present and future intercourse and cohabitation, which ended in the summer of 1893, and that a contract of marriage in consideration of sexual intercourse is void and contrary to good morals. But we do not so read the plaintiff's testimony. From the complaint and from her testimony it appears that the cohabitation did not take place until after the promise to marry, so that the consideration for the promise to marry was not that of present or future sexual intercourse.

The court adopted the theory of defendant's counsel, that, assuming the contract to be valid, it was abrogated by the marriage of the plaintiff, and that the plaintiff was not entitled to recover because public policy intervened to prevent. No authorities are cited by counsel holding that a contract such as is shown to have been entered into between the parties here is terminated by the marriage of the woman. It is not contended that the contract by its terms terminated upon the marriage of the woman, but that there must be inserted into the contract, by a broad public policy, words which relieve the man from liability after the marriage of the woman. It is probably true that a married woman cannot maintain an action to compel support under a contract made upon the consideration and under the circumstances the contract sued on in this case was made. But when, as in this case, the obligation of the husband ceases by reason of a divorce, and it appears that the woman is unable to support herself, public policy does not require that the contract to support should be held void. It appears that the plaintiff is unable to support herself, and that she is unfit to work and unfit to marry, or to perform domestic or wifely duties, and by her testimony she places the responsibility for her condition upon the defendant. Someone must support her as she cannot support herself. The testimony shows that she and her mother are living in a condition of almost destitution. The defendant has made a contract to support her. He says that public policy should relieve him from this burden. If he is relieved, the public must take upon itself the burden of her support; but we know of no consideration of public policy that would permit the defendant to thus shift his burden and cast it upon the public. Moreover, long after the plaintiff's marriage, and long after her divorce, the defendant made a payment on account of the contract, from which it may fairly be inferred that he did not believe that he was relieved of his obligation because the plaintiff had married.

The defendant claims, and urges as his second and third grounds in support of the

judgment, that there was no consideration for the contract, and that there can be no novation of a void contract. These positions are based upon the ground that the contract of marriage was illegal and void because based upon an illegal consideration, but the testimony does not bear out the defendant's contention that the contract of marriage was based upon an illegal consideration. The testimony of the plaintiff shows that there were no illicit relations between her and the defendant until a long time after the defendant had promised to marry the plaintiff. Then, when the plaintiff, in the year 1893, agreed to release the defendant from the promise of marriage in consideration of his agreement to support and maintain her, and provide her with medical attendance, she was not substituting a valid contract for a void one, but she was making a legal contract and releasing the defendant from a legal contract; and the law authorizes and allows contracts of this character to be made, and, when so made, the substituted contract will be enforced.

The defendant states that the contract is so indefinite and uncertain that it cannot be enforced. We think that objection to the enforcement of this contract is not tenable. The plaintiff has stated what amount is necessary for her support. A jury should determine what amount is reasonably necessary, based upon the testimony, for her support; and this contract should not be held to be unenforceable merely because an amount to be paid was not fixed by the terms of the agreement.

The case should be submitted to the jury, and, because it was taken from the consideration of the jury, the judgment is reversed.

Goddard and Bailey, JJ., concur.

Petition for rehearing denied November 11, 1908.

INDIANA SUPREME COURT.

CHICAGO, INDIANA. & LOUISVILLE
RAILWAY COMPANY, Appt.,

v.

TOWN OF SALEM.

(— Ind. —, 82 N. E. 913.)

Railroad crossing — light — authority of municipality.

1. Statutory authority to a municipal corporation to require railroad companies operating roads across its streets to light the crossings at night, provided that it shall have no authority to require the railroad to maintain any different kind of light at 19 L.R.A. (N.S.)

the crossing from that maintained by the municipality at street crossings, refers simply to the kind of light, and does not compel the requirement of a light of the strength of those maintained at street crossings if one of less power will properly light the crossing.

Municipal ordinance — reasonableness — judicial inquiry.

2. A court will not inquire as to the reasonableness of a requirement which a municipal corporation makes of a railroad company with respect to the lighting of the places where its tracks cross streets if it is within the authority conferred upon the municipality by the legislature.

Same — railroad crossings — lights — certainty.

3. A municipal ordinance requiring a railroad company to maintain at places where its tracks cross public streets, during the passage of trains at night, and for not less than thirty minutes prior thereto, except when the moonlight is sufficient, lights of a certain character and power in such manner as to enable persons passing over the crossings to see the tracks and protect themselves from danger of running trains, is not invalid for uncertainty or indefiniteness.

Railroads — lighting crossings — validity of statute.

4. A statute and ordinance requiring the maintenance by a railroad company at street crossings of lights which are not excessive in foggy or stormy weather are not, because they may be so in clear weather, so unreasonable as to amount to unconstitutional invasion of property rights.

(December 12, 1907.)

Case Note. — Power to compel railroad companies to light their tracks in cities.

This note supplements the note to Cincinnati, H. & D. R. Co. v. Bowling Green, 41 L.R.A. 422.

An ordinance requiring a railroad company to maintain electric lights where its tracks intersect public streets, even though it lays some expense on the company, does not amount to a taking of property without just compensation. Pittsburgh, C. C. & St. L. R. Co. v. Hartford City (Ind.) 82 N. E. 787.

A statute granting the power to cities to require railroad companies to light their street crossings is not invalid merely because it does not grant the power to all cities and towns in the state, or because every street and railroad intersection in the state is not ordered lighted. Ibid.

The power granted by the legislature to a city to require railroad companies to light their crossings on all nights embraces the power to require lights at all hours of the night or parts of nights. Chicago, I. & L. R. Co. v. Crawfordsville, 164 Ind. 70, 72 N. E. 1025.

Where a city has statutory authority to

A PPEAL by defendant from a judgment of the Circuit Court for Washington County in plaintiff's favor in an action brought to recover the penalty for failure to maintain a light at a street crossing. **Affirmed.**

The facts are stated in the opinion.

Messrs. E. C. Field and H. R. Kurrie for appellant.

Messrs. Mitchell & Mitchell for appellee.

Hadley, J., delivered the opinion of the court:

Suit by appellee against appellant for the violation of a town ordinance, requiring it to maintain lights at points where its railroad crosses the public streets of said town. The ordinance is in these words:

"Whereas, it is necessary for the safety and security of citizens and other persons from the running of trains through the town of Salem, by railroad companies running and operating railroads through the town, that an electric light be kept and maintained as hereinafter directed at certain crossings where said railroad or railroads intersect certain streets in said town, now, therefore,

"Section 1. Be it ordained by the board

require all-night lighting at railroad crossings, the fact that the ordinance exonerates the company from lighting when the moon furnishes the traveler the same amount and strength of light required of the company by the ordinance, and also excuses the company from lighting at all times when the city lights are not lighted, does not render the ordinance void for uncertainty or unreasonableness. *Ibid.*

The fact that there is a device which can be attached to the railroad track in such a way that a moving train at a distance will ignite a lamp at the crossing, which will continue to burn and light the crossing until the train has passed over and beyond, is no defense to an action against the company for failure to light the street crossings as required by a valid ordinance, where the company has not installed such device, or been obstructed by the city in a bona fide effort to do so. *Ibid.*

A railroad built by authority of the state, engaged in transporting freight, passengers, and the United States mail between the states, must, so long as Congress does not interfere, submit to a reasonable local regulation requiring it to light its tracks. *Pittsburg, C. C. & St. L. R. Co. v. Hartford City, supra.*

Such an ordinance is not invalid merely because passed without affording the railroad company an opportunity to be heard relative thereto. *Ibid.*

Such an ordinance is not invalid merely because the light at the crossing impairs

of trustees of the town of Salem, in Washington county, Indiana, that it shall hereafter be the duty of every railroad company running and operating a railroad through said town to keep and maintain an electric light at every point where the main track of said railroad company upon which it runs any regular train or trains during the nighttime crosses or intersects at grade any public street in said town; such electric light shall be of two thousand (2,000) candle power to light the crossing of such railroad where they are placed and maintained in such a manner as to enable citizens and other persons traveling and passing over such crossings to see the track and protect themselves from the danger of running trains on such railroad; Provided, such lights shall not be required to exceed in power those now in use for lighting the streets of said town; that the town of Salem now maintains and supports electric lights of two thousand (2,000) candle power each, for lighting the streets and intersections thereof.

"Sec. 2. All lights provided in § 1 hereof shall be lighted at night during the passage of every train and for not less than thirty minutes prior thereto. Provided, said lights shall not be required to be kept burning or lighted during such hours or

the efficiency of the headlight on the locomotive, and compels the engineer to run slowly or cautiously in approaching it. *Ibid.*

A requirement in such an ordinance that the power of the light shall not exceed that of the lights used by the city does not make the ordinance so indefinite as to be invalid. *Ibid.*

The mere fact that the legislature has seen fit to give the city council the power to prescribe the character of the light, and that the latter body has required that the lighting shall be done by electricity, affords no sufficient ground for an overthrow of the ordinance. *Ibid.*

An ordinance enacted by virtue of statutory authority, requiring a railroad company to light its street crossings within the village in the same manner that the streets are lighted; and providing that, in case the company fails to erect the lights within twenty days from notice of the passage of the ordinance, the lighting committee of the village shall cause the lights to be erected, and the cost thereof shall be assessed on the property of the company, or collected as directed by law,—relates to the comfort, safety, convenience, and good order of the village, is not penal and not subject to the rule of strict construction; and the requirement that the company shall do the lighting within twenty days after notice is not unreasonable. *St. Marys v. Lake Erie & W. R. Co. 60 Ohio St. 136, 53 N. E. 795.*

parts of hours when the moon shall be shining so as to give sufficient light to light the crossing as hereinbefore required. And provided, further, such lights shall not be required to be kept burning nor lighted during such hours, or parts of such hours, when the lights in use for lighting the streets of said town shall not be lighted or burning. The purpose of said last provision being to exempt such railroad company or companies from lighting such crossing at any time or times when the streets of said town are not lighted.

"Sec. 3. Any railroad company or railroad companies who shall fail to keep and maintain such lights as hereinbefore provided, or who shall violate any of the provisions of this ordinance, shall, upon conviction thereof, be fined and forfeit to said town the sum of ten dollars (\$10.00) for each and every offense."

The complaint is in a single paragraph. Defendant's demurrer thereto for insufficient facts was overruled. An affirmative answer in one paragraph was held bad on demurrer, and, the defendant refusing to answer further, judgment was given upon the complaint in favor of the plaintiff for \$10 and costs, from which the defendant appeals, and assigns error on all adverse rulings.

The complaint, filed before a justice of the peace, alleges the due incorporation of the town; the defendant's ownership and operation of a railroad through the town; the crossing of three named public streets therein; the proper enactment of the ordinance; the maintenance of the plaintiff of electric lights at street crossings in said town of 2,000 candle power; the three named streets at the railroad crossings are much traveled by the public at all times of the day and night, and are very dangerous without being lighted; that the defendant had failed to put up and maintain lights at its said crossings, as required by said ordinance, and is now running and has continued to run for a long time its cars and locomotives through the town and over said crossings at all times of the day and night. The complaint, as to its formal averments, is good on demurrer, under the ruling in *Brookville v. Gagle*, 73 Ind. 117; *Hardenbrook v. Ligonier*, 95 Ind. 70.

In its answer to the complaint the defendant admits that it owns and operates a railroad through the plaintiff city, crossing the three named public streets; that it has but two regular passenger trains and one freight train which pass through said town and across said streets in the nighttime, and no extra passenger and not exceeding two extra freight trains passing through said town after night; that, if defendant

is required to maintain lights at said several crossings, and have said lights burning for half an hour before and during the passage of all trains, the aggregate burning time for all trains would not exceed two hours per night on the average; that the present schedule has existed for many years, and there is no probability of its being changed in the near future; that there is, has been, and will be in the near future, very little travel on said streets and across the railroad in the nighttime; that an electric light of 2,000 candle power, which the defendant is required by said ordinance to maintain at each of said crossings, will brightly illuminate said streets for a distance of 300 feet on each side of the crossing, and sufficiently to enable travelers to use said streets for a distance of 600 feet on each side of the crossing. The defendant has no means of its own for the production of electricity. There is but one electric-light plant in the town. The town maintains electric lights of 2,000 candle power at its street crossings, which electricity it obtains from said plant by direct current, under which system it is impossible to extinguish one without extinguishing all lights. The town maintains its lights all night, except on moonlight nights, and the defendant cannot secure 2,000 candle power lights except by connection with said town system, and having it supplied by said direct current, so that it could not turn off its lights at said crossings without extinguishing all the lights in the town. It is impossible, therefore, for the defendant to maintain the lights required by said ordinance without having them burn from seven to ten hours every night, except moonlight nights, and which will impose upon the defendant an expense of \$72 per annum for each light; that, if said lights could be extinguished except for the times required by the ordinance at the passage of trains, the expense to the defendant would not exceed \$10 per annum per light; that an incandescent light at each of said crossings will clearly illuminate the entire right of way at said points, and defendant can construct and maintain such lights at an expense to it of not exceeding \$1 per month for each light; that, by reason of the premises, the ordinance is unreasonable and void in this: (1) The defendant cannot comply therewith without assuming greater burdens than the said town is allowed by law to put upon it. (2) It is the purpose of said town to require the defendant thereby to maintain three high-power lights, and burn them at all times, to relieve it of part of its burdens of street lighting. (3) The said ordinance is so indefinite and uncertain as to be void

upon its face. (4) The said town cannot require more of defendant than that it light its right of way at said crossings, while there is danger from a train that is about to use it, and the said ordinance requiring high-power lights is therefore void. (5) The act of the general assembly, in so far as it empowers towns to pass ordinances requiring lights at railway and street crossings at the sole expense of the railroad company, violates the 14th Amendment to the Constitution of the United States. The answer in a more concrete form, comes to this: The ordinance under the conditions existing in Salem is unreasonable and void because it is, first, uncertain; and, second, because it requires the defendant to maintain stronger and longer lights than is necessary to light the crossings, thus entailing upon it an annual expense of \$72 per light, while the defendant could light the entire right of way at the crossings during all the time the city lights are kept burning, with incandescent lights, at an expense not exceeding \$1 per month for each light. The law relating to the powers of municipal legislative bodies is settled in this state to the effect following: (1) All powers possessed by cities and towns are expressly conferred by legislative enactment, or implied when necessary to accomplish some municipal purpose. (2) When a city council or board of trustees of a town has conferred upon it by the legislature an express general power, or when a power is implied as being essential to the carrying out of some express municipal duty, the mode of exercising the power must, as a question of law, be reasonable, or the ordinance will be declared void. (3) When a power is specifically conferred by the general assembly, but the manner of its exercise is not prescribed, the mode of employing it must be reasonable or it will be held invalid. (4) When the legislature, under the sanction of the Constitution, provides that a particular thing may be done, and points out the way for doing it, courts will not strike down the law, or ordinance passed in pursuance thereof, or abridge the authority, because they may deem it to be unreasonable or against public policy. *Pittsburgh, C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, 422, 35 L.R.A. 684, 45 N. E. 587, and cases cited; *Skaggs v. Martinsville*, 140 Ind. 476, 33 L.R.A. 781, 49 Am. St. Rep. 209, 39 N. E. 241; *Champer v. Greencastle*, 138 Ind. 339, 24 L.R.A. 768, 46 Am. St. Rep. 390, 35 N. E. 14; *Dill. Mun. Corp.* § 328. The trustees of appellee city derived power to legislate on the subject of lighting railroads at street crossings from § 31 of the towns and cities act of 1905 (Acts 1905, chap. 129, p. 231), which 19 L.R.A. (N.S.)

reads as follows: "The board of town trustees shall have the following powers: . . . (14) to require any railroad company, operating a line of railroad over a street of the town, to maintain a street light at such crossing, to be lit at night during the passage of every train, and for not less than thirty minutes prior thereto: Provided, that such board shall have no authority to require such railroad to maintain any different kind of light at such crossing from that maintained by the town at other street crossings." By this statute the legislature has declared that the board of trustees has the right to require railroad companies to maintain lights at the points where their road crosses the town streets, but the same act specifically declares that that authority shall extend only to requiring the same kind of lights maintained by the town at its own street crossings. The statute would mean the same thing if phrased thus: The board of trustees shall have power to require railroad companies to maintain at all points of street intersection by their railroad the same kind of lights maintained by the town at its other street crossings, and no other. We think, however, that the term "kind of light" refers to class, or sort, rather than to grades, or degrees, of the same class; that is, that it refers to such general kind and classifications as electricity, gas, oil, and the like, and not to various grades of such general classes. And, while the town board was without authority to require of appellant a light different in kind from that maintained by the town at its street crossings, it was not compelled to exact of appellant the same degree, or strength, of light in use by the town if it should deem a lesser grade adequate to properly light the crossings. In other words, the town had no authority to require a stronger light, but might have required a lesser degree of the same light from that maintained by the town.

This brings our question within the fourth rule above set out, namely, that, when the legislature grants a specific power, and specifies how it may be exercised, this court cannot question the power, if constitutional, or the reasonableness of the manner of its exercise. Therefore the admissions of the answer, in effect, that the city maintains at its other street crossings lights of the same kind as those required of appellant, preclude us from any inquiry into the reasonableness of the strength of the lights to light the crossings. And, even if the legislature had not foreclosed us, we should hardly feel at liberty to hold that the board of trustees, in this instance, had abused its discretion in the selection of a

proper light. The ordinance cannot be held invalid for uncertainty or indefiniteness. There is strong reason for believing that the one before us is the result of a studied and successful effort to cure the infirmities in a former ordinance of the town, upon the same subject, and which was held invalid by this court in *Chicago, R. I. & P. R. Co. v. Salem*, 166 Ind. 71, 76 N. E. 631. The ordinance held void in the case just cited provided that the lights to be maintained by the railroad company "shall be electric lights of such candle power, not exceeding two thousand (2,000) candle power, and giving such lighting service as the town of Salem maintains." It was held that these words of the ordinance do "not attempt or purport to furnish the standard by which . . . [the railroad company's] guilt or innocence may be determined upon a charge of noncompliance." No such objection can be urged against the ordinance before us. In this the duty of the railroad company is definite and certain. It shall maintain at every point where the main track of the railroad, upon which it runs trains in the night, crosses a street of the town, an electric light which shall be 2,000 candle power strong. Neither is the ordinance assailable for being uncertain and indefinite as to the times when the lights shall be set, or the length of time they shall be kept going, as insisted upon by appellant. The language of the ordinance is, "All lights . . . shall be lighted at night during the passage of every train and for not less than thirty minutes prior thereto,"—except that the company shall not be required to keep its lights burning when said crossings are lighted by the moon sufficiently to enable travelers to see the track and protect themselves from running trains, or when the town's street lights shall not be lighted and burning. The provisos and exceptions are made for the benefit of the lighting railroad company. Such company has control, and of all others knows best when its trains will pass the crossings. It can be no hardship to require it to take notice of the passage of its trains, and no uncertainty, as affects the company, to require it to light the crossings accordingly; and, if it finds it profitable and convenient to extinguish the lights between trains, it may rightfully do so. It would be wholly impracticable for the town to fix certain and definite periods for lighting, since the schedule for the running of trains and orders for special trains would be constantly liable to change. The exigencies of the business requiring more extra trains on one day than upon another, and the running of such trains during the different times of the day and night, would invest the subject with so much un-

certainty that the town board might reasonably expect a train to pass at any time of the night, and so would be without any reliable data for periodical lighting. Rather than condemn the ordinance for unreasonableness in its requirements concerning the lighting and burning of the lights, all the exceptions and concessions relating to the subject, and of which appellant complains, are beneficial to the company, and evidently so intended; in the words of the ordinance, "the purpose being to exempt such railroad company from lighting such crossings at any time when the streets of said town are not lighted." We think the case is fully within the rule declared in *Chicago, I. & L. R. Co. v. Crawfordsville*, 164 Ind. 70, 72 N. E. 1025. A 2,000 candle-power light may be stronger than is necessary to properly light the crossings in ordinary weather, but it is not alleged, and we cannot assume, that it would be excessive in foggy, heavy, or stormy weather, when it is most needed. Hence there is no ground for saying that either the statute which authorizes or the ordinance passed as a police measure to conserve the safety of citizens in traveling the streets of the town, in the nighttime, is so unreasonable in its exaction as to amount to an invasion of constitutional right. It is therefore not in conflict with the Constitution, either state or Federal.

The demurrer to the answer was properly sustained.

Judgment affirmed.

Petition for rehearing denied.

IOWA SUPREME COURT.

JOHN HARBISON

v.

M. D. SHIRLEY et al., Appts.

(— Iowa, —, 117 N. W. 963.)

Landlord — unlawful uses of premises — bond — liability.

Mere fear or suspicion on the part of the lessor that a lessee intends to sell intoxicating liquor on the leased premises without authority of law will not avoid a bond by which the lessee undertakes to hold the lessor harmless from any expenditure or costs because of the unlawful sale of liquor upon the premises.

(October 23, 1908.)

Case Note. — Effect of landlord's knowledge that tenant intends to use premises in violation of law.

This note includes only those cases which consider the question of the land-

A PPEAL by defendants from a judgment of the District Court for Wapello County in plaintiff's favor in an action to enforce a bond conditioned to hold plaintiff harmless from expenditures because of the unlawful use of premises leased by him. Affirmed.

The facts are stated in the opinion.

Messrs. Jaques & Jaques for appellants.

Messrs. J. R. Price, J. C. Mitchell, and F. M. Hunter, for appellee:

Mere knowledge of a lessor that the lessee intends to use the property for an unlawful purpose is not a sufficient basis on which to deny the lessor the right to recover on the lease.

9 Cyc. Law & Proc. pp. 571, 572; 2 Wood, Land. & T. 2d ed. pp. 1341, 1345; *Anheuser-Busch Brewing Assn. v. Mason*, 44 Minn.

318, 9 L.R.A. 506, 20 Am. St. Rep. 580, 46 N. W. 558; *Chamberlin v. Fisher*, 117 Mich. 428, 75 N. W. 931; *Gambs v. Sutherland*, 101 Mich. 355, 59 N. W. 652; *Webber v. Donnelly*, 33 Mich. 469; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Waugh v. Beck*, 114 Pa. 422, 60 Am. Rep. 354, 6 Atl. 923; *Rose v. Mitchell*, 6 Colo. 102, 45 Am. Rep. 522; *Hubbard v. Moore*, 24 La. Ann. 591, 13 Am. Rep. 128; *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *J. M. Brunswick & B. Co. v. Valteau*, 50 Iowa, 120, 32 Am. Rep. 119; *Ralston v. Boady*, 20 Ga. 449.

Evans, J., delivered the opinion of the court:

On March 30, 1903, the plaintiff leased to the defendants certain premises to be used

lord's knowledge of the tenant's intention to use the premises for an unlawful purpose as affecting their rights and relations. The question of a landlord's criminal liability as affected by his knowledge of the wrongful use of his property has not been examined.

The courts will not enforce the terms of a lease where the demised premises were rented with knowledge on the part of the landlord that they were to be used for an illegal purpose. The authorities cited in the three following groups were all cases where the action was brought for the recovery of rent:

For purposes of prostitution. *Dougherty v. Seymour*, 16 Colo. 239, 26 Pac. 823; *Ralston v. Boady*, 20 Ga. 449; *Kessler v. Pearson*, 126 Ga. 725, 55 S. E. 963, 8 A. & E. Ann. Cas. 180; *Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207; *Egan v. Gordon*, 65 Minn. 505, 68 N. W. 103; *Ashbrook v. Dale*, 27 Mo. App. 649; *Plath v. Kline*, 18 App. Div. 240, 45 N. Y. Supp. 951; *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 603; *Burton v. Dupree*, 19 Tex. Civ. App. 275, 46 S. W. 272; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. 294; *Fields v. Brown*, 188 Ill. 111, 58 N. E. 977; *Girardy v. Richardson*, 1 Esp. 13; *Garish v. Duval*, 7 Lower Can. Jur. 127; *Harris v. Fontaine*, 13 Lower Can. Jur. 336; *Crisp v. Churchill*, cited in 1 Bos. & P. 340.

For the illegal sale of liquor. *Codman v. Hall*, 9 Allen, 335; *Sherman v. Wilder*, 106 Mass. 537; *Mound v. Barker*, 71 Vt. 253, 76 Am. St. Rep. 767, 44 Atl. 346; *Vanbuskirk v. McNaughton*, 34 N. B. 125; *Mitchell v. Scott*, 62 N. H. 596; *Dunn v. Stegmann* (Cal. App.) 101 Pac. 25. See also *Arras v. Richardson*, 24 N. Y. S. R. 742, 5 N. Y. Supp. 755.

For gambling and other unlawful uses. *McDonald v. Tree*, 69 Ill. App. 134; *Harris v. McDonald*, 79 Ill. App. 638; *Ryan v. Potwin*, 62 Ill. App. 134; *Canfield v. Vacha*, 4 Ohio S. & C. P. Dec. 240; *Simpson v. Wood*, 105 Mass. 263; *Holmead v. Maddox*, 2 Cranch, C. C. 161, Fed. Cas. No. 6,629; 19 L.R.A. (N.S.)

Edelmuth v. McGarren, 4 Daly, 467. See also *Gaslight & Coke Co. v. Turner*, 6 Bing. N. C. 324.

But it has been held that mere knowledge on the part of the lessor that the lessee intended to use the demised premises in violation of law is not sufficient to render the lease void; in order to have such effect, there must have been also some active participation on the part of the lessor in the illegal purpose. *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966; *Gorman v. Keough*, 22 R. I. 47, 46 Atl. 37; *Almy v. Greene*, 13 R. I. 350; *Allen v. Keilly*, 18 R. I. 197, 30 Atl. 965; *Updike v. Campbell*, 4 E. D. Smith, 570.

A landlord will not be prevented from recovering his rent because, during the term, he acquires knowledge that his house is being used for an illegal purpose, where he had no knowledge thereof at the time of the demise. *Kessler v. Pearson*, supra; *Koester v. State*, 36 Kan. 27, 12 Pac. 339. See also *Allen v. Keilly*, supra.

A lease containing nothing to show that the unlawful sale of liquor was contemplated on the premises is not avoided by the subsequent use of the premises for such unlawful purpose, even though it continues with the landlord's knowledge. *Kittredge v. Allemania Society*, 3 Ohio N. P. 312.

In *Jennings v. Throgmorton*, Ryan & M. 251, it is held that a landlord acquiring knowledge that his premises are being used for an illegal purpose may not recover rent accruing from the time of discovering the illegal use. In this case the tenancy was from week to week.

In order to defeat a landlord's right to recover rent on the ground that the premises were let for carrying on an illegal business, it must be shown that the lessor, at the time the lease was made, was a party to the illegal intent, and let the premises in furtherance thereof. *Gibson v. Pearsall*, 1 E. D. Smith, 90.

In *Zink v. Grant*, 25 Ohio St. 352, the court, in construing a statute providing that all contracts leasing or renting a build-

ERROR to the District Court for Wyandotte County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due upon a promissory note. Reversed.

This action was brought by the Citizens' National Bank to recover from R. A. Sykes & Son the amount of a promissory note, a copy of which reads:

\$3,636.83. New Murdock, Kansas,
Sept. 22, 1899.

Two hundred seventy days after date, without grace, for value received, we promise to pay to Ladd, Penny & Swazey, or order, thirty-six hundred thirty-six and $\frac{1}{100}$ dollars, at the office of Ladd, Penny, & Swazey, Live Stock Exchange, Kansas City, with interest after maturity at 8 per cent per annum until paid.

The makers and indorsers hereof hereby severally waive protest, demand, and notice

of protest and nonpayment, in case this note is not paid at maturity, and agree to all extensions and partial payments, before or after maturity, without prejudice to holder.

R. A. Sykes & Son.

Due June 19, 1900. No. of 1012.

P. O., New Murdock, Kan. 1543.

The note was indorsed as follows:

Notice, demand, and protest waived.
Payment guaranteed.

Ladd, Penny, & Swazey.

Further facts sufficiently appear in the opinion.

Messrs. S. S. Ashbaugh and A. E. Helm, for plaintiffs in error:

The note is a Kansas contract, made to be enforced in Kansas, and is governed by Kansas laws.

Downer v. Chesebrough, 36 Conn. 39, 4

lottery contracts; and to United States Sav. & L. Co. v. Beckley, 62 L.R.A. 33, as to the governing law with respect to interest and usury. These notes, of course, include bills and notes as well as other contracts. Occasionally, however, questions of this kind arise in such a form as to make them distinctive of the subject of negotiable paper, as, for instance, where the question relates to the law which determines the right of a bona fide holder of negotiable paper to be protected against defenses arising from lack of capacity, illegality of consideration, the reservation of usury, or other defenses available as between the prior parties. To this extent, it has been the intention to include the cases, either in the original note or in the present note.

The question as to where the contract of the primary obligors or that of the secondary obligors is deemed to have been made under a particular state of facts and circumstances is closely related to the subject of this note. For the most part, however, the question depends upon principles that are equally applicable to other classes of contracts and therefore cannot be properly treated in this note. The question, however, as to where the contract of an accommodation party is deemed to be made when he signs the instrument in one state and delivers it there to the accommodated party, who first negotiates the same in another state, is in a sense peculiar to, or at least practically confined to, bills and notes. See, in this connection, case note to Chemical Nat. Bank v. Kellogg, 2 L.R.A.(N.S.) 299, and especially the case of Union Nat. Bank v. Chapman, 169 N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672, referred to in that note.

General commercial principles as opposed to local law.

As pointed out in the note in 61 L.R.A. 193, the Federal courts, in the absence of a 19 L.R.A.(N.S.)

local state statute, assume the right to determine for themselves the general principles of commercial law applicable to negotiable paper, without being bound by the local precedents of the state the law of which, if statutory, would concededly govern.

So, in the later case of State Nat. Bank v. Cudahy Packing Co. 126 Fed. 543, the question as to negotiability of a note is declared to be one which pertains to the law merchant, with regard to which the Federal courts are not bound by local decisions unless predicated on a statutory enactment.

The very general adoption by the different states of the uniform negotiable instrument law, however, operates to restrict very materially the freedom of the Federal courts in dealing with these questions.

As also pointed out in the earlier note, some of the state courts assume the same right as the Federal courts to determine the general principles of the law merchant or the common law with relation to bills and notes without being bound by the judicial precedents of the courts of another state whose law, if statutory, would concededly govern. This position, however, so far as it relates to the courts of different states, is contrary to the great weight of authority, or at least to the tacit assumption of the majority of the cases, which make no distinction in this respect between a law of another state which is embodied in a statute and one which is evidenced by the judicial precedents of the courts of that state. In the subsequent case of Midland Steel Co. v. Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290, the court, in discussing this subject, and speaking of the common-law rules of Pennsylvania with respect to the negotiability of paper, said: "The foreign court is the only tribunal competent to decide upon the common or the statute law of its own state, and we fail to see any reason for permitting such decisions to be questioned in the one case and not

Am. Rep. 29; Hefferlin v. Sinsinderfer, 2 Kan. 401, 85 Am. Dec. 593, 899; Denny v. Faulkner, 22 Kan. 98; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Howenstein v. Barnes, 5 Dill. 482, Fed. Cas. No. 6,786; Joslin v. Miller, 14 Neb. 91, 15 N. W. 214; Strawberry Point Bank v. Lee, 117 Mich. 122, 75 N. W. 444; Farmers' Nat. Bank v. Sutton Mfg. Co. 17 L.R.A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191; Tilden v. Blair, 21 Wall. 241, 22 L. ed. 632; Shoe & Leather Nat. Bank v. Wood, 142 Mass. 563, 8 N. E. 753; Stix v. Mathews, 63 Mo. 371, 75 Mo. 96; Goddin v. Shipley, 7 B. Mon. 575; Calhoun County v. Galbraith, 99 U. S. 214, 25 L. ed. 410; Baxter Nat. Bank v. Talbot, 154 Mass. 213, 13 L.R.A. 52, 28 N. E. 163; Pierce v. Indseth, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418.

The note was secured by property located in Kansas; and, when a mortgage is exe-

cuted as a part of the contract, it is presumed the parties had in view the laws when the mortgage is to be enforced.

Mutual Home & Sav. Asso. v. Worz, 67 Kan. 509, 73 Pac. 116; Royal Loan Asso. v. Forter, 68 Kan. 473, 75 Pac. 484, 1 A. & E. Ann. Cas. 794; People's Bldg. Loan & Sav. Asso. v. Kidder, 9 Kan. App. 391, 58 Pac. 798; Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley, 38 Or. 319, 58 L.R.A. 816, 84 Am. St. Rep. 793, 63 Pac. 489; St. Joseph Loan & Bldg. Asso. v. Thompson, 19 Kan. 325; National Mut. Bldg. & L. Asso. v. Burch, 124 Mich. 57, 83 Am. St. Rep. 311, 82 N. W. 839; Clark v. Skeen, 61 Kan. 526, 49 L.R.A. 190, 78 Am. St. Rep. 337, 60 Pac. 327; Mackey v. Pettijohn, 6 Kan. App. 57, 49 Pac. 636; Dan. Neg. Inst. 867; Wharton, Conf. L. 401; Scudder v. Union Nat. Bank, *supra*.

Messrs. Stewart Taylor and J. D. McCue for defendant in error.

permitting them to be questioned in the other." On the general subject of conflicting interpretations of common-law rules in different jurisdictions, see case note to Root v. Kansas City Southern R. Co. 6 L.R.A. (N.S.) 212. Some additional cases on the question in its relation to carriers' contracts will be found in a note to Southern Exp. Co. v. Gibbs, 18 L.R.A. (N.S.) 874.

Negotiability.

As pointed out at page 205 of the earlier note, it is unsatisfactory to attempt any discussion of the question of the governing law with respect to the negotiability of an instrument, in an abstract manner and apart from the ultimate question which depends upon the character of the instrument in that respect. As there pointed out, most of the cases, though there are some exceptions, refer the preliminary question of negotiability to the same law that governs the ultimate question dependent thereon; that is, if the ultimate question relates to the liability of, or defenses available to, the maker or acceptor (the primary obligor), the preliminary question of negotiability as affecting that ultimate question is referred to the same law as the ultimate question, viz., the law of the place of performance of his obligation; upon the other hand, if the ultimate question relates to the substantive liability of, or defenses available to, the drawer or indorser (secondary obligors), the preliminary question of negotiability as affecting that ultimate question is referred to the same law as the ultimate question, viz., the law of the place where the drawer's or indorser's contract is made (that being also the place where it is performable). As shown under subdivision XI. of the earlier note, this principle has in some cases been carried so far as to refer the question of negotiability to the law of the forum where the ultimate question dependent thereon related to the remedy, and was, as such, 19 L.R.A. (N.S.)

governed by the *lex fori*. None of the cases included in the present note which pass upon the governing law with respect to negotiability involved any question of remedy depending upon the character of the instrument in that respect, and there is therefore, no opportunity to discuss further the question as to the governing law with respect to negotiability as affecting the remedy.

It will be observed, however, that while in most of the cases subsequently cited which involve the question as to the governing law with respect to negotiability that question was referred to the law of the place of payment of the bill or note (*i. e.*, the law of the place of performance of the maker's or acceptor's contract) if there was any conflict on the subject, that was also the governing law of the ultimate question, which was affected by the character of the instrument in this respect. And in *Amsinck v. Rogers*, 189 N. Y. 252, 12 L.R.A. (N.S.) 875, 121 Am. St. Rep. 858, 82 N. E. 134, the court, having referred the ultimate question as to the necessity of protest and notice in order to hold the drawers of a bill to the law of the place where the drawers' contract was made (which was also the place of the performance of his contract), referred the question of negotiability as affecting the ultimate question to the law of the same place.

For reasons now apparent, the further discussion of the cases involving the governing law with respect to negotiability will be in connection with the particular ultimate question dependent upon the character of the instrument in that respect.

See *State Nat. Bank v. Cudahy Packing Co.* *supra*, under the heading, "General commercial principles as opposed to local law;" *Smith v. Myers*, 207 Ill. 126, 69 N. E. 858, and *Cherry v. Sprague*, 187 Mass. 113, 67 L.R.A. 33, 105 Am. St. Rep. 381, 72 N. E. 456, under the heading, "Character of par-

Benson, J., delivered the opinion of the court:

A judgment for the bank in this action was reversed on a former hearing in this court. 60 Kan. 134, 76 Pac. 393. On the second trial, in addition to the facts stated in the former opinion, the court found that the office of the payees, where the note was made payable, was in Missouri, and that by the law of that state the note is, and was, negotiable. By reason of the recitals in the note making the time of payment uncertain, it was held to be non-negotiable by this court. The trial court, after an amendment of the petition, having found the additional facts above stated, again rendered judgment for the plaintiff. The defendant now asks for reversal, upon the grounds, first,

ties; liability of irregular indorser;" numerous cases under the heading, "Liability of and defenses available to maker or acceptor;" and *Amsinck v. Rogers*, supra, under the heading "Liability of and defenses available to drawer or indorser."

Bill or note fraudulently transferred.

In *Embricos v. Anglo-Austrian Bank* [1905] 1 K. B. 677, 2 A. & E. Ann. Cas. 703, the English court of appeal declared, upon the authority of *Alcock v. Smith* [1892] 1 Ch. 238 (set out at length at page 224 of the earlier note), that the validity of a transfer of a bill of exchange or check, as affecting the title to the same or the proceeds thereof, is governed by the law of the place where the transfer takes place; and accordingly held that the law of Austria, according to which a Vienna bank acquired a good title to a check drawn upon a London bank by purchasing it in good faith, without negligence, after it had been specially indorsed by the payee to a London firm, from a clerk of the payee who had abstracted it from a letter and forged the indorsee's name, should prevail over the law of England, according to which the Vienna bank would not acquire a good title; and that consequently the payee could not recover damages, as for a wrongful conversion of the check, from defendants to whom the Vienna bank indorsed it and who cashed it at the bank on which it was drawn. *Vaughan Williams, L. J.*, expressly stated that the decision in *Alcock v. Smith*, supra, was limited to the rights of subsequent parties to the instrument itself, and did not establish the proposition that the law of the place by which the transfer takes place would govern the sufficiency of the indorsement as against the original parties, having regard to the contractual liability incurred by them; and intimated that the decisions in *Re Marseilles Extension R. & Land Co. L. R. 30 Ch. Div. 598*, and *Lebel v. Tucker, L. R. 3 Q. B. 83* (see former note, page 225), were authority to the contrary. He added, however, that it may be—and he was disposed to take that view of the contract—that the

that the former decision of this court that the note is non-negotiable is a final adjudication of that matter; and, second, that the finding of the district court relative to the law of Missouri is not sustained by the evidence. This note was made in Kansas, by residents of this state, and was payable, as the evidence now shows, in Missouri. It was indorsed by the payees, before maturity, to the Union Brokerage Company, of Kansas, and was indorsed by that company, in Kansas, to the plaintiff, a national bank of Iowa. The makers had no knowledge or notice of these transfers, and paid the note before maturity to the payees, who had no authority from the holder to receive such payment. Upon these facts alone the judgment should be for the defendants, if we

contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England, even though that indorsement be invalid according to what, for convenience, he calls the local law of England. He further said that the question under consideration in the case was not concluded by the provision of subsection 2 of § 72 of the bills of exchange act, 1882, declaring that, "subject to the provisions of this act, the interpretation of the drawing, indorsement, acceptance or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made, provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom." *Romer, L. J.*, said that such subsection recognized the general principles of international law on which the decision proceeded, and that the proviso did not touch the case at bar. *Stirling, L. J.*, who concurred in the decision, remarked that he attached more weight to the statutory provision than the other judges.

Character of parties; liability of irregular indorser.

As pointed out at page 200 of the earlier note, there is a difference of opinion whether the character, and therefore the nature, of the contract, of a party who indorses his name on the back of a promissory note before its delivery or indorsement by the payee, is to be determined by the law of the place where the instrument is made or delivered, or by the law of the place where it is payable.

In *Smith v. Myers*, 207 Ill. 126, 69 N. E. 858, the court said that, if the instrument in question were a promissory note, the question whether one who signed his name on the back before delivery to the payee was an indorser or guarantor should be determined by the law of Connecticut. The note having been delivered in that state. The court formally refers the holding on this point to the general proposition that, in an action upon a negotiable instrument, the law of the place where the same is de-

follow the former decision that the note was non-negotiable. It is claimed by the plaintiff, however, that the additional findings that the note was payable in Missouri, and that it is a negotiable instrument, warrant the judgment for the plaintiff. The new issue, presented upon an amendment allowed by the district court in its discretion, had not before been adjudicated, and was properly tried. Therefore the first ground urged for reversal cannot be sustained. Subject to qualifications not necessary now to consider, the law of the place of performance of contracts governs in determining the liability of the contracting parties, and this principle applies to promissory notes. Randolph, Com. Paper, § 31; 2 Parsons, Notes & Bills, 324; Dan. Neg. Inst. § 879. "Mat-

ters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." Scudder v. Union Nat. Bank, 91 U. S. 406, 412, 23 L. ed. 245, 248. We conclude that the negotiable character of this note must be determined by the laws of Missouri, where it was made payable. The question how this law is to be determined has been elaborately argued. Two views have been taken, both well supported by precedents.

livered and negotiated is to control in determining the liability, if any, thereon; and that the place where a contract is made depends, not on the place where it is actually written, but on the place where it is delivered as consummating a bargain. In this case, however, the instrument was apparently payable in Connecticut, so that there was no conflict between the *lex loci contractus* and *lex loci solutionis* on this point. The Connecticut statute, which in such a case declares that, whether the indorsement be before or after the indorsement by the payee, it shall import the contract of an ordinary indorsement, was held not to apply for the reason that the instrument in question was not a promissory note within the law merchant, because of the provision therein for payment of taxes as well as principal and interest. The court did not formally refer the question as to the character of the instrument as a promissory note to the law of Connecticut, but apparently disposed of that question on the general principles of the law merchant. This, however, was probably on the assumption that those principles prevailed in Connecticut, and not upon the theory that the local laws of Illinois would govern.

In Nashua Sav. Bank v. Sayles, 184 Mass. 520, 100 Am. St. Rep. 573, 69 N. E. 309, the court applied the law of New Hampshire, that one who signs a note on the back thereof before delivery to payee is liable as a joint maker without a demand on the other maker, it appearing that a bank in New Hampshire sent a blank form of note to a resident of Massachusetts to take up an overdue note held by the bank against him and an indorser, and that he made out a note payable to the order of the bank for part of the amount due on the old note, procured the defendant to indorse the new note on the back and sent it through the mail to the New Hampshire bank, together with a check for the balance. The court said that, upon such facts, there was no doubt that the note in suit first took effect as a binding contract when it was received by the bank in New Hampshire, and that it was unnecessary to consider whether,

under the circumstances of the case, the fact that the note was made payable in New Hampshire would make the laws of that state applicable to it.

In Cherry v. Sprague, 187 Mass. 113, 67 L.R.A. 33, 105 Am. St. Rep. 381, 72 N. E. 456, the preliminary question whether an instrument was a promissory note, as well as the ultimate question depending thereon, whether those who signed on the back before delivery to the payee were original promissors, or makers, or indorsers entitled to notice, was referred to the law of South Dakota, the note being payable there, and having also been sent through the mail to South Dakota, although signed in Massachusetts. Here, again, there was no conflict between the *lex loci contractus* and the *lex loci solutionis*.

In Hackley Nat. Bank v. Barry (Wis.) 120 N. W. 275, the question whether one who signed his name on the back of a note before delivery to the payee was maker or indorser was referred to the law of Michigan, it appearing that the note was payable in Michigan, and that it was signed by the regular maker in that state and sent by him to the irregular party in Wisconsin, who signed it there, and, by the regular maker's direction, sent the paper to the payee in Michigan. While it is not expressly so stated, it was probably assumed that the irregular maker's contract was in a legal sense made in Michigan, so that in this case also there was no conflict between the *lex loci contractus* and the *lex loci solutionis*.

The case of Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co. 69 Ohio St. 351, 69 N. E. 613, however, supports the position that the character of such an irregular party depends on the law of the place where the note is payable rather than on the place where the contract is made by the delivery of the note. In this case the note, which was payable in Kentucky, was indorsed, apparently for the accommodation of the maker, before its delivery to the payee, by one person in Kentucky and by another in Pennsylvania, and was then returned to the maker in Ohio, who there delivered it to the payee in Ohio. The court expressly held that the

The Federal court and the courts of New York, Iowa, Maine, and Georgia have held that, as the law to be applied is the general commercial law or law merchant, it must be sought for, not in the decisions of local tribunals, but in the general doctrines of commercial jurisprudence; that, while following the decisions of the courts of final resort of the state where the note is payable in the construction of its statutes, the courts of the state where the case is tried will be governed by their own precedents in expounding the general common law applicable to commercial transactions. *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L.R.A. 241, 27 N. E. 849; *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep.

246, 40 Atl. 128; *Franklin v. Twogood*, 25 Iowa, 520, 96 Am. Dec. 73; *National Bank v. Green*, 33 Iowa, 140; *Pattillo v. Alexander*, 105 Ga. 482, 30 S. E. 644. Notwithstanding the weight of the foregoing decisions, and the strength of the argument in their support, the rule adopted in a large majority of the state courts, and announced by text writers, is that when it becomes necessary to determine the common law of another state, the decisions of the courts of final resort of that state will be followed, regardless of precedents to the contrary in the state where the trial is held; and that this rule applies to the law merchant as well as to other branches of the common law. This rule is based upon the presumption that the parties have contracted with

locus contractus was in Ohio, but that the *locus solutionis* was in Kentucky, and that the *lex loci solutionis* governed.

In *Columbia Finance & T. Co. v. Purcell*, 142 Fed. 984, the question is referred to the law of Pennsylvania as the place where the irregular party's contract was made, although the court said the note was dated and delivered in Kentucky, and was therefore a Kentucky contract.

But the law of the forum governs as to the right to show by parol the true relations as between themselves of the original parties, although the contract was made and payable in another state. *Kufman v. Barbour*, 98 Minn. 158, 107 N. W. 1128.

Liability of and defenses available to maker or acceptor.

As shown in the earlier note the great weight of authority holds that the substantive questions of liability of, and defenses available to, the maker or acceptor (primary obligors) of a bill or note is governed by the law of the place where the bill or note is payable. Proceeding by the same process of elimination that was adopted in the earlier note, the cases first cited are those in which there was no conflict except between the law of the forum and the law of the state where the note was made and payable:

Thus, the law of Iowa, where a note was made and payable, determines the question whether or not it is negotiable, as affecting the question whether a purchaser in good faith may recover more than he paid for the same against the maker, the note having originated in a fraud. The ultimate question in this case, as well as the question of negotiability, was determined by the law of Iowa rather than by the law of Missouri as the *lex fori*. *Creston Nat. Bank v. Salmon*, 117 Mo. App. 506, 93 S. W. 288.

So, the law of another state, where a note is made and payable, relieving the maker from liability, even against a bona fide holder, where his signature was procured by fraud without knowledge of the character of the instrument, will govern in an action in South Dakota. *First Nat. Bank v. Doeden* (S. D.) 113 N. W. 81. 19 L.R.A. (N.S.)

So, in *Bailey v. Devine*, 123 Ga. 653, 107 Am. St. Rep. 153, 51 S. E. 603, involving the availability of the defense of fraud and duress, the court said that a note made and payable in Colorado by a citizen of Georgia was governed by the law of Colorado; but, in the absence of proof of the law of that state, the court indulged the presumption that the common law was in force there.

So, the negotiability of a note as affecting the substantive liability of the maker to subsequent parties is governed by the law of Montana, where the note is made and payable, rather than by the law of South Dakota, where the action is brought. *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89.

In *Arden Lumber Co. v. Henderson Iron Works & Supply Co.* 83 Ark. 240, 103 S. W. 185, the court of Arkansas refused to enforce a stipulation for attorneys' fees in notes made and payable in Louisiana, by the law of which such stipulation is valid; but this decision was upon the ground that it was contrary to the public policy of the forum to enforce such a stipulation, and the decision therefore is a mere exception to, and not denial of, the general principle which refers bills and notes to the law of the place where payable.

In *Barry v. Stover*, 20 S. D. 459, 107 N. W. 672, the court, while holding that the negotiability of a note payable in Massachusetts was to be determined by the law of Massachusetts irrespective of the state in which it was made, nevertheless held that the question whether the payment to a payee of a non-negotiable note before notice of assignment would constitute a defense must be determined by the law of South Dakota, where the action was brought. It will be observed that, tested by the law of Massachusetts, the instrument involved in this case was not a negotiable instrument, and therefore did not as such carry to subsequent bona fide holders the immunity from defenses between the original parties that would attach to negotiable paper; and it may be that, treating payment as an affirmative defense, the decision referring the point to the law of South Dakota might be justified assuming that the payment was made

reference to the law of the place of payment, and that law is applied in accordance with the doctrine of comity. This rule has been approved in this court in its application to other subjects, but it does not appear to have been directly invoked with respect to commercial paper. *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Alexander v. Barker*, 64 Kan. 396, 67 Pac. 829; *St. Louis & S. F. R. Co. v. Johnson*, 74 Kan. 83, 86 Pac. 156. The opinion in *Midland Sav. & L. Co. v. Solomon*, 71 Kan. 185, 79 Pac. 1077, clearly states the principle upon which contracts solvable by the laws of another state are enforced here.

Following the rule generally prevailing, we should now hold the note in question to

be a negotiable instrument, if the law of Missouri is as the district court found it to be. That finding, however, is challenged upon the ground that it is not supported by the evidence; and, as the evidence consists of the statutes of Missouri, and decisions of courts of that state, pleaded as facts, the sufficiency of the proof to sustain the finding is fairly presented for review here. *Belknap Hardware Mfg. Co. v. Sleeth*, 77 Kan. 164, 93 Pac. 580. The statute pleaded and read in evidence is as follows: "Every promissory note for the payment of money to the payee therein named, or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland

in that state (which, however, does not appear from the opinion). The court, however, in declaring that, while the validity and interpretation of a contract may be controlled by the laws of a sister state, yet that, in determining what shall be good defenses to actions instituted in South Dakota, its courts must administer its own laws, and not those of other states, seems to have fallen into a contradiction, and its generalization, at least, is not sustained by the authorities.

As shown at page 208 of the earlier note, while the law of the place where a contract of indorsement is in a legal sense made governs as to the liability of the indorser to subsequent parties, that law does not govern as to the liability—even to indorsees—of the maker of a note or the acceptor of a bill (the primary obligors), since the governing law of his contract depends upon the facts at the time his contract is made, and his liability cannot be increased or diminished by the law of the place where a subsequent indorsement is made, except as the character of the indorsee as a bona fide holder may depend on the law of that place (as to which, see subdivision VII. of the earlier note). It will be observed that in *First Nat. Bank v. Doeden*, supra, the law of the place of payment, as to the question of negotiability, is held to prevail over the law of the place of indorsement, as well as over the law of the place where the note is made, and the law of the forum.

So, the fact that a note made and payable in another state is assigned by persons other than the maker in Kentucky does not operate to make the contract so far as the makers are concerned subject to the law of Kentucky requiring the words "peddlers' notes" to be placed on certain notes. *Arnett v. Pinson*, 33 Ky. L. Rep. 36, 108 S. W. 852.

The later cases sustain the rule as stated at page 209 of the earlier note, that the law of the place where a note or bill is payable, rather than the law of the place where the same as made or drawn, or accepted (if the place of acceptance and the place of payment are different), governs so far as the 19 L.R.A. (N.S.)

essential liability of, and the defenses available to, the maker or acceptor (the primary obligors) are concerned (excluding mere formal requisites, capacity of parties, etc.)

This rule, it will be observed, is applied in *SYKES v. CITIZENS' NAT. BANK* not only to the ultimate question as to the liability of the maker, but also to the preliminary question of negotiability as affecting that ultimate question.

So, the law of Pennsylvania, where a note is payable, rather than the law of Indiana, where it is made, governs as to the substantive liability of the maker to a subsequent holder, and also as to the question of negotiability as affecting such liability. *Midland Steel Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107, 72 N. E. 290.

So, the question whether failure of consideration is available to the maker as a defense against a subsequent holder of a note made in Mississippi, but importing that it is negotiable and payable in Alabama, depends upon the law of Alabama as the place of performance. *Lienkauf Bkg. Co. v. Haney* (Miss.) 46 So. 626.

In *Price v. Gatloff*, 33 Ky. L. Rep. 324, 110 S. W. 332, the question of negotiability as affecting the liability of the maker to a subsequent bona fide holder was referred to the law of Iowa, it appearing that the notes were payable at a bank in that state, and that they were sent in blank from that state to the maker in Kentucky, who signed them and returned them through the mail to the payee in Iowa. While the court did not expressly refer the decision to the rule that the law of the place of payment prevails over the law of the place where the contract is made, that would seem to be implied, and the court apparently assumed that the maker's contract was to be regarded as having been made in Kentucky.

In *Johnson County Sav. Bank v. Kramer* (Ind. App.) 86 N. E. 84, the court said that a contract of acceptance of a bill, having been made in Indiana, was governed by the law of that state, which prevents the acceptor of a bill from availing himself of the defense of lack of consideration as against a subsequent indorsee for value in good faith;

bills of exchange." Mo. Rev. Stat. 1889. § 733. The decision of the supreme court of Missouri, a part of which was set out in the petition, and all of which was read in evidence, is the opinion in *Stillwell v. Craig*, 58 Mo. 24. The action was upon a promissory note "payable in instalments not to exceed 10 per cent on each share (of the stock for which it was given), at thirty days' notice of call from the board of directors." The opinion says: "Our statutory requisites for negotiable paper are fully met in this instrument. . . . But the defendants insist that it lacks, in two particulars, the certainty essential to make it a promissory note, *viz.*, as to amount, and as to time of payment. . . . As to time of payment, the law is less exacting. . . .

and thus apparently referred the question to the *lex loci contractus* rather than the *lex loci solutionis*. In this case, however, the bills were not only accepted in Indiana, but were addressed to the drawee in that state, so that Indiana was clearly the law of the place of performance of the acceptor's contract, and the result was therefore the same as if the decision had been expressly referred to the *lex loci solutionis*. Indeed, on the facts as stated by the court at the beginning of the opinion, it is extremely doubtful whether the acceptor's contract must not be regarded as having been made in Iowa, it appearing that a company in that state drew drafts to its own order directed to the drawee in Indiana, who in the latter state, accepted the same by signing his name on the face thereof, and, as the court said, "delivered them at said Iowa City."

In *Krantz v. Kazenstein*, 22 Pa. Super. Ct. 275, the sufficiency of a power of attorney in a note purporting to authorize the entry of a judgment in Pennsylvania by confession was held to be governed by the law of that state, although the contract was made in New York.

The validity and enforceability of a note payable in Illinois with power of attorney to confess judgment is to be determined by the law of Illinois, which permits confession of judgment whether the note was made in that state or not. *Vennum v. Mertens*, 119 Mo. App. 461, 95 S. W. 292.

Liability of and defenses available to drawer or indorser.

The later cases recognize and apply the general principle stated and formulated at page 212 of the earlier note, to the effect that the contract of the drawer or indorser (the secondary obligors) is not only a separate contract which has a situs of its own independent of that of the maker or acceptor (the primary obligor), but also that his obligation is to pay, in the event of the default of the primary obligor, not at the place of payment expressly or impliedly named in the bill or note, but at the place where, in a legal sense, his contract was made. 19 L.R.A. (N.S.)

Contingencies in this particular must be exceedingly remote, in order to vitiate the paper for negotiable capacity. In *Washington County Mut. Ins. Co. v. Miller*, 26 Vt. 77, a note for \$21, payable 'in such portions and at such time or times as the said company may, agreeably to their act of incorporation, require,' was held to be a promissory note for the sum specified, so as to determine a question of jurisdiction; but a doubt was expressed whether it would be such in a commercial sense. The doubt, however, as it seems to me, is not justified by the reasoning of the opinion, or by the authorities which it cites. In *Goshen Turnp. Co. v. Hurtin*, 9 Johns. 217, 6 Am. Dec. 273, a similar instrument was held to be a good promissory note, as being 'pay-

This general principle is comprehensively stated in *Amsinck v. Rogers*, 189 N. Y. 252, 12 L.R.A. (N.S.) 875, 121 Am. St. Rep. 858, 82 N. E. 134, and *Sullivan v. German Nat. Bank*, 18 Colo. App. 99, 70 Pac. 162, and exemplified and applied in cases subsequently cited in this note as well as in the earlier note.

By the application of this principle, the validity of indorsements, made in Texas as a part of a gambling transaction, of certificates of deposit '(negotiable paper) issued in Colorado, was held in *Sullivan v. German Nat. Bank*, *supra*, to be governed by the law of Texas.

As the place of performance of the indorser's contract is the place where in a legal sense his contract is made, it is obvious that, if the indorsement is in a legal sense made in the state in which the bill or note is payable, the indorser's contract will be governed by the same law as that of the maker or acceptor. Ordinarily an indorser's contract is deemed to be made not necessarily in the state in which he writes his name on the back of the paper, but in the state in which the instrument is delivered, so as to become a binding contract on him. In *Colonial Nat. Bank v. Duerr*, 108 App. Div. 215, 95 N. Y. Supp. 810, however, the law of New York, which in case of an alteration in negotiable paper permits a holder in due course, not a party to the alteration, to enforce payment of the paper according to its original tenor, was applied as against one who indorsed his name on a note in New York and there delivered it to the maker, who, after making an alteration therein, negotiated it in Ohio, where, as the court said, it had "its first inception as a legal contract," notwithstanding that the note was dated in Ohio and was also payable there. This decision apparently rests on the ground that the contract of indorsement was deemed to have been made in New York notwithstanding that, until the delivery in Ohio, the contract was not binding upon the indorser. This view of the place of the making of the indorser's contract is perhaps supported by the case of *Union Nat. Bank v. Chapman*, 169

able in money, and payable absolutely, and not depending on any contingency.' In the element of certainty as to time of payment I can perceive no difference in principle between such a note and one payable on demand. Hence, if the note under consideration be transferable at all, I have no hesitation in saying that it is negotiable, at least to the extent of authorizing a suit jointly against makers and indorser." Pages 30, 31 of 58 Mo. The clause in the note in question here, upon which it was held by this court in the former decision to be non-negotiable, was this: "The makers and indorsers [hereof] hereby severally waive protest, demand, and notice of protest and nonpayment in case this note is not paid at maturity, and agree to all extensions and

partial payments before or after maturity, without prejudice to holder." In the opinion in *City Nat. Bank v. Gunter Bros.* 67 Kan. 227, 72 Pac. 842, the precedent followed in the former decision of this case, it was said: "In the note in question payment is first fixed at 182 days after the date, but, as will be observed, a later provision makes the time indefinite by stipulating that it may be changed and extended either before or after maturity. If the time is to remain fixed until maturity, when another time is to be fixed by the parties, or if payment is made to depend upon events which necessarily must occur, and the time of payment is ultimately certain, other considerations would arise; but here payment is not ultimately certain, for the

N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672; but is of doubtful soundness (see authorities referred to in case note in *Chemical Nat. Bank v. Kellogg*, 2 L.R.A. (N.S.) 299, and also *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 100 Am. St. Rep. 573, 69 N. E. 309, and *Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co.* 69 Ohio St. 351, 69 N. E. 613.)

Other applications of the general principle which regards the drawer's or indorser's contract as distinct from that of the maker's or acceptor's to questions of substantive liability of the drawer or indorser will be found at page 213 of the earlier note.

The principle has also been frequently applied to the determination of governing law with respect to the conditions precedent to the liability of the drawer or indorser. Thus, in *Amsinck v. Rogers*, supra, by a specific application of this principle, it is held that the duty to cause protest and notice of presentment and nonpayment, in order to fix the liability of the drawers of a bill of exchange upon parties in Austria, drawn, indorsed, and transferred in New York, is governed by the law of New York rather than by the law of Austria; and it was further held that the question whether the bill of exchange was a negotiable instrument as affecting the duty to cause protest and give notice of presentment and nonpayment was also to be determined by the law of New York, so that, the instrument being negotiable by that law, protest and notice were essential to bind the drawer, notwithstanding that by the law of Austria the instrument may have had the character of a "commercial order" for the payment of money, as to which no protest is necessary.

So, the law of Pennsylvania, where indorsement is made, governs as to the necessity of demand and protest, and also as to the necessity of exhausting the maker's resources, in order to hold the indorsers, though the note was dated and delivered in Kentucky, and is, as a result, a Kentucky contract. *Columbia Finance & T. Co. v. Purcell*, 142 Fed. 984.

In *State Bank v. Carr*, 130 N. C. 479, 41 S. E. 876, the court apparently assumed that the 19 L.R.A. (N.S.)

rule of West Virginia, where the note was made (no place of payment being mentioned), would have governed as to the necessity of protest if that law had been proved; but, in the absence of proof indulged the presumption that the common law prevailed in that state. It does not appear where the note was indorsed.

As pointed out in the earlier note, however, the question as to the maturity of the paper, even as affecting the liability of the drawer or indorser, is necessarily governed, not by the law of the place of performance of the drawer's or indorser's contract, but by the law of the place of payment of the bill or note itself.

Thus, in *Hammond v. American Exp. Co.* 107 Md. 295, 68 Atl. 496, an action against the drawers, the court clearly implied that the law of England, if proven, would have governed as to the time of the maturity of drafts drawn in Maryland upon a drawee residing in Dublin who accepted them payable in London. In the absence of proof of the law of England, however, the court indulged the presumption that it was the same as the law of Maryland on the point.

So, in *Vaughan v. Potter*, 131 Ill. App. 334, the court said that, while the contract of the maker was a Missouri contract and that of the indorser (it being conceded that he made the indorsement in Illinois) an Illinois contract, yet the time of the maturity of the paper entered into both contracts, and the law of the place of payment of the note (Missouri) governed the question of the proper time of presentment and demand.

As shown at page 218 of the earlier note, while the courts are substantially agreed that the necessity of giving notice of dishonor in order to hold drawer or indorser is to be determined by the law of the place where the bill was in a legal sense drawn, or the bill or note indorsed, as the case may be, there is a conflict of authority upon the question as to the governing law in respect of the time (i. e., time after maturity as fixed by the law of place of payment of the primary obligor's contract) and sufficiency of the notice in order to hold the secondary

time named in the paper is subject to change at any time, at the volition of some of the parties to the paper." Page 231 of 67 Kan. In *Stillwell v. Craig*, supra, the note was payable in instalments which would not affect its negotiability (Dan. Neg. Inst. § 48), and these instalments were to be paid in thirty days after a call by the board of directors of the payee; that is, in thirty days after demand. As was said of a like provision: "It was in effect payable on demand or in instalments on demand." *White v. Smith*, 77 Ill. 351, 353, 20 Am. Rep. 251.

The language of the supreme court of Missouri, quoted above, "I can perceive no difference in principle between such a note and one payable on demand," is significant, showing the interpretation placed upon the language of that instrument, holding it to be, in effect, a demand note. The language of the note in this case will not bear that interpretation, and the opinion in *Stillwell v. Craig*, supra, does not, in our view, sustain the finding of fact in this case with respect to the law of Missouri. It is true that it may indicate a trend in that direction, but this is not sufficient to prove the fact pleaded. The same court, in a recent case, in considering the effect of a decision of a sister state when offered in evidence to prove the common law of that state, said: "A close analysis of the Arkansas cases cited leads us to conclude that the supreme court of Arkansas never went so far as appellant contends. The very most that can be said was that that learned court was 'heading' in that direction. But, as seen by our own decisions, and pointed out in *Grattis v. Kansas City, P. & G. R. Co.* supra (153 Mo. 380, 48 L.R.A. 399, 77 Am. St. Rep. 721, 55 S. W. 108), courts do not always go on the way they are headed, and it is not always safe to say that a court will reach a goal to which its face is turned and its steps directed. Indeed, we may allow to the supreme court of Arkansas the same right and disposition to establish a growth in the law, or reconstruct its views, that we arrogate to ourselves." Root

obligor; and, as there stated, the weight of authority, in America at least, of the earlier cases, is that the time (in the sense just indicated) and sufficiency of the notice are governed by the law that determines its necessity,—that is, by the law of the place where the bill was drawn, if it is a question of the drawer's liability, or by the law of the place of indorsement, if it is a question of the indorser's liability.

In the later case of *Merchants' Bank v. Brown*, 86 App. Div. 599, 83 N. Y. Supp. 1037, however, involving the question as to the manner of giving notice where the indorser was dead, the court said that the

v. Kansas City Southern R. Co. 195 Mo. 348, 372, 6 L.R.A. (N.S.) 212, 92 S. W. 621. 629. The decision of the Kansas City court of appeals in *City Nat. Bank v. Goodloe-McClelland Commission Co.* 93 Mo. App. 123, fully sustains the finding; but that is an intermediate court, and its decisions do not settle the law of that state. Its jurisdiction is limited, both in territory and amount in controversy, and its decisions involving an amount in excess of \$2,500 are subject to review in the supreme court. We have the highest respect for that tribunal. The great learning and ability of its judges is unquestioned; but we cannot admit its opinions to determine that the common law of that state, as a fact, is different from what we have declared the common law to be here. "The decision of the Kansas City court of appeals in *Goodland v. Bank of Darlington*, 74 Mo. App. 365, is alone cited in support of this contention. A fixed and settled rule of decision in a state court or last resort establishes the law of the state in such manner as to bind the Federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, like the Kansas City court of appeals, while entitled to great respect and regarded as persuasive authority, are not controlling upon the Federal courts, because they do not settle the law of the state." *Anglo-American Land, Mortg. & Agency Co. v. Lombard*, 68 C. C. A. 89, 109, 132 Fed. 721, 741. See also *Hennessy v. Bavarian Brewing Co.* 145 Mo. 104, 41 L.R.A. 385, 68 Am. St. Rep. 554, 46 S. W. 966. Other Missouri decisions read in evidence related to the effect of the mortgage security, and do not govern this question. The statute quoted above (Mo. Rev. Stat. 1889, § 733) is probably only declaratory of the common law (*First Nat. Bank v. Payne*, 111 Mo. 291, 33 Am. St. Rep. 520, 20 S. W. 41), and does not materially differ from our own.

Upon a careful examination of the evidence offered upon the subject, we conclude that the finding that the note sued upon was and is negotiable is not supported by the proof. In the absence of such proof it

note, having been made in Canada, and being by its terms payable there, was a contract governed by the law of Canada, without otherwise discussing the question as to the governing law or recognizing the distinction between the original contract and the indorsement. It does not appear where the indorsement was made, but, as the indorsee was the bank at which the note was payable, it seems quite probable that the indorsement was also made in Canada, in which event there would be no conflict between the decision in this case and the rule sustained by the weight of authority on this point.

will be presumed that the law of Missouri is the same as our own.

The judgment is reversed, and the cause remanded for further proceedings.

All the Justices concur.

KANSAS SUPREME COURT.

W. S. MANKER et al., Plffs. in Err.,
v.

L. M. TOUGH.

(— Kan. —, 98 Pac. 792.)

Agent — sale of real estate.

1. An agent employed to sell real estate, and not authorized to execute a contract of sale, or to execute an instrument of conveyance, is only an agent to find a buyer.

Sale — joint adventure — principal and agent — distinction.

2. A contract between a real-estate agent and a landowner that, if the agent should find a purchaser for the land, he should have, as compensation for his services the amount the land should sell for above a certain price, is an agency contract, and not a joint adventure.

Broker — license — effect on contract.

3. Where, under the statute which authorizes cities of the third class to impose a license tax upon "real-estate agents," the council of such a city enacts an ordinance imposing a license tax upon the business of "real estate," and a real-estate agent thereafter continues to conduct his business within said city without a license, and, in such business, makes a contract to find a buyer of real estate for a compensation, such ordinance does not render the contract illegal and void.

Municipal ordinance — construction.

4. In a civil action to which the city is not a party, where a breach of such ordinance is invoked for the purpose of avoiding a contract between the parties, the ordinance will be strictly construed.

Appeal — review — findings of fact — discretion.

5. The allowance or denial of a motion for a new trial, filed after a general verdict in a district court, is largely a matter of judicial discretion as to the findings of fact and the weight of evidence involved in the verdict; but alleged errors of law occurring upon the trial are not matters of discre-

tion, and are fully subject to review in this court.

(December 12, 1908.)

ERROR to the District Court for Scott County to review an order granting a new trial after verdict for plaintiffs in an action brought to recover commissions for the sale of certain real estate. Reversed.

Statement by Smith, J.:

The defendant in error employed the plaintiff firm of real-estate agents to sell a large tract of land for him, and contracted to pay them for their services therein the amount for which the land was sold in excess of \$6 per acre. The contract of employment was oral. The plaintiffs found a purchaser, and brought the purchaser and the seller together, and they entered into a written contract, duly executed, by the terms of which the defendant agreed to sell and convey by warranty deed 2,880 acres of land, by quitclaim deed 320 acres, and by relinquishment 160 acres, aggregating 3,360 acres, for which the purchaser agreed to pay \$23,520, and to pay \$5,000 cash, \$3,000 of which was paid at the time of the execution of the contract. Promissory notes, payable at specified times, and all bearing interest and secured by a mortgage on the land, were to be given for the remainder of the purchase price. A definite date for the consummation of the transaction was also included in the contract. Afterwards, by the mutual agreement of the purchaser and the seller, but without the consent or concurrence of the plaintiffs, the contract was canceled, and the \$3,000 which had been paid thereon was returned by the seller to the purchaser. Thereafter the plaintiffs brought this action to recover from the seller the sum of \$3,360, being equivalent to \$1 per acre, as compensation for their services. The making of the contract between the plaintiffs and the defendant is virtually admitted by the pleadings. The plaintiffs allege that the defendant agreed to pay them for their services the amount for which the sale should be made in excess of \$6 per acre provided they found a purchaser who was able and willing to buy the land. The answer, however, alleges that he agreed, if the plaintiffs should find a purchaser for the lands, and should close up and complete a sale thereof, he would allow them as compensation for their services any amount they obtained therefor above \$6 per acre. The case was tried in the district court of Scott county to a jury, and a verdict was returned in favor of the plaintiffs for the full amount claimed. A motion for a new trial was filed by the defendant, and was

Headnotes by SMITH, J.

Note. — See subject note to *Levison v. Boas*, 12 L.R.A. (N.S.) 575, on the general subject of the validity of contracts in a business which it is a misdemeanor to transact, including the specific question (page 615) as to the right of an unlicensed real-estate broker to recover for services. 19 L.R.A. (N.S.)

sustained by the court. To reverse this order the plaintiffs bring the case here.

Messrs. David Ritchie and Ed. R. Bane, for plaintiffs in error:

To entitle plaintiffs to their commission it was only necessary to establish that the purchaser and seller were brought together through their efforts, and entered into an enforceable contract.

Lockwood v. Halsey, 41 Kan. 166, 21 Pac. 98; Davis v. Lawrence, 52 Kan. 383, 34 Pac. 1051; Francis v. Baker, 45 Minn. 83, 47 N. W. 452; Mattes v. Engel, 15 S. D. 330, 89 N. W. 651; Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 327; Riemer v. Rice, 88 Wis. 16, 59 N. W. 450; Arnold v. National Bank, 126 Wis. 362, 3 L.R.A.(N.S.) 580, 105 N. W. 828; Hobart v. Stewart, 99 Minn. 394, 109 N. W. 704.

The contract was one of agency.

Durkee v. Gunn, 41 Kan. 496, 13 Am. St. Rep. 300, 21 Pac. 637; Weaver v. Snively, 73 Neb. 35, 102 N. W. 77; Young v. Ruhwedel, 119 Mo. App. 231, 96 S. W. 228.

Messrs. J. S. Simmons and R. D. Armstrong, for defendant in error:

A contract to sell land, against which the vendee can successfully plead the statute of frauds, is not a valid contract which will entitle the broker employed to produce a purchaser to recover.

Wilson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; Francis v. Baker, 45 Minn. 83, 47 N. W. 452; Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 327.

The ordinance in question should be liberally construed.

First Municipality v. Cutting, 4 La. Ann. 335; McQuillin, Mun. Ord. § 293; Swift v. Topeka, 43 Kan. 671, 8 L.R.A. 772, 23 Pac. 1075; Meriam v. New Orleans, 14 La. Ann. 318; Zorger v. Greensburgh, 60 Ind. 1; State v. Carpenter, 60 Conn. 97, 22 Atl. 497; Davis v. Darling, 80 Hun, 299, 30 N. Y. Supp. 323.

Smith, J., delivered the opinion of the court:

The jury was properly instructed as to the burden of proof in the case, and it is not contended by the defendant that there was not some evidence to support every material issue of fact. The court sustained the motion for a new trial only upon the ground of errors of law occurring at the trial, as will hereinafter more fully appear. It follows that the court approved the verdict of the jury as to the facts involved, and we shall therefore regard it as a fact that the contract was as alleged by the plaintiffs. Indeed, where one employs another to sell land for him, and does not confer authority to execute a contract of sale or to execute an instrument of conveyance, the contract

necessarily is that the agent should find a purchaser ready, willing, and able to make the purchase at the price and on the terms prescribed by the seller to the agent. The court, on sustaining the motion for a new trial, filed a statement of his reasons for making the order, which is made a part of the record. They are as follows: "(1) I conclude, as a matter of law, that in a contract such as the one in question, where agent's compensation was to be such sum as might be derived from the sale above a fixed price, the relation of principal and agent is not created, and does not exist, and that the transaction partakes of the nature of a joint venture, in which neither one may profit to the exclusion of the other, unless the sale shall fail by reason of the fault or neglect of the owner. (2) I conclude that the contract entered into between Tough and Sample was nonenforceable, for the reason that the contract provided for a relinquishment, on the part of Tough, of a homestead entry upon government land, and for a mortgage on the part of Sample on such land after he should have acquired homestead interest therein,"—neither one of which provisions could be enforced specifically, and the latter of which is especially contrary to law. (3) I conclude that the term 'real estate,' as used in ordinance No. 67 to define a business, includes within itself the usual and reasonable acceptance 'real-estate agents,' and that, while such term may include other business than real-estate agents, the fact that the ordinance goes beyond statutory authority will not vitiate it, in so far as the ordinance is within the scope of granted authority; and that such ordinance was sufficient to impose a license-tax upon persons engaged as real-estate agents within the limits of Scott City, and that the plaintiffs, by their failure to obey such license, are not in a position to recover this action. (4) I am of the opinion that the willingness of Sample to buy the land in question is immaterial, beyond the fact that he signed the contract upon which plaintiffs rely; but, if it should be for any reason held otherwise, then substantial error was committed against the defendant in the progress of the trial by excluding the deposition of Kelly. (5) From which conclusions it must follow as a matter of course that I believe the verdict to be contrary to law, and that it must be set aside and a new trial granted. (6) That the new trial was granted upon the grounds stated in the above and foregoing statement, and none other."

The contract, as pleaded by the plaintiffs, and which the general verdict determines to be the true contract, is, we think, a contract of agency, and not a joint venture,

and, except as to the basis of payment, is not unusual. It does not differ materially from the usual contract with real-estate agents to sell land. We cannot therefore concur with the court in the first reason for granting a new trial. Neither can we concur in the second reason assigned by the court. Whether the contract between the seller and the purchaser was enforceable or not is not material to this case. The seller was able to make just such a conveyance to the purchaser as in their written agreement he agreed to make. The purchaser in return was able to make just such a mortgage as he agreed to make and the seller agreed to accept. Indeed, it appears from the evidence produced by defendant that, at the time their contract was abrogated by mutual consent, the seller had prepared the deeds of conveyance, and the purchaser had prepared his notes and mortgage. The only apparent obstacle to the closing of the deal is that the purchaser had changed his mind, and to avoid proceeding preferred to lose, if necessary, the \$3,000 paid. Also there appears to have been no contention that he was not financially responsible. As to the fourth ground for sustaining the motion, we agree with the court as to the immateriality of the deposition, other than the portion thereof admitted in evidence, of the witness, Kelly, but this does not furnish a reason for granting a new trial. There remains, then, only to consider the meaning of the term "real estate" as used in ordinance No. 67 of Scott City as applicable to this action. The court admitted the ordinance in evidence, and afterwards withdrew it from the consideration of the jury. In the third conclusion the court indicates that the latter action was erroneous. Scott City is a city of the third class, and § 1127, Gen. Stat. 1901, provides: "The city council shall have authority to levy and collect a license tax on . . . real-estate agents." Ordinance No. 67, § 1, reads: "That, on and after the 1st day of September, 1901, it shall be unlawful for any person or persons, corporation or corporations, to engage in any of the branches of business or industry, within the corporate limits of the city of Scott City, Kansas, set forth in this ordinance, without first having obtained a license therefor, signed by the mayor and countersigned by the clerk of said Scott City, Kansas, and sealed with the city seal." Section 3, amended (omitting all enumerations but the following), reads: "That the license tax on the following professions and businesses shall be for . . . real estate . . . \$2.00 per year." Section 5 reads: "Any person violating the provisions of this ordinance shall be deemed guilty of a misdemeanor, 19 L.R.A. (N.S.)

and, upon conviction thereof before the police judge, shall be fined in a sum not less than \$5 nor more than \$50." It is admitted by the plaintiffs that they were real-estate agents doing business in Scott City, and that the contract in question was made therein, and that they had paid no license fee and had secured no license for such business. Also that, if the ordinance, strictly construed, applied to their business, and required of them the payment of the license fee, they cannot recover in this action; and that the order of the court in granting a new trial by reason of the exclusion of said ordinance from the consideration of the jury is right. They contend, however, that the statute only authorized the city to impose a license tax upon "real-estate agents," and that the city council had not acted upon that grant of authority, but had assumed to impose a license tax upon the business of "real estate;" further, that the ordinance is penal in its nature, and must be strictly construed. The defendant, on the other hand, contends that the intention of the council is apparent, and was to tax the business of real-estate agents; that the business of real-estate agents is commonly designated as the "business of real estate" or the "real-estate business."

If the ordinance in question imposed a license tax upon "real-estate agents," it would be within the express statutory grant of power, and this case would involve the identical question decided in *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207. In that case the ordinance imposed a license tax upon the business of "real-estate agents," and also, in substance, provided that no person or firm should conduct or carry on such business within the city of Winfield without first having obtained a license so to do and having paid the license tax. That ordinance also, as the one in this case, prescribed a fine for a violation of its provision. It was held therein that a firm of real-estate agents who, without obtaining the license, had contracted in the city of Winfield to sell a tract of real estate for a certain commission, and who had performed their part of the contract, could not maintain an action to recover the stipulated compensation for their services for the reason that the contract was made in violation of law. Also that any remedy upon a contract made in violation of a city ordinance is denied for the benefit of the city in the collection of its revenues. The above case was decided in January, 1894. In different forms it was twice afterwards in this court, and it has been cited with apparent approval several times in this and other courts of last resort. *Denning v. Yount*, 62 Kan. 218, 50 L.R.A. 103, 61 Pac. 803; *Denning v. Yount*, 66 Kan.

766, 71 Pac. 250; *Mayes v. Cherokee Strip Live Stock Asso.* 58 Kan. 717, 51 Pac. 215; *Mayer v. Hartman*, 77 Kan. 788, 90 Pac. 807. The decision is *stare decisis* upon the facts involved. Moreover, it must be said to be in accord with the long-recognized principle that no action can be maintained to enforce a contract made in violation of law. This statement of the law was an enlargement of the original doctrine as to a contract to do an act which would be a crime or misdemeanor under the common law, or against public policy, or a trespass upon the private rights of a third person. Courts differ widely as to whether the power granted by statute to a city to impose a license tax upon an occupation or business includes, in the absence of any intimation of authority so to do, the power to prohibit the prosecution of the occupation or business unless a prescribed license tax be first paid. But the decisions of this court, *supra*, at least assume that the power to prohibit is embodied in the power to impose the license tax.

Still questions will continue to recur. Why should one party to a contract be allowed to avoid the payment of debts he has contracted to pay and thus gain an unconscionable advantage because the other party deliberately, or through inability or mere oversight, has failed to discharge an obligation to the city when there is available to the city both a civil remedy for the wrong and a penal remedy against the wrongdoer? Was it any benefit to the city, in *Yount v. Denning*, *supra*, that one party was relieved from paying the other an agreed compensation for services actually rendered, or in *Mayer v. Hartman*, *supra*, that one party was enabled to cheat his neighbor out of coal worth nearly \$1,000? Is not the penalty entirely disproportionate to the offense, especially as, when it has been suffered, neither the civil nor the penal action by the city has been abated? In the present state of the law, if these questions are not to continue to arise, it devolves upon the legislature to modify the law. As the law has been construed for a long time by this and most other courts of last resort, it appears to furnish an inducement to evil-disposed persons to watch opportunities to contract with anyone upon whom a license tax has been imposed, at a time when, for perhaps only a day, he has neglected to pay his tax, and thus acquire merchandise or service without payment therefor. The denial of a remedy upon the illegal contract is, in effect, tantamount to a penalty or fine in the amount the party, by the terms of the contract, is entitled to recover. By constitutional provision the "proceeds of fines for any breach of the penal laws, shall be ex-

clusively applied in the several counties in which the . . . fines [are] collected to the support of common schools." Article 6, § 6. And "an act of the legislature giving to an informer who has sustained no loss one half of such proceeds is unconstitutional and void." *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1. The rule, then, that allows one party to a civil action to penalize for his own benefit the other party for an act which occasioned him no loss would seem to be exotic to the jurisprudence of this state, but to have been ingrafted thereon.

As to whether a penal ordinance should be strictly or liberally construed, there is some diversity of opinion in other courts. See also *Meriam v. New Orleans*, 14 La. Ann. 318; *Zorger v. Greensburgh*, 60 Ind. 1; *State v. Carpenter*, 60 Conn. 97, 22 Atl. 497; *Davis v. Darling*, 80 Hun, 299, 30 N. Y. Supp. 323; *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; *Sarlis v. United States*, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; *United States v. Reese*, 5 Dill. 405, Fed. Cas. No. 16,137; *Re McDonough* (D. C.) 49 Fed. 362; *United States v. Starn* (D. C.) 17 Fed. 435; *French v. Foley* (D. C.) 11 Fed. 801; *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372; *Lair v. Killmer*, 25 N. J. L. 525; *State v. Lovell*, 23 Iowa, 304; *Daggett v. State*, 4 Conn. 60, 10 Am. Dec. 100; *Johnson v. Southern P. Co.* 54 C. C. A. 508, 117 Fed. 467. In this state the doctrine of strict construction was early adopted in *Snyder v. North Lawrence*, 8 Kan. 82. This case is cited in *Missouri, K. & T. R. Co. v. Long*, 27 Kan. 696, where the construction of a penal statute was involved, indicating that the same rule of construction should prevail. In *Swift v. Topeka*, 43 Kan. 671, 8 L.R.A. 772, 23 Pac. 1075, a city ordinance is construed liberally for the purpose of maintaining its validity, but strictly according to its letter to relieve one charged with a violation thereof. In the *Snyder* Case the ordinance provided, among other things, that "no one should, without license, keep, hire out, or cause to be run, 'any hackney coach, carriage, omnibus, or dray.'" In the agreed statements of facts it was stated that defendant had kept a certain wagon, drawn by four horses, which was used in the transportation of property and for transferring goods of grocers and merchants within the city, and that he had paid no license tax therefor. It was undoubtedly urged in that case, as it is in this, that the defendant was, by the intent and spirit of the ordinance, required to pay a license tax. Indeed, it would have been no strained construction to say that a wagon, drawn by four horses and used for the transportation of property, and for

transferring goods for grocers and merchants within the city, was a dray. Yet it was not within the letter of the law. Neither in this case is the business of real-estate agents within the letter of the law which imposes a license tax upon the business of real estate. The Snyder Case was one that arose in the city court for the enforcement of the ordinance, while the case at bar is between two citizens, one of whom invokes a violation of the ordinance for the purpose only of relieving him of his obligations under a contract. In consonance with the general doctrine in a number of the cases cited, it is said in *Lair v. Killmer*, supra: "In defining the crime and the punishment, penal statutes are to be taken strictly and literally. A penal law cannot be extended by construction. The act constituting the offense must be both within the spirit and the letter of the statute."

We conclude that the admission, that the plaintiffs were engaged in the business of real-estate agents in Scott City, and had not procured a license for said business, and had made the contract in question in said city as such agents, does not prove that the making of such contract was a penal offense under the ordinance of the city; that the ruling of the court withdrawing ordinance No. 67 from the consideration of the jury was not an error of law. True it is that the allowance of a motion for a new trial is a matter largely in the discretion of the district court, and especially so where questions of fact and the weight of evidence are involved. In this case by positive intimation the court approved all findings of fact involved in the general verdict of the jury in favor of the plaintiffs which, under the instructions of the court, involved a finding that the failure to complete a sale of the land resulted from the fault or inability of the defendant "to do the things necessary by him to be done." The questions involved, then, as stated by the court, were purely questions of law, and the rulings of the court upon questions of law are not matters of discretion.

The order granting a new trial is therefore reversed, and the case is remanded, with instructions to overrule the motion and to render judgment for the plaintiffs in accordance with the general verdict.

Burch, Mason, and Graves, JJ., concur.

Porter, J., specially concurring:

Aside from the ordinary rules for construing penal statutes and ordinances, a court would be justified, in my opinion, in 19 L.R.A. (N.S.)

construing the ordinance in question with the utmost strictness. Its enforcement is not demanded in order to carry out the purpose for which the legislature authorized its enactment, but solely to enable one person to avoid the payment of a just debt. In the recent case of *Fossett v. Rock Island Lumber & Mfg. Co.* 76 Kan. 428, 430, 14 L.R.A. (N.S.) 918, 92 Pac. 833, 834, it was said: "The doctrine of *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207, that a person who fails to pay an occupation tax cannot recover for his services is adopted for the protection of the licensing power of the state, not primarily for the benefit of some other person who has had dealings with him and who seeks to avoid the payment of what would be otherwise justly due,"—citing *Wicks v. Carlisle*, 12 Okla. 337, 72 Pac. 377. The decision in *Yount v. Denning*, supra, holding that the failure to pay a license tax renders a business or occupation unlawful, and that the failure can be interposed as a defense in an action to recover for services rendered or property sold, may accord with the weight of authority, but its reasoning has never seemed conclusive, and it is doubtful if it has met with the general approval of the profession in this state. There is nothing in any of the statutes granting to cities the right to levy and collect an occupation tax which conveys the slightest intimation of an intention on the part of the legislature to delegate to cities the power to declare a business unlawful for the failure to pay such a tax. The various statutes authorizing the cities of the three classes to impose license taxes all read about alike, and simply declare that the mayor and council may levy and collect a license tax upon and regulate certain occupations, and that the licenses shall be regulated by ordinance, and shall not be issued for a longer period than one year. There is implied the authority of the city to provide penalties for the enforcement of the ordinance and the collection of the tax. But ordinances to be valid must be reasonable, and courts have the power to declare them unreasonable. If a city were to ordain that a merchant who has failed to pay a license tax shall henceforth be denied the right to engage in such business in the city, or that his stock of goods be confiscated, it would not stand the test of the courts for a moment. And this is the place where the decision should have turned the other way in *Yount v. Denning*, supra. License ordinances usually provide a penalty by way of a fine for a failure to comply with their provisions, and sometimes provide, also, for

the collection of the tax in an action of debt. Therefore the additional penalty, forfeiting property and contract rights, is wholly unnecessary to enable the city to collect its revenue. So serious a penalty for the neglect to pay a mere nominal license tax is out of all proportion to the offense. Besides, to allow another person, whose rights have in no way been prejudiced, to take such unconscionable advantage of the omission and avoid the payment of a just debt shocks the sense of justice. Following the law as declared, however, this court recently, in *Mayer v. Hartman*, 77 Kan. 788, 90 Pac. 807, felt obliged to affirm a judgment permitting a man who had purchased several car loads of coal to keep the coal and escape payment for it because the merchant who furnished it to him had failed to pay a city license tax. It would seem that any city could better afford to lose a year's revenue from occupation licenses than to permit one such instance of a failure of justice. *Yount v. Denning*, however, is the law of the state. It has stood for fourteen years, during which the legislature might at any time have enacted a simple statute providing that the failure to pay a license tax on a business otherwise lawful, and which requires neither supervision nor regulation, shall not render it unlawful. Until the situation is relieved by the legislature the courts should construe a license ordinance, when interposed for such a purpose, with the greatest strictness.

Benson, J., concurring specially:

The law of the state allowed the council to levy and collect a license tax on real-estate agents. Gen. Stat. 1901, § 1127. The ordinance offered in evidence undertook to levy such a tax upon persons engaged in the business of "real estate." This expression is vague and indefinite, and the ordinance does not carry into effect the express power to levy a tax on real-estate agents, given by the statute. For this reason the ordinance was invalid, and the failure to pay the tax was not a defense to the claim for commissions, and the court erred in the third reason given for sustaining the motion for a new trial. The ordinance being properly excluded, the possible effect of the failure of the plaintiff to pay a tax levied under a valid ordinance is a question not presented in this record, and I prefer to express no opinion upon it.

I concur in the views expressed in the opinion of the court upon the other points involved, and concur in the result reached.
19 L.R.A. (N.S.)

MAINE SUPREME JUDICIAL COURT.

ROBERT O. LOUD

v.

LANE & LIBBY.

(103 Me. 309, 69 Atl. 270.)

Master — arranging apparatus — liability to employee.

1. One engaged in discharging coal from vessels, who provides suitable apparatus for the work, is not responsible to an employee for the manner in which it is set up by the men employed in doing the work; and therefore he is not liable for injury to an employee caused by the fall of the apparatus because it was fastened to a decayed cleat on the mast of the vessel, without stays to prevent its falling if the fastenings should give way.

Same — subsequent employment.

2. One employed to assist in unloading a cargo of coal from a vessel after the apparatus for doing the work is set up has no greater rights against the employer with respect to the safety of the manner in which the work is done than though he was employed at the time it was done.

(December 18, 1907.)

EXCEPTIONS by plaintiff to an order of the Supreme Judicial Court for Knox County granting a nonsuit in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. Overruled.

The facts sufficiently appear in the opinion.

Messrs. Joseph E. Moore and C. M. Walker for plaintiff.

Messrs. Benjamin Brooks, Edward C. Stowe, and M. O. Garner for defendant.

Emery, Ch. J., delivered the opinion of the court:

The evidence adduced by the plaintiff shows the following: The defendant company was engaged in the coal business at Vinalhaven, where it owned and occupied a wharf for the unloading and storage of coal from vessels and for other purposes. A vessel, not owned by the defendant, having arrived at this wharf with coal consigned to the defendant, and to be unloaded, two men, Young and Dyer, in the employ of the de-

Note. — See case note to *Leishman v. Union Iron Works*, 3 L.R.A. (N.S.) 500, as to responsibility of master for appliances constructed by employees as part of the work; and subject note to *Haskell v. Cape Ann Anchor Works*, 4 L.R.A. (N.S.) 220, as to the duty of master to furnish safe appliances as affected by the fact that defective appliances are prepared by fellow servants.

defendant, went to the wharf and vessel, and set up tackles and other appliances, furnished by the defendant, for hoisting the coal out of the hold of the vessel and conveying it to the coal shed. They rigged up an iron triangle over the hatch and wheeling platform between the fore and the main mast, supported by a rope or span passing through blocks at the head of each mast and down near the foot of the mast. At the foot of the mainmast this supporting rope was made fast around the mast itself. At the foot of the foremast it was passed under a hook or snatch, and made fast to a cleat on the mast. This cleat was designed and used to hold the foresail halyards supporting the foresail when hoisted. To this triangle, thus supported, a gin block was attached through which passed the hoisting rope connecting the hoisting buckets with the hoisting power on the wharf.

After rigging up these appliances, as above stated, these two men, with others in the employ of the defendant, began the work of discharging the coal; Dyer going into the hold to shovel coal into the bucket, and Young going on the platform to wheel the coal to the shed, as hoisted. The plaintiff was employed by the defendant a few hours later to join this crew, and began wheeling coal on the platform along with Young. This work of unloading the coal was begun in the afternoon of one day. At about 11 o'clock of the next forenoon, as a bucket of coal was being hoisted, it caught under the hatch, and the consequent strain pulled the cleat off the foremast, allowing the tackle or triangle to fall upon the plaintiff, to his injury.

Nothing but the cleat gave way. None of the ropes, blocks, etc., proved insufficient. The giving way of the cleat was the sole cause of the injury. Upon subsequent inspection the cleat was found to be decayed on the inside next the mast.

It does not directly appear who set the discharging crew at work, or who directed Young and Dyer to set up the appliances for unloading; but it is to be presumed that some agent of the defendant having authority did so. It does not appear that any directions were given to any of the men how to set up the appliances, or how, where, or to what to make them fast, or what precautions to take against the giving way of any fastening. The superintendent of the defendant company was about on the wharf occasionally, but there is no evidence that he gave any directions, or that he or any other officer of the defendant company knew how the appliances were arranged or secured. So far as appears, that was left to the workmen themselves.

There were available several other sup-
19 L.R.A. (N.S.)

ports of greater strength than the cleat to which the ropes sustaining the triangle, etc., could have been fastened. Indeed, Dyer, one of the two men setting up the appliances, suggested another support, but Young, who seems to have been the foreman of that work, nevertheless selected the cleat. There was no allegation nor evidence that either Young or Dyer was incompetent or too habitually careless to be intrusted with such work.

The plaintiff claims that, upon the above statement, the defendant company was guilty of negligence toward him, an employee, in not having the sustaining ropes more securely fastened, and in not having preventive stays rigged to hold up the triangle, etc., in case anything broke or gave way. No other negligence is alleged or claimed. Granting, *arguendo*, these omissions to be negligence, it remains to be considered whether the negligence was that of the defendant in the performance of its duty to the plaintiff, or was the negligence of fellow servants of the plaintiff for which the defendant would not be liable.

In this case it was the duty, and the whole duty, of the defendant to the plaintiff to exercise due care in the supply and maintenance of suitable and sufficiently strong platforms, ropes, and other appliances for discharging coal from vessels with safety to its employees by the exercise of due care on their part, and to exercise due care for the employment of competent and ordinarily careful men for the work. This duty the defendant seems to have performed, or at least there is no evidence of nonperformance, and hence performance is to be presumed. *Nason v. West*, 78 Me. 253, 3 Atl. 911. The platform, the triangle, blocks, pulleys, ropes, etc., necessary for the work proved to be suitable and sufficient. These appliances were not fixed, but were movable, to be set up and fastened anew to different supports for the discharging of each new cargo of coal as it arrived. The support, whether cleat, windlast, rail, or mast, to which the appliances, the apparatus, should be fastened for support, was not part of them. That would be left behind when these should be taken down and removed.

The setting up and making fast these appliances, including the selection of the place or object to which to make them fast, for the purpose of discharging a particular cargo of coal, was part of the operation or work of discharging coal to be done by the workmen sent to discharge the cargo. Negligence in this setting up, fastening, and generally making secure, including securing by preventive stays if necessary, was the negligence of those workmen, for which,

under the settled law of this state, the defendant is not responsible. *Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112; *Atkins v. Field*, 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375; *Rounds v. Carter*, 94 Me. 535, 48 Atl. 175; *Small v. Allington & C. Mfg. Co.* 94 Me. 551, 48 Atl. 177; *Pellerin v. International Paper Co.* 96 Me. 388, 52 Atl. 842; *Amburg v. International Paper Co.* 97 Me. 327, 54 Atl. 765; *Lombard Water-Wheel Governor Co. v. Great Northern Paper Co.* 101 Me. 114, 6 L.R.A. (N.S.) 180, 63 Atl. 555.

That the plaintiff's employment to assist in discharging the coal was after the platform, etc., were set up does not make the defendant liable for such negligence. The defendant was, for the reason, under no greater obligation to him than to the others. *Killea v. Faxon*, 125 Mass. 485; *O'Connor v. Rich*, 164 Mass. 560, 49 Am. St. Rep. 483, 42 N. E. 111. The latter case was cited in *Beal v. Bryant*, 99 Me. 112, 58 Atl. 428, where it was said at page 119 of 99 Me.: "It matters not that the stage was already secured in position before the plaintiff was set to work discharging the coal. 'An employer, under such circumstances, owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which may ordinarily be intrusted to them without liability to his fellow servants.'"

In *Donnelly v. Booth Bros. & H. I. Granite Co.* 90 Me. 110, 37 Atl. 874, the defendant did not furnish suitable and sufficient ropes for holding up the platform, etc., for loading paving blocks on a vessel, but it was recognized in that case (90 Me. 115) that, where "the master does not undertake the duty of furnishing or adapting the appliances by which the work is to be performed, but this duty is intrusted to or assumed by the workmen themselves within the scope of their employment, he is exempt from responsibility, if suitable materials are furnished and suitable workmen are employed by him, even if they negligently do that which they then undertake." Also, at page 116 of 90 Me. that, "when the selection of materials or construction of the appliances to the business is such that it may properly be left to the workmen in their capacity as workmen and within the scope of their employment, and it is so left by the master, he is relieved from responsibility for their negligence as in the case of a mason or carpenter building a house where in the progress of the work a staging is being frequently changed or enlarged."

In *Beal v. Bryant*, *supra*, the defendant did not furnish suitable or sufficiently strong ropes for holding up the platform

used in discharging coal from a vessel; but the court in that case said, by way of caution: "The adjusting and securing the platform in place was incidental to and a part of its contemplated use, one of the ordinary duties of the workmen and a part of the work which they were engaged to do. In doing this they acted as fellow servants of the plaintiff, and the defendants would not be liable for their negligence in the manner of doing it."

In *Twombly v. Consolidated Electric Light Co.* 98 Me. 353, 64 L.R.A. 551, 57 Atl. 85, a movable ladder, furnished by the defendant for the plaintiff, its employee, to stand upon while at work, was decayed and fell under his weight. Had the ladder fallen because not properly set up, or properly secured at top or bottom by a fellow workman of the plaintiff, the case would have been like this, and it is evident the master would not have been responsible.

It follows that the defendant in this case is not shown to be responsible for the plaintiff's hurt, and that he must look to those whose negligence was the cause. *Atkins v. Field*, 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375.

Exceptions overruled.

Nonsuit confirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

LEWIS L. WHITMAN

v.

WILLIAM G. MCINTYRE et al.

(199 Mass. 436, 85 N. E. 426.)

Assignment for creditors — sale of property — rights of assignor.

1. An assignor for creditors cannot complain that the property was sold to a corporation for shares of its stock where the

Case Note. — Right of assignor to complain of sale made by assignee for creditors.

An extended search fails to disclose any other cases passing on the question whether or not an assignor has the right to complain of a sale made by the assignee, under conditions similar to those in *WHITMAN v. MCINTYRE*; that is, where the assets of the assignor were admittedly insufficient to meet the outstanding claims of the creditors, and the latter themselves had agreed to take the proceeds of the sale in payment of their respective claims.

Nor have very many cases been found where the circumstances were somewhat more favorable to the assignor; that is, where the assets exceeded the liabilities, or where, in other words, he still had a pecun-

property was not sufficient to satisfy in full the demand of creditors, and they consented to take the stock in payment of their claims.

Same — breach of trust.

2. An assignor for creditors cannot set aside a sale for the property to a corporation because an agent of the assignee, who was managing the property, was a stockholder in the purchasing corporation, and, before the deed was executed, he increased his holdings out of stock issued to pay for the property, and one of the assignees became a stockholder, and both were elected directors of the purchasing corporation,—

lary interest in the property. It would seem, however, that, where the assignor still has an interest in the property and a possibility of there being a balance in his favor, there can be very little doubt as to his right to complain of a sale made by the assignee, if such sale was contrary to his interests.

In *Bush v. Halsted*, 121 App. Div. 538, 106 N. Y. Supp. 133, where attorneys of a trustee to whom an insolvent had made an assignment for the benefit of creditors conducted the sale of property in such a manner that it should be for the joint benefit of themselves and the purchaser, it was held that the invalidity of the sale might be asserted by the insolvent as well as by the trustee, since the former's assignment provided for the return to him of any surplus after payment of the creditors, besides there being by statute a reverter to him.

In *Glenn v. Mickey*, 130 Pa. 586, 18 Atl. 939, where assigned real estate was sold as a whole for a price less than the amount of the bids from responsible bidders in parcels, the conveyance thereof was restrained, and a resale ordered at the instigation of the assignor.

In *Graves v. Long*, 87 Ky. 441, 9 S. W. 297, it was held that a person who had assigned his property to a trustee for the benefit of creditors had such an interest in the property as entitled him to except to the report of its sale on the ground of non-compliance with a statute which, in effect, required property sold to be first valued, and allowed a redemption if it did not bring a certain fraction of that valuation.

Where, however, an assignor advises a purchaser to buy, and promises not to object to the sale if the land is struck down to him, and the purchaser thereupon does so and makes a part payment on the faith of the promise, the assignor is estopped from contesting the sale on the ground of inadequacy of price. *Re Seybert*, 5 Kulp, 172.

In *Arcenaux v. His Creditors*, 6 La. 6, it was held that an insolvent cannot complain of a judgment homologating a tableau of distribution presented by his syndics, and thereby defeat the distribution among his creditors of any sum of money in the syndics' hands, on account of irregularities in the sale of the surrendered property, of overcharge made by the syndics, or their failure to charge themselves with any sums

at least where the assignor was insolvent, so that the trust was a creditors' trust, and they did not object to such proceeding.

Same — interest — burden of proof.

3. An assignor for creditors has the burden of showing that he is entitled to interest on funds which the assignee kept on deposit in the bank, and the amount of it.

(June 19, 1908.)

RESERVATION by the Supreme Judicial Court of Hampden County for the opinion of the full bench of a suit to com-

for which they are legally chargeable. The court said: "If the sale has been illegally conducted, it can only be set aside, and the property recovered, by a proper suit against proper parties; and we are not aware that the homologation of the tableau could preclude the insolvents, or affect any right to which this irregularity might give a rise, or to any claim he might have against the syndics after the creditors were all paid, if he could show that from their neglect in giving proper credits, or from illegal charges, they have destroyed or administered what he might be entitled to after his creditors are fully paid."

In *McHenry v. McVeigh*, 56 Md. 578, a person went into insolvency and conveyed his property to the trustee appointed by the court; the trustee made sale of the property under order of the court, and the same was ratified *nisi*; the order *nisi* was duly published; but, the purchaser and the insolvent petitioner having both filed objections to the ratification of the sale, the sale was set aside, and from this order the trustee appealed. The court, in reversing this order, said: "A sufficient case had not been made for this action. The purchaser had signed the memorandum of sale, and was bound for the price he agreed to give for the property. The creditors had none of them complained that the price was inadequate. The petitioner did complain, but he gave no reason for supposing the property would bring more at another public offer, or that the sale was not fair, and did not invite full competition. Had the order only suspended the final ratification of the sale for the period named, to give the petitioner an opportunity to secure the consent of his creditors to the withdrawal of the petition, and the reconveyance of the property to him, such action would have been unobjectionable. But the creditors had a vested interest in the property, through the trustee, and the sale that was effected, and their rights ought not to have been jeopardized, by subjecting them to possible loss, by the expenses of a new advertisement and a new sale, and the possible sale for a less sum. The trustee representing the creditors, and also personally interested as the bonded trustee, with right to fair compensation for his services, was in the proper discharge of his duty, and the exercise of an undoubted right to appeal from the decision made."

pel an accounting by the trustees under a deed of assignment for the benefit of creditors. Dismissed.

The facts are stated in the opinion.

Messrs. Henry F. Buswell and J. M. Browne & Son for plaintiff.

Messrs. Spellman & Spellman. for defendants:

The plaintiff has no interest in the assets of the estate, and is entitled to no relief.

Morse v. Hill, 136 Mass. 60: Re Shotwell, 49 Minn. 170, 51 N. W. 909, 52 N. W. 1078; Nabours v. McCord, 97 Tex. 526, 80 S. W. 595; Leavell v. Leavell, 4 Ky. L. Rep. 889.

Morton, J., delivered the opinion of the court:

This case was reserved for the full court by a single justice on the pleadings, the master's report and supplemental report and the exceptions thereto, such decree to be entered "as equity may require."

The bill is a bill to compel an accounting by the defendants McIntyre, Callender, and Chapin as trustees under a deed and assignment made to them by the plaintiff for the benefit of his creditors, and by one Coats, who is alleged to have been wrongfully employed by them to carry on the business of the trust. It also seeks to set aside a conveyance made by the trustees to the Gowdy Distilling Company, the other defendant, and to have the property reconveyed to the plaintiff. The plaintiff has deceased since the suit was begun, and it is prosecuted by his executor.

The principal part of the property conveyed to the trustees consisted of a distillery in Agawam carried on by the plaintiff under the name of the H. Porter Company, and of the personal property belonging to and connected therewith. The assignment provided, amongst other things, that the trustees could carry on the distillery if they could do so at a profit; and if, at the end of a year, they found that the condition of the estate was such that the debts could not be paid without a sale of the property, then they could sell it and convert it into money. The trustees came to the conclusion at the end of the year, and rightly, as the master has found, that the condition of the estate required that the property should be sold, and, after some negotiations, they sold the distillery to the Gowdy Distilling Company, receiving in payment therefor 200 shares of the capital stock of that company of the par value of \$100 each. The plaintiff alleges, in substance, that the trustees did not conduct the business in a prudent and businesslike manner or in accordance with the terms of the trust: that they wrongfully agreed with

Coats to carry on the business of the distillery; that the debts could have been paid or reasonably provided for without a sale of the distillery; that the sale to the distilling company was fraudulent and collusive and was voidable by reason of the fact that Chapin and Coats were directors and stockholders in that company; that the sale was not for money as, according to the terms of the assignment, it should have been; and that what was received for the sale and conveyance was much less than the value of the property conveyed. The plaintiff also contends that the trustees were negligent in not making some arrangement for payment by the banks where they were deposited of interest on the trust funds, and in not providing for the sale and application of certain collateral from which the dividends received were less than the rate of interest on the notes and demands secured by the collateral.

It will be seen that the most of these contentions and objections relate to matters of fact. In regard to such matters the master's findings will not be disturbed unless clearly erroneous. The master finds generally "that, in connection with the appointment of the attorneys, the conduct of the business, the sale of the distillery and other property, and the management of the trust generally, there was no actual fraud, bad faith, or collusion on the part of the defendants, or any attempt to profit in any improper way individually or collectively at the expense of the estate, or against the rights of the plaintiff." He finds more particularly in regard to the appointment by the trustees of the firm of E. M. Coats & Company as their agents and attorneys for the purpose of carrying on the distillery and managing the business, that the appointment was agreed to by Whitman, and that in making the appointment "the trustees acted wisely, in good faith and for the best interests of the estate, and, in the performance of the duties assigned to them, the said firm and the defendant Coats have dealt honestly with all parties concerned and without any improper advantage to themselves." We see nothing to impugn the correctness of these findings.

It cannot be said, we think, that the trustees managed the trust in an imprudent and unbusinesslike manner, and the master has not so found. The parties, and especially the plaintiff, may have been disappointed, as not infrequently happens in such cases, in their expectations as to the amount of the estate and what would be realized from it; but that furnishes no ground, of course, for holding the trustees liable. At the time the distillery was taken over by the trustees it was being operated

at a loss, and was very much run down and out of repair. It was thought that, by making necessary repairs, it could be brought up to a state of efficiency and a profit made, and the trustees expended a considerable sum upon repairs. The master has found that the expenditure was necessary and proper. The trustees were disappointed in making a profit; but there is nothing to show that they did not exercise a sound business judgment in what they did, or that in selling the product or disposing of any of the other property the estate suffered any loss in consequence of what they did or omitted to do. We do not think, therefore, as already observed that it can be said that the trustees did not carry on the business in a prudent and business-like manner.

As to the sale to the Gowdy Distilling Company, the master finds that the stock of that company was worth at the time of the sale from \$75 to \$100 per share, and that the property conveyed did not exceed in value \$20,000, including the good will and trademark, which he finds was once valuable, but, owing to changes in the conditions of business, had lost most of its value. He also finds that at no time would the assets have been sufficient to meet the outstanding claims of the creditors who had become parties of the third part to the assignment, and who, with the plaintiff, were the only parties interested in the sale, so as to leave any balance payable to the plaintiff. And he finds still further that the creditors aforesaid consented to the sale and agreed to take their proportional part of the stock on account of and in payment of their respective claims. As to them, therefore, the sale was in effect a sale for money, and the plaintiff has no just ground for complaint that the sale was for stock in the Gowdy Distilling Company, and not for money even if we assume that the sale could not otherwise be fairly regarded as a sale for money.

We see no ground on which the sale can be avoided by the plaintiff because of the relation of Coats and Chapin to the transaction. The general rule is well settled that a trustee cannot directly or indirectly himself be a purchaser of the trust property or derive any personal advantage or profit from the management of the estate. But in the present case Coats occupied no fiduciary relation whatever to the plaintiff, and, so far as he acted as agent and attorney for the trustees, the master has found, as already observed, that he dealt honestly with all parties concerned. Chapin was trustee under the assignment; and, if he had purchased the property for himself directly or indirectly, or for the bank of which he was

cashier, the plaintiff could have the sale set aside, or, if he had derived any personal profit or advantage from the management of the estate, he could be compelled to account for it. But the sale was not to Chapin nor to the bank, but was to the distilling company. The terms of sale were agreed upon between the trustees and the directors of the distilling company with the consent and approval of all other parties interested, except the plaintiff. Chapin was not a director of, or a stockholder in, the distilling company at the time when the terms of the sale were agreed upon. He was elected a director before the deed was executed, presumably to represent the interests of his bank which was a creditor and of other creditors, and he became a stockholder. Coats, who was a stockholder in the distilling company and a large creditor of the plaintiff, was also elected a director at the same time. The master does not find that it was understood and agreed as a part of the terms of the sale that Chapin should become a stockholder in and should be elected a director of the distilling company, and we are not called upon, therefore, to consider what the effect if any of such a finding would be. The sale could not be carried through unless the capital stock of the distilling company was increased; and at some time, it does not appear, when, except that it was before the execution of the deed, Chapin and Coats undertook to provide for \$5,000 of this increase, and Chapin agreed to take personally some of the stock. Coats took \$2,500 of the \$5,000, and Chapin the balance, which he obtained from his bank. Subsequently, on a final settlement of the matter between him and the bank, the bank took 20 shares of the stock and Chapin took the remaining 5, for which he paid the bank. There is nothing we think in these transactions or in the other circumstances attending the sale, which gives the plaintiff the right to have the sale avoided. The trustees sold the property as they had the right and it was their duty to do. The sale was approved by all parties interested except the plaintiff. He was not consulted,—possibly because his condition was such that it would have been useless to consult him. There is no reason to believe, if that is material, that the failure to consult him operated to his detriment. The trustees did not advertise the property, but there is nothing to show that it could have been sold on any more favorable terms, or that all parties concerned acted otherwise than in entire good faith. The master finds that, at the date of the assignment, Whitman was insolvent, and that at no time since have the assets been sufficient for the payment of

W. in said real estate was conveyed through a third person to the petitioner.

The question is as to the meaning of said deed of Lucius Simonds. A cardinal rule in the interpretation of conveyance is that every deed should be so construed as to give effect to the intent of the parties, unless inconsistent with some rule of law or repugnant to the terms of the grant. *Packard v. Old Colony R. Co.* 168 Mass. 92, 46 N. E. 433. The first step, then, is to ascertain the meaning of the words used in the deed. In our present republican civilization, where primogeniture does not prevail, the mind does not readily adjust itself to a purely arbitrary preference of older to younger children. In the absence of some particular reason, the custom of people, as well as the provision of the statutes, is for an equal division among children. To the ordinary understanding the meaning conveyed by the language of the habendum clause is that the son is to have an estate for life, and that thereafter all his children, grandchildren of the grantor who reach the age of twenty-one years, regardless of the time when any one of them may attain majority, shall share equally. If after the words, "age of twenty-one years," there had been inserted the words, "whether before or after the death of the said Charles A.," there could be no possible dispute as to the meaning of the grantor. Yet these words only accentuate the meaning which the expression actually employed conveys in the common conception of mankind. One way to test the meaning of the language used is to suppose that, immediately after the delivery of the deed, Charles A. Simonds had died. If this event had thus happened, there would then have been no one of his children of a sufficient age to become immediately entitled to the estate. If it be assured that a contingent remainder is created, in the case supposed, it must fail and the estate revert, for the reason that a contingent remainder must take effect immediately upon the termination of the prior estate, or fail altogether. It is plain, therefore, that the deed cannot be construed as creating a contingent remainder in such children of Charles A. Simonds as shall arrive at the age of twenty-one years, without wholly defeating, in the contingency suggested, the intent of the grantor. Another criterion of the signification of the words is to ascertain how they would be interpreted if found in a devise to trustees. No doubt can be entertained that in such an instrument it would be held that the children who reached majority, either before or after the termination of the life estate, would take. *Astley v. Micklethwait*, L. R. 15 Ch. Div. 59. But further language

of the deed is decisive that it was not intended to create a contingent remainder. The grantor, in the body of the instrument, at the close of the description, reserves to himself for his life the right to cut wood and timber on the granted premises, and, as a part of the habendum clause, expressly states that neither he nor those claiming under him by grant or descent have "any estate, right, title, or interest of, in, or to the aforesaid premises, with the appurtenances, except as aforesaid." The position and subject-matter of this clause show that it refers only to the reservation excepted out of the conveyance and immediately preceding the habendum clause. Hence the intent of the grantor is made clear by emphatic phrase, that no possibility of reversion is left in himself. But, if it be held that a contingent remainder was created by the deed, and Charles A. Simonds had died before any of his children had attained majority, there would then be a reversion of the entire estate in the grantor, for the reason that it would not be possible for the remainder to take effect instantly on the termination of the prior estate. But this would be directly contrary to the express terms of the deed.

It is perhaps possible that the intent of the grantor may be given effect by holding that the deed created a vested remainder in all children of Charles living at the delivery of the deed, subject to open and let in after-born children, and to be devested by death during minority. *Riley v. Garnett*, 3 De G. & S. 629; *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313; *Edwards v. Hammond*, 3 Lev. 132; *Muskett v. Eaton*, L. R. 1 Ch. Div. 435; *Jull v. Jacobs*, L. R. 3 Ch. Div. 703; *Pearks v. Moseley*, L. R. 5 App. Cas. 714; *Blanchard v. Blanchard*, 1 Allen, 223. See, however, *Inman v. Rolis* [1893] 3 Ch. 518. But it is not necessary to place the decision upon this ground, or to strain the language from its natural import to effectuate the intent of the instrument. Nor are we required to discuss *Festing v. Allen*, 12 Mees. & W. 279, and analyze the many cases in which it has been followed or criticized. See *Cunliffe v. Branker*, L. R. 3 Ch. Div. 393; *Browne v. Browne*, 3 Smale & G. 568; *Patching v. Barnett*, 49 L. J. Ch. N. S. 665.

On other reasoning, the intent of the grantor can be carried into effect.

The granting clause of the deed is in the ordinary form of a quitclaim deed, and is adapted to a conveyance to uses. It is to "Charles A. Simonds, his heirs and assigns." This conveyed the fee. The habendum clause grants a life estate to Charles A. Simonds with an estate in fee to such of his children as attain majority. This is an

attempt to create one estate in fee simple to commence in the future at the time of an occurrence not sure to come to pass, that is on their reaching twenty-one upon another estate in fee simple. This can be done by way of a use. No set form of words is required in a conveyance to uses, and the present deed is not wholly inapt, even if this were the precise intent of the draftsman. *Leonard v. Southworth*, 164 Mass. 52, 41 N. E. 126; *Thatcher v. Omans*, 3 Pick. 521; *Carr v. Richardson*, 157 Mass. 576, 32 N. E. 958. The use was not immediately executed by the statute of uses, for the reason, as before pointed out, that the grantor contemplated the possibility of a gap intervening between the termination of the life estate in his son and the commencement of the fee in his grandchildren. It was possible that none of the latter might have been in position to take at the termination of the life estate. It would then have operated probably as a springing use, not coming into existence in derogation of any other estate, nor necessarily at the termination of the first estate created by the deed, but upon the happening of an independent though uncertain future event, namely, when any of the class named reached the age answering to the description of the *cestui que use* and were thus able to take. It has turned out to be the fact that it was not possible, at the termination of the life estate, to determine all who might ultimately answer the terms of the description, although two were then certain. It must operate, therefore, as a shifting use. The fee vested in Charles A. Simonds and his heirs and assigns to hold first for the use of Charles A. Simonds during his life, and then for the use of such of his children as should attain majority. When all who constitute this class are finally determined the use shifts to them in fee, being executed by the statute of uses. *Second Cong. Soc. v. Waring*, 24 Pick. 304; *Re Lechmere*, L. R. 18 Ch. Div. 524; *Miles v. Jarvis*, L. R. 24 Ch. Div. 633; *Dean v. Dean* [1891] 3 Ch. 150; *Blackman v. Fysh* [1892] 3 Ch. 209; *Re Wrightson* [1904] 2 Ch. 95.

There is nothing at variance with this view in the well-settled rule that a limitation, if it can so operate, is to be construed as a remainder, and not as an executory devise, even if the rule be conceded to apply with equal force to springing and shifting uses. That rule is adduced to give effect to the intent of the maker and carry out the terms of the instrument. Its invocation here could only thwart that intent and defeat those terms. Hence it has no application. Nor is the use of the word "remainder" in the habendum clause de-

cisive that a technical remainder was intended. The whole clause must be construed together, in order to ascertain its sense, and its true significance must be declared even though a popular rather than a strict meaning be attached to particular words. *Dole v. Keyes*, 143 Mass. 237, 9 N. E. 625.

Exceptions overruled.

MINNESOTA SUPREME COURT.

ADDIE SHIGLEY, Appt.,

v.

CITY OF WASECA, Resp.

(— Minn. —, 118 N. W. 259.)

Municipal corporations — powers — legislative control.

1. Municipal corporations are created by the legislature as proper and convenient agencies in the work of government. Their powers, duties, and liabilities, in so far as they relate to governmental matters, are subject to legislative regulation and control.

Same — streets — negligence.

2. The liability of a municipality to individuals for damages for injuries caused by the negligence of the municipal authorities to keep the streets in proper repair arises out of the fact that it has the exclusive control of the streets, and has the power to provide the means for the proper performance of the duty of keeping them in safe condition.

Same — liabilities — legislative regulation.

3. The legislature may relieve a public corporation from such liability, or it may impose or recognize the liability upon such conditions as it thinks advisable. When conditions are thus imposed, an action cannot be maintained without showing performance of the conditions.

Same — defective streets — notice — legislative regulation.

4. The legislature may legally provide that ten days' written notice to the city, prior to the accident, of the existence of a defect in a street or sidewalk, shall be a condition precedent to liability for damages caused thereby to individuals.

Same — liabilities — municipal regulation.

5. The conditions upon which a municipality shall be liable for damages to indi-

Headnotes by ELLIOTT, J.

Note. — The validity of a requirement of written notice of defect to render a municipal corporation liable for injuries caused by defective streets is upheld in *MacMullen v. Middletown*, 11 L.R.A.(N.S.) 391, and cases cited in the case note appended thereto.

viduals caused by the defective condition of a street or sidewalk is a matter which belongs properly to the government of municipalities, and may be determined and regulated in a home-rule charter.

(November 13, 1908.)

APPEAL by plaintiff from an order of the District Court for Waseca County sustaining a demurrer to the complaint in an action brought to recover damages for personal injuries caused by a defective sidewalk. Affirmed.

The facts are stated in the opinion.

Messrs. A. S. Maloney and John J. Isker, for appellant:

The charter provision is unconstitutional and void as being in contravention of the public policy and the laws of the state.

Tiedeman, Mun. Corp. chap. 17; 3 Abbott. Mun. Corp. chap. 10; Barron v. Detroit, 94 Mich. 601, 19 L.R.A. 452, 34 Am. St. Rep. 366, 54 N. W. 273; Kellogg v. Janesville, 34 Minn. 132, 24 N. W. 359; Shartle v. Minneapolis, 17 Minn. 308, Gil. 284; St. Paul v. Seitz, 3 Minn. 297, Gil. 205, 74 Am. Dec. 753; Moore v. Minneapolis, 19 Minn. 300, Gil. 258; Furnell v. St. Paul, 20 Minn. 117, Gil. 101.

The city is liable for the consequences of its negligence.

Kellogg v. Janesville, supra.

Charter provisions in the main must conform to the general laws of the state.

Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1133.

Mr. P. McGovern, for respondent:

Statutes requiring actual notice of the defective conditions are valid.

Goddard v. Lincoln, 69 Neb. 594, 96 N. W. 273; MacMullen v. Middletown, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 79 N. E. 863; Hurley v. Bowdoinham, 88 Me. 293, 34 Atl. 72; Gurney v. Rockport, 93 Me. 360, 45 Atl. 310; McNally v. Cohoes, 127 N. Y. 350, 27 N. E. 1043; Smith v. Rochester, 79 Hun. 174, 29 N. Y. Supp. 539, 150 N. Y. 581, 44 N. E. 1128; Allen v. Cook, 21 R. I. 525, 45 Atl. 148; Houston v. Vatter, 32 Tex. Civ. App. 298, 74 S. W. 806.

The question of notice is a proper subject for regulation in a home-rule charter.

State ex rel. Getchell v. O'Connor, 81 Minn. 79, 83 N. W. 498; State ex rel. Ryan v. District Ct. 87 Minn. 146, 91 N. W. 300; State ex rel. Barber Asphalt Paving Co. v. District Ct. 90 Minn. 457, 97 N. W. 132; Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1133; 3 Elliott, Mun. Corp. § 1037.

A statute on the same subject would not necessarily be in conflict with this charter provision.

Tierney v. Dodge, 9 Minn. 166, Gil. 153; 10 L.R.A.(N.S.)

State ex rel. Kansas City v. Field, 99 Mo. 352, 12 S. W. 802; Kansas City v. Marsh Oil Co. 140 Mo. 458, 41 S. W. 943; McGarty v. Deming, 51 Conn. 422.

Elliott, J., delivered the opinion of the court:

This appeal from an order sustaining a general demurrer to the complaint in an action to recover damages for personal injuries sustained by reason of a defective sidewalk presents the question of the validity of a provision in the home rule charter of the city of Waseca, adopted in May, 1904, pursuant to chapter 238, p. 349, Gen. Laws 1903, enacted under the authority of § 36 of article 4 of the state Constitution.

The complaint does not allege that written notice of the defect in the sidewalk had been given the city prior to the accident. The city charter provides that "said city shall be absolutely exempt from liability to any person for damages for injuries suffered or sustained by reason of defective streets or sidewalks within said city, unless actual notice in writing of such defect in said streets or sidewalks shall have been filed with the city clerk within, at least ten days before the occurrence of such injury or damage. In the absence of such notice, the city shall not be liable for any injury or damage on account of such defects, and in all cases such notice shall describe with particularity the place and nature of the defects of which complaint is made." The effect of this provision is to charge the city with liability only for accidents which occur after it has had ten days' actual written notice of the existence of the defect.

Municipal corporations, including chartered municipalities, are agencies in the work of government. They are created by the legislature, and to them it delegates certain clearly defined portions of the sovereign power. Except as restrained by constitutional provisions, these auxiliary agencies of government are under the absolute control of the legislature. Powers and duties may be imposed and taken away at the legislative will. The duty of caring for the streets and highways rests primarily upon the legislature of the state. It has, however, always been customary, as a matter of convenience and in the interest of good administration, to delegate to municipalities, counties, and townships the duty of overseeing and caring for the highways and streets within their limits. This arrangement is purely optional with the legislature. The duty is a governmental one, and the rule is almost universal that public quasi corporations, such as counties and townships, are not liable to individuals for dam-

ages resulting from the careless and negligent manner in which the duty of caring for the highway is performed. Probably the same rule applied to chartered municipalities under the English law, and certainly such is the rule at the present time in the New England states. But in the Central and Western states chartered municipalities are now held liable for damages resulting to individuals from defects in streets of which they had actual or constructive notice for such a time as to justify the conclusion of negligence. In a few states this liability is imposed by statute, while in many others it is held to exist independently of statute. Various theories have been advanced to support this liability. Thus, it has been often said that when a municipal corporation accepts a charter, by which it acquires special powers and privileges in return for its assumption of some of the duties which rest primarily upon the legislature, its relation to the legislature becomes in that respect contractual, and for the violation of the duty which it has contracted to perform it is liable for damages thereby resulting to individuals. This theory is not very satisfactory, and probably the liability might better be said to arise out of the fact that the municipality has the exclusive control of the streets and highways within its limits, with power to provide means for the proper performance of the duty of keeping them in safe condition.

The liability, then, is inferred or implied from the imposition upon the corporation of duties accompanied by the power and authority necessary for the proper performance of such duties. The legislature may delegate the power over streets and highways to municipalities, or it may create a special body within the municipality and vest it with full power over the streets. Manifestly, by virtue of its plenary power over the highways and over all the agencies of government which it has created, it may properly determine whether such agencies shall or shall not be liable to individuals for damages resulting from the careless and negligent manner in which such delegated duties are performed. An individual has no right of action against the state for its failure to construct and maintain the highways in proper condition, and, as against the will of the state, he has no greater right against an agency of the state to which it has delegated the performance of such duties. But the state may, if it chooses, authorize a right of action if the municipality neglects the proper performance of its duties; and, as we have seen, an intention to authorize such an action is inferred when a chartered municipality is given full power of control over the streets and high-

ways within its limits. A right of action against the municipality is thus a matter of legislative favor, and may be granted absolutely or conditionally. When it has been held to exist by implication, it may be taken away by the legislature, without violating any constitutional right of the individual. Obviously, then, the right of action may be made to depend upon compliance with certain conditions.

We are familiar with provisions which require the giving of a notice of a claim for damages which shall describe the time, place, and manner of the action, and compliance with this condition has always been held necessary to the maintenance of an action. It is also the settled rule that, in an action against a municipality, it is necessary for the plaintiff to show that the municipality had notice of the existence of the defect for such a time prior to the action as is necessary to make the failure to repair negligence. Ordinarily this notice may be actual or constructive, but in some instances the legislatures have thought it advisable, in order to protect the municipalities from the results which sometimes follow the application of the doctrine of constructive notice, to provide that actual notice of the existence of the defect must be shown to have been given the municipal authorities. The statute considered and sustained in *Hurley v. Bowdoinham*, 88 Me. 293, 34 Atl. 72, made it incumbent upon one injured by reason of a defective culvert in a highway to prove, as a condition precedent to the maintenance of an action, that the proper municipal officers of the town had twenty-four hours' actual notice of the defect. A former statute had required the plaintiff to show that the town had "reasonable notice of the defect," and by the amendment "the legislature manifestly designed to prescribe a more definite requirement respecting notice and impose a more rigorous limitation upon the traveler's right to recover for injuries received." See also *Rogers v. Shirley*, 74 Me. 144; *Smyth v. Bangor*, 72 Me. 249; *Gurney v. Rockport*, 93 Me. 360, 45 Atl. 310. The statute considered in *Allen v. Cook*, 21 R. I. 525, 45 Atl. 148, provided that a city should not be liable for injuries to persons or property caused by snow or ice obstructing any part of its highways, unless notice in writing of the existence of the particular obstruction had been given to the surveyor of highways at least twenty-four hours before the injury was caused. This statute was held to exempt the city from liability, except in cases where the notice was given as required. In *Houston v. Vatter*, 32 Tex. Civ. App. 298, 74 S. W. 806, a provision in the legislative city charter that the city

should not be liable to any person for damages caused by defects in the streets unless such defect had remained for ten days after special notice in writing to the mayor or street or bridge committee was held valid. "While this provision of said charter," said the court, "may appear to be unreasonable in its sweeping and stringent restriction of the liability of the city for injuries caused by its negligence, it is plain and unambiguous in its terms, and stands as an insuperable barrier against any recovery by the plaintiff in this case, since the undisputed evidence shows that the requisite notice of the defective condition of the crossing was not given and the unsafe condition was not due to any affirmative act on the part of the city."

The effect of such requirements has been fully considered by the courts of New York. The statute under consideration in *McNally v. Cohoes*, 127 N. Y. 350, 27 N. E. 1043, provided that the city should not be liable unless actual notice of the defective condition of the street had been given to the proper authorities at least twenty-four hours previous to the injury. It was held that the purpose of this statute was to prevent recovery upon constructive notice, and that there could be no recovery in any case unless the statute was complied with. See also *Smith v. Rochester*, 79 Hun, 174, 29 N. Y. Supp. 539, 1d. 150 N. Y. 581, 44 N. E. 1128. The question of the constitutionality of a statute requiring such notice was fully considered in *MacMullen v. Middletown*, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 79 N. E. 863. It was held that the duty imposed upon a municipality to care for its streets and sidewalks is governmental, and not private or local, in its nature; that liability to individuals for the failure to properly perform the duties may be created or denied by the legislature; and that, if created, its enforcement may be surrounded by any conditions or restrictions which the legislature chooses to impose. A city charter which imposed upon the common council the duty of keeping the streets in good order, and provided that no civil action should be maintained for damages for injuries to the person, sustained in consequence of the existence of snow or ice upon any sidewalk or street, unless written notice thereof relating to the particular place was actually given to the common council, and there was a failure or neglect to cause such snow or ice to be removed or the place otherwise made reasonably safe within a reasonable time after the receipt of such notice, was held constitutional, as the legislature had power to provide that the liabilities should be conditional upon the notice in writing being given.

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In *Goddard v. Lincoln*, 69 Neb. 594, 96 N. W. 273, it was held that, as the liability of the city for injuries resulting from defective streets or sidewalks rests exclusively upon express or implied provisions of the statute, it was competent for the legislature to provide against such liability or create it under such conditions and limitations as it saw fit to impose. The statute which provided that cities of the first class should not be held liable for such injuries unless notice in writing of the defect had been given to the city clerk at least five days before the accident occurred, was held not to contravene the provisions of the constitutional Bill of Rights, which guaranteed to every person a remedy for any injury done to him in his lands, goods, person, or reputation. "It was competent," said the court, "for the legislature to relieve such cities from the duty of maintaining their walks, and from all liability for injuries resulting from their unsafe condition. If the right to recover for such injuries might have been withheld entirely, one seeking to recover for such injuries certainly cannot complain of the conditions with which the legislature has seen fit to accompany the right."

It is thus clear upon principle and authority that the legislature may grant or deny to individuals a right of action against municipal corporations for injuries resulting from the negligent manner in which streets and highways are maintained. Having this power, it may grant the right of action upon any conditions which it chooses to prescribe. It may therefore provide that the city shall not be liable unless it has had actual notice of the existence of the defect in the street for a designated or reasonable time before the accident. It follows that the legislature may determine the manner in which such notice shall be given, and that a general statute enacted by the legislature which contained the provision which we have quoted from the charter of the city of Waseca would be constitutional.

The question then remains whether the provision in question is one which may properly be placed in a home-rule charter enacted under legislative and constitutional authority. The power to frame a city charter, which is granted by the Constitution, extends to all powers properly belonging to the government of municipalities, and this necessarily includes all subjects appropriate to the orderly conduct of municipal affairs. In *State ex rel. Getchell v. O'Connor*, 81 Minn. 79, 83 N. W. 498, and *State ex rel. Ryan v. District Ct.* 87 Minn. 146, 91 N. W. 300, it was held that the constitutional provisions contemplated that the legisla-

ture should prescribe limits within which such charters may be framed; that is, prescribe limits beyond which a charter may not go. Within such restrictions, the right to regulate any subject, which properly relates to municipal government is secured to the people of the particular locality. In *State ex rel. Barber Asphalt Paving Co. v. District Ct. 90 Minn. 457, 97 N. W. 132*, it was held that a provision in the charter of the city of Duluth requiring the presentation of all claims to the city council for adjustment and allowance was a proper subject for charter supervision, and "it would seem to follow logically that it was also proper to continue the subject, and provide the manner in which the determination of the city council allowing or disallowing a claim might be removed to the district court for judicial investigation and determination." In *Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1133*, it was held that the subject of contractors' bonds to secure the performance of contracts with a city and the payment of laborers and material, including the contents of the bonds and conditions and limitations as to their enforcement, was germane to the subject of municipal legislation and superseded the provisions of the general laws on the subject. In *Peterson v. Red Wing, 101 Minn. 62, 111 N. W. 840*, it was held that the subject of notice to a municipality of claims for damages incurred by reason of defects in the streets as a condition precedent to maintaining an action therefor was relevant to the subject of municipal legislation, and that the provisions of the charter with respect to that subject superseded the general law. The principle was also applied in *Turner v. Snyder, 101 Minn. 481, 112 N. W. 868*, where it was held that the provisions in the charter of Crookston upon the subject of local assessments for street improvements superseded the provisions of the general law.

There can, therefore, be no serious question as to the right to insert in a municipal home-rule charter a provision prescribing the conditions under which an individual may maintain an action against the city for personal injuries caused by the failure of the authorities to keep the streets and highways in proper condition. Under the common law of the state, a person so injured cannot recover damages unless he can prove that the municipality had notice of the defect. He may, however, establish this essential element of his right of action by facts which charge the municipality with constructive notice. This charter changes the general rule to the extent of requiring actual notice in writing. The written notice need not, of course, have been 19 L.R.A. (N.S.)

given by the injured party. It does not relieve the city from liability in all cases, although it manifestly places a very serious obstacle in the way of the injured party. The policy of such a limitation may be open to serious question; but that is a matter to be determined by the legislature and the voters of the particular city. The legislature has not deemed it advisable to restrict the city in this respect, and, as the subject is clearly one proper for municipal legislation, the charter provision has the force and effect of a direct act of the legislature, and is therefore effective.

The order sustaining the demurrer is affirmed.

NEBRASKA SUPREME COURT.

BUFFALO COUNTY TELEPHONE COMPANY

v.

BART TURNER, Appt.

(— Neb. —, 118 N. W. 1064.)

Telephone — rent — payment — rule — reasonableness.

1. A rule of a rural telephone company that telephone rent must be paid six months in advance is reasonable; and a subscriber refusing to comply therewith is not entitled to service from the company.

Same — counterclaim.

2. Nor will the existence of a counterclaim or setoff asserted by the subscriber, a large part of which is exorbitant and illegal, justify him in demanding that he be given service without prepayment of charges as other subscribers pay.

Same — defective service — repairs.

3. A telephone subscriber is presumed to know that his telephone is liable to get out of order, and, if it is situated in the country, that some time may elapse before it can be repaired; and such subscriber is only entitled to a deduction from his bill subsequent to the expiration of a reasonable time after the company had notice of the trouble and failed to repair it.

(December 5, 1908.)

Headnotes by Root, C.

Case Note.— *Reasonableness of regulation of public service corporation requiring payment of rentals in advance.*

The right of a telephone company to demand payment of rentals in advance is recognized in *Malochee v. Great Southern Teleph. & Teleg. Co. 49 La. Ann. 1690, 22 So. 922*.

A public water supply company may adopt a rule requiring the payment of water rentals in advance. *Hieronimus Bros. v. Bienville Water Supply Co. 131 Ala. 447,*

APPEAL by defendant from a judgment of the District Court for Buffalo County in plaintiff's favor in an action brought to enjoin interference with plaintiff's telephone appliances. Affirmed as modified.

The facts are stated in the Commissioner's opinion.

Mr. Fred A. Nye, for appellant:

A telephone system is a common carrier, and as such must serve the public and its subscribers with indiscriminate and impartial facilities for the transmission of intelligence.

State ex rel. American U. Teleg. Co. v. Bell Teleph. Co. 36 Ohio St. 296, 38 Am. Rep. 583; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; Nebraska Teleph. Co. v. State. 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; 25 Am. & Eng. Enc. Law, p. 775.

If failure to pay is due to the company's refusal to render the patron the service he is entitled to, it affords no ground for the company to discriminate.

Owensboro Harrison Teleph. Co. v. Wisdom. 23 Ky. L. Rep. 97, 62 S. W. 529; Jones, Teleg. & Teleph. Cos. § 251; State ex rel. Payne v. Kinloch Teleph. Co. 93 Mo. App. 349, 67 S. W. 684.

Mr. Warren Pratt, for appellee:

The telephone company had the right to adopt reasonable rules for the conduct of its business.

Jones, Teleg. & Teleph. Co. § 333; Becker v. Western U. Teleg. Co. 11 Neb. 87, 38 Am. Rep. 356, 7 N. W. 868; Nebraska Teleph. Co. v. State. 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; Watauga Water Co. v. Wolfe. 99 Tenn. 429, 63 Am. St. Rep. 841, 41 S. W. 1060.

The requirement that the charges be paid six months in advance is not unreasonable.

Jones, Teleg. & Teleph. Cos. § 352; Rushville Coö. Teleph. Co. v. Irvin, 27 Ind. App. 62, 59 N. E. 327.

31 So. 31; Harbison v. Knoxville Water Co. (Tenn. Ch. App.) 53 S. W. 993; Robbins v. Bangor R. & Electric Co. 100 Me. 496, 1 L.R.A.(N.S.) 963, 62 Atl. 136; Newark v. Newark, Ohio, Waterworks Co. 4 Ohio N. P. 341.

But a rule of a water company requiring water rentals to be paid annually in advance is rendered unreasonable by a further requirement that one year's rent shall be paid in any event irrespective of the length of time water may be used. Rockland Water Co. v. Adams. 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840.

So, a rule requiring payment of semi-annual water rentals in advance is vitiated by a provision that thirty days' default therein will cause a discontinuance of serv-

The company did not have to allow any setoff, but was entitled to its rentals, and had the right to enforce payment thereof by discontinuing service.

Rushville Coö. Teleph. Co. v. Irvin, supra.

Root, C., filed the following opinion:

Plaintiff is a corporation engaged in the telephone business in the vicinity of Kearney. Its stockholders, officers, and subscribers are farmers, who are served by connecting the phones with party wires which converge at Kearney and are there connected with a local switchboard owned, controlled, and operated by the Kearney Telephone Company. Plaintiff pays said company a fixed sum for connecting the phones of its subscribers to complete service. Plaintiff charges \$1 per month, payable six months in advance, for the use of its phones. Plaintiff's business does not warrant the continuous employment of an electrician or mechanic to repair its phones, but, as repairs are called for, it disconnects the faulty instrument and has it repaired in Kearney. Defendant is a stockholder in and a customer of plaintiff. In June, 1905, his phone did not give satisfaction, and one of plaintiff's officers took it to Kearney for repairs. The instrument was not returned for a week, and defendant, at the suggestion of one of the plaintiff's directors, brought the instrument home with him one day when in Kearney on other business, and for this he insisted that he should receive from plaintiff \$3 and an allowance of 25 cents for the week that he did not have the use of the phone. When the semiannual rental of \$6 became due in January, 1906, defendant refused to pay it unless given credit for \$3.25, and in March plaintiff disconnected defendant's phone. Defendant paid said rent, and there was no further difficulty until an attempt was made to collect the second installment of rent for said year. Defendant refused to pay because plaintiff would not al-

ice, which will not be resumed until a charge of \$1 is paid for turning on the water. American Waterworks Co. v. State. 46 Neb. 194, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711.

It is a reasonable regulation for a gas company to require, as a prerequisite, security or a deposit of money to secure the payment for gas to be consumed. Shepard v. Milwaukee Gaslight Co. 6 Wis. 539, 70 Am. Dec. 479; Williams v. Mutual Gas Co. 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983, 42 S. W. 351.

But such rule must apply equally to all applicants in order to be upheld. Owensboro Gaslight Co. v. Hildebrand, supra.

low him for the time his phone was out of commission, nor his charges for services hereinbefore referred to, plus a charge of \$1.50 for reconnecting the phone in March, 1906. Defendant would not permit plaintiff's employee to take its phone out of his house. The employee disabled said instrument, and later the line from defendant's phone to the party wire was disconnected. Defendant repaired the phone, reconnected it with the party line, and insisted upon service through the switchboard of the Kearney company; and plaintiff brought this action for an injunction against defendant. The district court perpetually enjoined defendant from in any manner meddling with the appliances of plaintiff, and from making or permitting any connections of the phone in defendant's house with the lines of plaintiff, or from using said phone in connection with said lines. Defendant appeals.

1. It is apparent that neither party to this controversy is entirely without fault. Plaintiff is a public service corporation, and should render to each individual in situation to patronize it equal service and upon the same terms. Defendant was not notified that, if he did not pay his rental as demanded, the service would be discontinued, and the actual work of disconnecting was done after dusk and so adroitly in one instance that no one other than a skilled lineman could detect the severance of the lead wire. On the other hand, plaintiff is a small concern, evidently created for neighborhood accommodation, and not as a source of profit to its stockholders. Its resources are slender, and its ability to serve its customers and keep its plant in condition for efficient service depends upon prompt payment of the rentals charged. If a considerable fraction of its subscribers become contentious and refuse to pay the tolls and charges unless counterclaims for faulty service or for insignificant acts performed for its benefit are deducted from the rental, plaintiff would be without means to pay for switching charges and maintenance of its lines and instruments. *Vanderberg v. Kansas City Missouri Gas Co.* 126 Mo. App. 600, 105 S. W. 17; *Rushville Coöp. Teleph. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327. Although defendant was not specifically informed that, if he did not pay, he would not be permitted to receive service, we are of opinion that he did not know who was responsible for the discontinuance of the service and the reasons therefor.

Defendant's demand to be paid \$3 for bringing the instrument from Kearney to his home was exorbitant, and was properly disallowed. It appears from the evidence that none of the other stockholders or the direc-

tors of the company had ever charged for like services, and, had defendant intimated that he did not intend to abide the custom, some other stockholder or one of the directors, all of whom resided in the neighborhood, would have returned the phone to his place. Also the demand for a rebate of 25 cents was uncalled for. A telephone subscriber must be presumed to know that the instrument is liable to get out of order, and, if situated in the country, that a reasonable time must pass to secure its repair. There is nothing in the record to warrant a holding that the delay of one week was unreasonable in the instant case; and, unless the delay was unreasonable, he would not have been entitled to any allowance for impaired service. *Eastern Kentucky Teleph. & Teleg. Co. v. Hardwick*, 32 Ky. L. Rep. 582, 106 S. W. 307. The subsequent charges are based upon the efforts of defendant, forcibly and against the will of plaintiff, and while defendant was in default in the payment of his rental for that very term of six months, to compel plaintiff to give him service; and we do not think that he is entitled to collect from plaintiff therefor.

Defendant insists that, as plaintiff had not formally adopted a rule that if subscribers did not pay in advance they would not be given service, the case of *Rushville Coöp. Teleph. Co. v. Irvin*, supra, does not apply. We are of opinion that, in the circumstances of all of the parties to this squabble, it was not necessary for plaintiff to prove the formal adoption of said rule. There is no evidence in the record to indicate that plaintiff arbitrarily discriminated against defendant, or that the same remedy would not have been applied to any other contumacious subscriber. Defendant occupies the unenviable distinction of being the only subscriber who absolutely refuses to pay for the use of a phone and service. Nor is this case within the principle of *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 128, 52 Am. Rep. 404, 22 N. W. 237. In the cited case the relator had refused to pay an accrued charge and his phone had been taken out. He thereafter tendered the regulation charge for reinstalling said instrument, and it appeared that he was able, ready, and willing to pay according as other subscribers paid, and the rules of the respondent did not exact a prepayment of charges. In the instant case defendant is able, but neither ready nor willing, to pay the charges according to the rule of plaintiff; nor has he tendered the payment exacted from all subscribers alike.

2. In one particular the decree, we think, is erroneous. Plaintiff charges that defendant and members of his family, in the use of the phone, would take down the trans-

mitter when other patrons on the party lines were called, and would listen to conversations not intended for them; that they would sing and whistle into the receiver, and break in on conversations between the other subscribers, and so conduct themselves as to become a nuisance. There is a general finding for plaintiff, and a perpetual injunction against defendant. There is not one scintilla of evidence to sustain the charges above referred to. The evidence shows that plaintiff maintains the only telephone service available for defendant, and he should not be precluded from its benefits if he will pay therefor. Defendant, by tendering \$6 to plaintiff, will be entitled to telephone service for six months, and thereafter, by paying that sum twice a year, may have the continued use of plaintiff's telephone, provided that he and the members of his family conduct themselves within the reasonable rules of plaintiff in that use.

The decree should be modified, by finding in favor of defendant as to the charges of misconduct in the use of the telephone, and so that he may receive service from plaintiff by paying in advance every six months therefor and abiding by the reasonable rules of the corporation. As thus modified, the decree should be affirmed; and we so recommend.

Fawcett and Calkins, CC., concur.

Per Curlam:

For the reasons stated in the foregoing opinion, the decree in this case is modified, by finding in favor of defendant as to the charges of misconduct in the use of the telephone, and so that he may receive service from plaintiff by paying it \$6 semi-annually in advance therefor and abiding the reasonable rules of said corporation. As thus modified, said decree is hereby affirmed.

NORTH CAROLINA SUPREME COURT.

C. A. BRAY, Trustee, etc., of B. J. Fisher,
Deceased,
v.

JOHN N. STAPLES et al., Appts.

(— N. C. —, 62 S. E. 780.)

Arbitration — third arbitrator — notice of action.

1. No valid award can be made without notice to the parties of the selection of the third arbitrator and of the time and place of meeting to make the award, where arbitrators who have failed to agree select a third arbitrator in accordance with the terms of the arbitration agreement.
19 L.R.A. (N.S.)

Same — setting aside — effect.

2. The original rights of parties who have entered into an arbitration agreement are not affected by a judgment setting aside an award because the arbitrators acted without giving the necessary notice to the parties.

(November 11, 1908.)

Case Note. — Necessity of notice of appointment of umpire or third arbitrator, and of proceedings before him.

In *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522, the distinction between an umpire and a third arbitrator, although the terms are used indiscriminately in many cases, is stated to be that the former acts in consequence of a disagreement of the original arbitrators and not in conjunction with them, the powers of the original arbitrators ceasing upon his appointment, while a third arbitrator acts conjointly with the original arbitrators.

And in either case, unless expressly waived, the parties are entitled to notice of the appointment of an umpire or third arbitrator, and to a rehearing before him; and an *ex parte* award by him will be void. *Gaffy v. Hartford Bridge Co.* 42 Conn. 143; *Walker v. Walker*, 28 Ga. 140; *Byrne v. Usry*, 85 Ga. 219, 11 S. E. 561; *Daniel v. Daniel*, 6 Dana, 93; *Selby v. Gibson*, 1 Harr. & J. 362, note; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522; *Elmendorf v. Harris*, 23 Wend. 628, 35 Am. Dec. 587; *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205, for same case upon second and third appeal, 23 N. J. Eq. 431. 24 N. J. Eq. 567; *Wheaton v. Crane*, 27 N. J. Eq. 368; *Re Grening*, 74 Hun, 62, 26 N. Y. Supp. 117; *Schmitt Bros. v. Boston Ins. Co.* 82 App. Div. 234, 81 N. Y. Supp. 767; *Wood v. Helme*, 14 R. I. 325; *Coons v. Coons*, 95 Va. 434, 64 Am. St. Rep. 804. 28 S. E. 885; *Thornton v. Chapman*, 2 Cranch, C. C. 244, Fed. Cas. No. 13,997.

It was said in *Haven v. Winnisimmet Co.* 11 Allen, 377 that, "in the absence of any agreement or assent by the parties to the controversy dispensing with a full hearing by the umpire, it is his duty to hear the whole case and to make a distinct and independent award thereon as the result of his judgment. He stands, in fact, in the same situation as a sole arbitrator, and he is bound to hear and determine the case in like manner as if it had been originally submitted to his determination.

And, in *Ingraham v. Whitmore*, 75 Ill. 24, the court said that, unless a hearing before the umpire is expressly dispensed with, he must hear the evidence of the parties, as he stands in the position of a sole arbitrator; and the original arbitrators are not required to join with him in making an award.

By statute, in Texas, notice of the appointment of an umpire in an arbitration proceeding and a rehearing before him are

APPEAL by defendants from a judgment of the Superior Court for Guilford County in plaintiff's favor in an action brought to set aside an award. Affirmed.

Statement by Connor, J.:

The facts necessary to a disposition of this appeal are: In an action pending in the superior court of Guilford county, A. L. Brooks, Esq., was duly appointed receiver of the estate of B. F. Fisher, deceased. In the discharge of his duties it became necessary for him to settle with the defendant John N. Staples a claim, presented by said defendant, against the estate of said Fisher, for professional services rendered said Fisher prior to his death. For the purpose of fixing the amount due said

defendant, the receiver, with the assent of Mrs. Isabelle Fisher in her capacity of administratrix and individually, and said John N. Staples entered into an agreement in writing to submit the question "as to the amount said Staples is entitled to as counsel for the said Fisher," in certain litigation referred to, "and as counsel for Isabelle Fisher and her children after the death of said Fisher," to Clement Manly, Esq., and Judge R. C. Strudwick; "and, in the event the said Manly and Strudwick cannot agree upon the amount, they are empowered to choose a third arbitrator, and the award of a majority of them shall be the amount to which the said Staples shall be entitled." This agreement, bearing date April 12, 1906, is signed by the receiver.

required. *Warren v. Tinsley*, 3 C. C. A. 613, 2 U. S. App. 507, 53 Fed. 689.

An umpire's award, if made without notice to the parties of the proceedings and an opportunity given for a rehearing of the controversy, will be void, notwithstanding the award is based upon the evidence submitted to the original arbitrators. *Taber v. Jenny*, 1 Sprague, 315, Fed. Cas. No. 13,720; *Frissell v. Fickes*, 27 Mo. 557; *Haven v. Winnisimmet Co.* 11 Allen, 377, 87 Am. Dec. 723; *Re Grening*; *Selby v. Gibson*; *Daniel v. Daniel*; *Byrne v. Usry*; *Wheaton v. Crane*; and *Coons v. Coons*,—supra; *Small v. Courtney*, 1 Brev. 205; *Falconer v. Montgomery*, 4 Dall. 232, 1 L. ed. 813; *Passmore v. Pettit*, 4 Dall. 271, 1 L. ed. 830.

And this is true, notwithstanding the arbitrators and the umpire met together, and, in the presence of the parties, the arbitrators stated the evidence to the umpire. *Falconer v. Montgomery* and *Passmore v. Pettit*, supra.

So, an award of a third arbitrator is void if made without notice to the parties, notwithstanding he met with the original arbitrators and heard the evidence presented. *Slater v. La Grande Light & P. Co.* 43 Or. 131, 72 Pac. 738.

The selection of a third arbitrator, under a submission providing that the agreement of two shall be binding, does not authorize an award without notice to the parties and an opportunity to be heard. *Linde v. Republic F. Ins. Co.* 18 Jones & S. 362.

In *Eaton v. Campbell*, 8 N. S. 314, an award by an umpire in a proceeding under rule of court, rendered without notice to or hearing of the parties, was referred by the court to the umpire with instructions to cite the parties before him so as to enable them to be heard.

An award of an umpire will be set aside, when rendered in the absence of a party's witnesses, where notice to produce witnesses was given on Saturday at 4 P. M. and the hearing was to take place the following Monday morning. *Proudfoot v. Trotter*, 6 U. C. Q. B. O. S. 163.

An umpire's denial of a party's request 19 L.R.A. (N.S.)

to hear his evidence avoids an award rendered upon the arbitrators' statement of the evidence. *Re Salkeld*, 12 Ad. & El. 767; *Re Jenkins*, 1 Dowl. N. S. 276.

And a demand of notice of the appointment of, and a hearing before, an umpire, if one shall be appointed, will render void an award by an umpire without such notice and rehearing. *Chenowith v. Phoenix Ins. Co.* 12 Ky. L. Rep. 232.

So, the expressed desire of a party to be heard, if an umpire is appointed, vitiates an award of the latter rendered without an opportunity given the former to be heard. *Ingraham v. Whitmore*, 75 Ill. 24; *Alexander v. Cunningham*, 111 Ill. 511.

A protest against a third arbitrator rendering an award upon a statement of the evidence by the arbitrators, without notice to the parties, renders his subsequent award void. *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205, for same case upon second and third appeal, 23 N. J. Eq. 431, 24 N. J. Eq. 567.

But an umpire's award is not invalidated by reason of his taking the evidence from the statements of the arbitrators, where, after his award was made, a party to the proceeding applied for a hearing before him, such request coming too late. *Hall v. Lawrence*, 4 T. R. 589.

The refusal of an umpire to hear a party's evidence will not vitiate an award where the submission provided that the evidence taken before the arbitrators might be the basis of his award. *Re Firth*, 19 L. J. Q. B. N. S. 169.

However, it has been held that an award rendered by an umpire will be valid, even though based upon the evidence submitted to the original arbitrators, where, with knowledge of his appointment, a party does not make application for a rehearing before him. *Finney v. Miller*, 1 Bail. L. 81; *Sharp v. Lipsey*, 2 Bail. L. 113; *Re Tunne*, 5 Barn. & Ad. 488; *Knowlton v. Homer*, 30 Me. 552.

And the doctrine just stated was applied where the submission provided that, upon the disagreement of the arbitrators, they might select a third, "who, either individu-

Colonel Staples, and by Mrs. Fisher. Pursuant to said agreement, the arbitrators met and heard testimony, examined papers, etc., submitted to them. One of them took notes of the evidence. After hearing the evidence and examining the papers, they failed to agree upon an award. Pursuant to the power conferred upon them, they selected R. B. Reid, Esq., as "a third arbitrator." Mr. Reid met with the other arbitrators at a time and place agreed upon. No notice was given the said receiver, Colonel Staples, or Mrs. Fisher of said meeting, or the time and place thereof. The two original arbitrators agreed that, as they had heard, all of the evidence, they would state the same to Mr. Reid, in the presence of each other. This was done, and an award was concurred in by Mr. Manly and Mr. Reid, to which Judge Strudwick declined to assent. The award fixing the amount to be paid Colonel Staples was drawn up and signed by Mr. Manly and Mr. Reid, April 18, 1908. Mr. Brooks, the receiver, before receiving notice of the award, through his partner paid a portion of the amount awarded to be due Colonel Staples. The plaintiff was, by order of the court, substituted as receiver in the place

of Mr. Brooks, and brings this action to set aside the award, for that no notice was given to the parties of the time and place of the meeting of the arbitrators, after the selection of Mr. Reid as third arbitrator; and that Mr. Reid did not hear the evidence upon which he joined in the award. Defendant Staples contended that the award was valid, and, if not so, that it had been ratified by Brooks, receiver. The case was brought to trial, and, upon the issue directed to the validity of the award, his Honor charged the jury that, if they believe the evidence, they should answer the issue "No;" and, as to the issue in regard to the alleged ratification, that Brooks, receiver, had no power, after June term, 1906, to ratify the award, and there was no evidence of any ratification. The jury answered the issue as instructed, and judgment was rendered setting aside and vacating the award. To all of which defendant Staples duly excepted. He asked the court to instruct the jury, if they believed the evidence, to answer the issue "Yes." To the refusal to do so he excepted and appealed, assigning as error the refusal of the court to instruct the jury as requested, and the instructions given.

ally or in conjunction with the other two," should determine the controversy. *Ranney v. Edwards*, 17 Conn. 309.

The right to notice of the meeting of an umpire with the arbitrators is waived by a party presenting himself before them without objection; and the umpire may take the facts as found by the arbitrators, and need not call and re-examine the witnesses. *Rounds v. Aiken Mfg. Co.* 58 S. C. 299, 36 S. E. 714.

So, a party waives his right to a rehearing when he informs an umpire that he is satisfied to have his determination rest upon the written evidence submitted to the arbitrators. *Crabtree v. Green*, 8 Ga. 8.

So, a party's statement to an arbitrator that he is advised not to attend before an umpire, together with the delivery to the former of a written statement to present to the umpire so that he will not overlook certain claims of the party, constitutes a waiver of the right to notice of the appointment of and proceedings before the umpire. *Graham v. Graham*, 9 Pa. 254, 49 Am. Dec. 557, same case on second appeal, 12 Pa. 128.

But the waiver of the right to be heard before an umpire will not be presumed. *Alexander v. Cunningham*, supra.

A party is not estopped by a delay of two weeks, during which he proceeded under an award, to assert its invalidity because he did not have notice of the appointment of and proceedings before an umpire, where, although he was dissatisfied with the award, he did not take steps to have it set aside, supposing he was bound by it. *Wheaton v. Crane*, 27 N. J. Eq. 368. 19 L.R.A. (N.S.)

But a waiver by a party of his right to appear before the original arbitrators is not a waiver of his right to be heard before an umpire; and an award rendered by the latter without notice to the party is void. *Re Martin*, 1 How. Pr. N. S. 28, and *Brown v. Lyddy*, 11 Hun, 451.

There are cases holding that notice is unnecessary. Thus, an umpire, where the submission does not require a rehearing before him, may, if he thinks proper, take the disputed points upon the statement of the arbitrators, without a rehearing thereon. *Blood v. Shine*, 2 Fla. 127.

So, in *Kile v. Chapin*, 9 Ind. 150, the court said that, even when the umpire acts on the narration of the arbitrators without hearing the evidence, his award is good.

And a submission to two arbitrators with power to call in a third implies that a decision of two of them is to be binding; and an umpire may act upon a statement by the arbitrators as to the evidence, without calling witnesses thereto. *Greenwell v. Embree*, 5 Ky. L. Rep. 313. However, nothing appears in the opinion as to whether the parties had notice of the appointment of the third arbitrator.

But, notwithstanding an umpire may act upon a statement of the evidence by the original arbitrators, he cannot, where the parties are ignorant of his appointment and have no notice thereof, privately hear such statement and render an award thereon. *Liverpool, L. & G. Ins. Co. v. Hall*, 10 Ky. L. Rep. 449.

Messrs. John A. Barringer and William P. Bynum, Jr., for appellants:

The award was valid without notice of the time and place of leaving.

Zell v. Johnston, 76 N. C. 302.

Messrs. King & Kimball, Stedman & Cooke, and Justice & Broadhurst, for appellee:

The award was invalid and void because of the acts of the third arbitrator or umpire and of the original arbitrator, in not giving notice to, or hearing, the parties before passing judgment.

Elmendorf v. Harris, 23 Wend. 628, 35 Am. Dec. 587; Day v. Hammond, 67 N. Y. 479, 15 Am. Rep. 522; Briggs v. Smith, 20 Barb. 413; Jordan v. Hyatt, 3 Barb. 284; Kyd, Awards, 95; Russell, Power & Duty of Arbitrator, p. 228; Alexander v. Cunningham, 111 Ill. 511; Gaffy v. Hartford Bridge Co. 42 Conn. 143; Thomas v. West Jersey R. Co. 24 N. J. Eq. 567; Coons v. Coons, 95 Va. 434, 64 Am. St. Rep. 805, 28 S. E. 885; Thornton v. Chapman, 2 Cranch, C. C. 244, Fed. Cas. No. 13,997; Selby v. Gibson, 1 Harr. & J. 362, note; Goldsmith v. Tilly, 1 Harr. & J. 361; 3 Cyc. Law & Proc. pp. 638, 639, 645, 653.

Connor, J., delivered the opinion of the court:

The right of the plaintiff to the relief demanded, and the ruling of his Honor, depends upon the answer to questions, in regard to which there is no conflicting evidence. Does the failure of the arbitrators to notify the parties of the appointment of Mr. Reid as "third arbitrator," and of the time and place of their meeting with him to finally hear and determine the matters submitted to them, and the failure of Mr. Reid to hear the evidence from the witnesses, invalidate the award? The questions do not appear to have been decided by this court. In Russell, Arbitration, 3d ed. 320, cited with approval in Gaffy v. Hartford Bridge Co. 42 Conn. 143, it is said that it is the duty of the umpire to re-examine such witnesses as the parties choose to produce, and as to such points as they choose to raise, although the same witnesses have been examined as to the same points before the arbitrators. He may not take the evidence, or any part of it, from the notes of the arbitrators, unless there be a special provision in the submission, or a clear agreement between the parties permitting such a course. In Thomas v. West Jersey R. Co. 24 N. J. Eq. 572, it is said: "When the new arbitrator was chosen, the complainants had the right to adduce additional testimony and additional arguments, and that, unless the right was clearly waived by their agreement or con-

duct, notice of the appointment of a third arbitrator and opportunity to be heard were essential preliminaries to a valid award. This doctrine is founded in natural justice, and is not denied to be law." Elmendorf v. Harris, 23 Wend. 628, 35 Am. Dec. 587; Alexander v. Cunningham, 111 Ill. 511; Day v. Hammond, 67 N. Y. 479, 15 Am. Rep. 522, in which it is said: "Parties are always entitled to a hearing before arbitrators, unless that hearing is waived; and that if an umpire or other arbitrator is called in, in case of disagreement, the same rule as to a right of rehearing applies. The waiver of this right must be distinct and unequivocal." In a well-considered opinion, reviewing the authorities, Keith, P., says: "We deduce from the authorities the general rule that, where two arbitrators who differ have the power to appoint a third, who shall have authority to decide between them, it is necessary to inform the parties in interest of his appointment and give them a reasonable opportunity to produce evidence before them touching the matters in controversy." Coons v. Coons, 95 Va. 434, 64 Am. St. Rep. 804, 28 S. E. 885. In 3 Cyc. Law & Proc. p. 660, the editor says that, after a disagreement between the original arbitrators, the special arbitrator, acting with them, or upon his sole responsibility, may proceed to a consideration of the case as presented by the original arbitrators, and make an award thereon without hearing the evidence anew or additional evidence, unless such rehearing be specially requested by one of the parties or required by the terms of the submission; but he further says this rule does not apply unless the parties have been notified of the appointment of the special arbitrator or umpire, and of the proceedings by him, and have been accorded reasonable opportunity to make such demand. In the note he says: "In the absence of such notice and opportunity to be heard or to demand a rehearing no authority to proceed exists,"—citing numerous cases. Some distinction has been made between the duty and power of an umpire and a "third arbitrator." It is unnecessary to consider this question, because Mr. Reid was, by the terms of the submission, made "third arbitrator," and comes clearly within the decisions cited. Whether the award may be attacked for failure to give the notice and hear the evidence by the third arbitrator collaterally, or only by a direct proceeding to set it aside, is not presented upon this appeal. This is a direct proceeding for that purpose.

It is insisted that, however the question

may have been decided in other jurisdictions, this court, in *Zell v. Johnston*, 76 N. C. 302, held the award valid. In that case Judge Rodman puts the decision on the ground that, conceding the rule as to notice, when the parties have presented their claims and evidence they are not entitled to notice of the time when the arbitrators will meet to consider and dispose of the case. He also says that the defendant clearly waived any other notice that he had. The decision is not in conflict with the uniform current of decisions on the question in other jurisdictions. His Honor's instruction on the first issue was clearly correct. We find no evidence of a ratification by the receiver, if it be conceded that he had the power to ratify, which is very doubtful. We concur with his Honor's instruction in that respect. It is conceded by all parties that the arbitrators, and each of them, acted in good faith, and no suggestion is made to the contrary. They inadvertently overlooked the necessity of notifying the parties of Mr. Reid's appointment, and the time and place of their meeting, to determine the matter submitted to them. We think that their course in that respect was in accordance with the custom with us, but the uniform current of authority is that notice must be given of the selection of the third arbitrator or umpire, and that the rule is founded in wisdom. Its observance secures to the parties an opportunity to present their evidence and arguments to the final arbiter of their rights, and tends to secure acquiescence in this mode of trial favored by the law, because it is inexpensive, expeditious, and usually works substantial justice. The gentlemen who consented to act and the "third arbitrator" were doubtless discharging "a friendly office," without compensation. The judgment of his Honor, for the reasons assigned, was correct. The other exceptions in the record are immaterial in the view which we take of the case.

Of course the parties, and their rights in respect to the subject-matter of the arbitration, are not affected by the award or the judgment setting it aside. They are relegated to their original status. It may be well enough to say that the form of his Honor's instruction to the jury does not conform to many decisions of this court; but, as there was no contradictory testimony, and no inference to be drawn from it contrary to the legal conclusion stated by his Honor, no harm could come to defendant.

The judgment must be affirmed.
19 L.R.A. (N.S.)

OHIO SUPREME COURT.

GARRETT YEAGER et al., Plffs. in Err.,
v.

JOHN P. TUNING et al.

(— Ohio, —, 86 N. E. 657.)

Easement — telephone line.

1. The right of an owner of an estate to erect and maintain, or to cause to be erected and maintained, a line of telephone poles over the estate of another for the benefit of the former, is an easement.

Same — creation.

2. An easement can be created only by deed or by prescription.

License — easement — distinction.

3. A parol agreement by several adjoining landowners to erect and maintain telephone poles on their respective lands, and to contribute equally to the expense of stringing wires thereon, and of operating a telephone line, does not create an easement, but is merely a parol license, and is revocable by any one of such owners, although in reliance thereon the poles have been erected and the line constructed.

(Davis, J., dissents.)

(December 1, 1908.)

Headnotes by the COURT.

Case Note. — Revocability of license to maintain burden on land after license has incurred expense.

This note does not include the cases on the question whether a license will ripen into an irrevocable right by lapse of time. As to void parol conveyance of an easement as foundation for easement by prescription, see case note to *Lechman v. Mills*, 13 L.R.A. (N.S.) 990.

As shown by the cases cited in the note to *Pifer v. Brown*, 49 L.R.A. 497, to which this note is supplemental, the weight of authority is that the incurring of expense in reliance upon a parol license to impose a burden upon the land of another will not prevent the revocation thereof. This doctrine has been applied to parol licenses to cast water upon the lands of the licensor,—*Jones v. Stover*, 131 Iowa, 119, 6 L.R.A. (N.S.) 154, 108 N. W. 112; *Huber v. Stark*, 124 Wis. 359, 109 Am. St. Rep. 937, 102 N. W. 12, 4 A. & E. Ann. Cas. 340; to mine coal,—*Entwhistle v. Henke*, 211 Ill. 273, 103 Am. St. Rep. 196, 71 N. E. 990, affirming 113 Ill. App. 572; to erect or rest a structure upon land of the licensor,—*Shipley v. Fink*, 102 Md. 219, 2 L.R.A. (N.S.) 1002, 62 Atl. 360; *Brown v. New York*, 78 App. Div. 361, 79 N. Y. Supp. 943 (affirmed without opinion in 176 N. Y. 571, 68 N. E. 1115); *Allerton v. Steele*, 59 App. Div. 622, 69 N. Y. Supp. 594; *Kommer v. Daly*, 104 App. Div. 528, 93 N. Y. Supp. 1021; to build a railroad track upon licensor's land,—*Johanson v.*

ERROR to the Circuit Court for Gallia County to review a judgment sustaining a demurrer to the complaint in an action brought to compel the replacing of certain telephone poles and wires and for an injunction restraining further destruction or interference with such line, which had been appealed from the Court of Common Pleas after that court had also sustained the demurrer. Affirmed.

Statement by Summers, J.:

It is averred in the petition that the plaintiffs and the defendants mutually agreed orally to construct a telephone line over and across their respective lands and to their respective residences thereon to enable them to have telephonic communication

with each other and with persons on other lines with which such line might be connected; that each agreed, at his own expense, to erect and maintain a certain number of poles, and that the plaintiffs and defendants agreed to contribute equally money to purchase and string the wires and to contribute equally sufficient money to repair and maintain the line; that the line was constructed as agreed; that it was of a permanent nature and of the value of \$250; that each of the parties expended about \$15 additional for telephone boxes and other appliances, and that the line was in use for about three years, and until shortly before the filing of the petition, when certain of the defendants cut the wires and cut down certain of the poles and rendered the line

Atlantic City R. Co. 73 N. J. L. 767, 64 Atl. 1061; to erect telephone poles in a highway where licensor owns the fee therein,—Andrews v. Delhi & S. Teleph. Co. 36 Misc. 23, 72 N. Y. Supp. 50 (affirmed without opinion in 66 App. Div. 616, 73 N. Y. Supp. 1129); Little v. American Teleph. & Teleg. Co. 96 App. Div. 559, 89 N. Y. Supp. 136; to string telephone wires on poles of a telegraph company, where license is for no stated time.—Western U. Teleg. Co. v. Carver (Tex. Civ. App.) 74 S. W. 55; to construct a sewer or drain over licensor's premises.—Pifer v. Brown, 43 W. Va. 412, 49 L.R.A. 497, 27 S. E. 399; Hicks Bros. v. Swift Creek Mill Co. 133 Ala. 411, 57 L.R.A. 720, 91 Am. St. Rep. 38, 31 So. 947; Fonda, J. & G. R. Co. v. Olmstead, 84 App. Div. 127, 81 N. Y. Supp. 1041; to maintain a dam,—Hicks Bros. v. Swift Creek Mill Co. supra.

So, the passive acquiescence by the licensor in the expenditure of a considerable sum of money by the licensee in the construction of an irrigating ditch will not prevent a revocation of a parol license by a grantee of the licensor. Ewing v. Rhea, 37 Or. 593, 52 L.R.A. 140, 82 Am. St. Rep. 783, 62 Pac. 790. This doctrine is applied in Fowler v. Delaplain (Ohio) 87 N. E. 200.

A parol license to connect a tile drain with that of the licensor which empties upon the land of another, even though executed, is revocable where the latter, as soon as he learns of such license, refuses longer to permit the licensor to empty water onto his land. Knoll v. Baker, 34 Ind. App. 124, 72 N. E. 480.

So, an executed license to connect with and empty water into a tile drain upon the licensor's land so long as it shall be satisfactory to the latter is revocable at pleasure. Thompson v. Normanden, 134 Iowa. 720, 112 N. W. 188.

And the court, in Turner v. Mobile, 135 Ala. 73, 33 So. 132, in holding a parol license to erect a wharf to be revocable notwithstanding the expenditure of money by the licensee in the erection thereof, said such a license is always revocable at pleasure, and neither imports title of any sort, 19 L.R.A. (N.S.)

nor, when acted upon, involves any matter of estoppel *in pais* against the licensor.

A parol license to install a set of drug-store fixtures in the licensor's building, to remain permanently therein, and the rental therefrom to be divided between the licensor and the licensee, being within the statute of frauds, is revocable upon reasonable notice. Adams v. Weir (Tex. Civ. App.) 99 S. W. 726.

A parol license that a wall of a building might remain upon the licensor's property until he demanded it is revoked by the death of the latter. Chaves v. Torlina (N. M.) 99 Pac. 690.

A parol license to impose a burden upon the land of another is revoked by a conveyance of the premises by the licensor. Smyth v. Brooklyn Union Elev. R. Co. infra. and Hicks Bros. v. Swift Creek Mill Co. supra.

Assuming that the interest or right in question is nothing more than a license, it would seem to be immaterial, so far as the question of revocability is concerned, whether it is created in writing or by parol, though the fact in that respect may affect the question whether the interest or right created is merely a license.

So, this doctrine of revocability has been applied to a written license to construct a switch track for the licensor's benefit.—Rodefer v. Pittsburg, O. V. & C. R. Co. 72 Ohio St. 272, 70 L.R.A. 844, 74 N. E. 183; and to a written license to maintain elevated tracks in a street the fee of which rests in the licensor.—Smyth v. Brooklyn Union Elev. R. Co. 121 App. Div. 282, 105 N. Y. Supp. 601; however, in the last case the court of appeals, in holding that the instrument in question created an easement and not a license, stated that the decision of the lower court would be correct if a license was created.—193 N. Y. 335, 85 N. E. 1100.

Thus, a written license to construct a side track upon the licensor's land, for his benefit, the licensee to have the right to remove it upon thirty days' notice, is revocable at the licensor's pleasure without reimbursing the licensee for his expenditures. Belzoni

in places useless; and they pray for a mandatory order requiring the replacing of the poles and the restoring of the line, and for an injunction against the destruction or interference with the line in the future. The case went to the circuit court on appeal, where a demurrer was sustained and the petition dismissed.

Mr. R. M. Switzer, for plaintiffs in error:

The right given by each of the parties on and over his premises, when acted upon, became as to him an irrevocable license in favor of all the other parties.

Wilson v. Chalfant, 15 Ohio. 248, 45 Am. Dec. 574; Meek v. Breckenridge, 29 Ohio

St. 642; Hornback v. Cincinnati & Z. R. Co. 20 Ohio St. 81; Le Fevre v. Le Fevre, 4 Serg. & R. 241, 8 Am. Dec. 696; Rerick v. Kern, 14 Serg. & R. 267, 16 Am. Dec. 696; Hazelton v. Putnam, 3 Pinney (Wis.) 107, 54 Am. Dec. 158; 2 Story, Eq. Jur. 70. 75; Angell, Watercourses, 359; 1 Spelling. Inj. §§ 587-591.

Messrs. H. C. Johnston and E. D. Davis for defendants in error.

Summers, J., delivered the opinion of the court:

If the plaintiffs are entitled to a specific performance of the agreement, then they have an easement created by parol in the lands of the defendants. An easement is a

Oil Co. v. Yazoo & M. Valley R. Co. (Miss.) 47 So. 468.

The court observed, in the case last cited, that, even when based upon a valuable consideration, or when great expense had been incurred by the licensee, it had declined to follow the rule that such a license was thereby rendered irrevocable. To the same effect, see *Kommer v. Daly*, supra.

There are cases, however, holding that the expenditure of money in reliance upon a license to impose a burden upon the licensor's land thereby renders it irrevocable whether created by parol or in writing. Thus, this doctrine has been specifically applied to a written license to construct a telegraph line upon a railroad right of way,—*Western U. Teleg. Co. v. Pennsylvania Co.* 68 L.R.A. 968, 64 C. C. A. 285, 129 Fed. 849; to a written license to erect a retaining wall upon licensor's land,—*Patterson v. Burlington* (Iowa) 119 N. W. 593; to a written license, for a valuable consideration, to construct a tram road,—*Hiers v. Mill Haven Co.* 113 Ga. 1002, 39 S. E. 444; to a parol license to construct an irrigation ditch,—*Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301, 83 Pac. 808, 7 A. & E. Ann. Cas. 704; to a parol license, for a valuable consideration, to use a stairway on licensor's land in order to obtain access to the licensee's building,—*Dodge v. Johnson*, 32 Ind. App. 471, 67 N. E. 560; *Kastner v. Benz*, 67 Kan. 486, 73 Pac. 67; to a parol license to dig a ditch in order to drain land purchased from the licensor, the licensee making valuable improvements upon his land in order to enjoy the license,—*Brantley v. Perry*, 120 Ga. 760, 48 S. E. 332.

A parol license to construct a drain over, and to cast refuse from a creamery upon, the licensor's land, which also benefits the latter by draining a portion of his land, becomes irrevocable when the licensee expends money upon his own and the licensor's land in reliance upon the license. *Ruthven v. Farmers' Co-op. Creamery Co.* (Iowa) 118 N. W. 915.

A license to construct and maintain a spur track over land of the licensor for his benefit in removing timber therefrom, to

continue until the timber on adjoining land may be removed, is not revocable as soon as the timber has been removed from the licensor's land; but will continue no longer than is necessary to remove the timber contemplated when the license was granted. *Sumpter R. Co. v. Gardner*, 49 Or. 412, 90 Pac. 499.

So, a parol license to dump *débris* from a mine upon licensor's property, even though the licensee claims to have expended a large sum of money in improving his property upon the faith thereof, is revocable at pleasure, where it does not appear but that he may have been amply remunerated for his outlay by valuable mineral obtained from his mine, notwithstanding the rule adopted by the court is that valuable improvements upon the strength of a parol license render it irrevocable. *Miser v. O'Shea*, 37 Or. 231, 82 Am. St. Rep. 751, 62 Pac. 491.

But, as the right to recover damages for the destruction of a tile drain by a licensor exists only by reason of the fact that the licensee has incurred expense thereunder, a recovery of damages by the licensee is a revocation of the license; and he cannot afterwards insist that the license is irrevocable. *Oster v. Broe*, 161 Ind. 113, 64 N. E. 918.

It was held in *Dawson v. Western Maryland R. Co.* 107 Md. 70, 14 L.R.A. (N.S.) 809, 68 Atl. 301, that the doctrine that equity will not permit the revocation of a license without compensating the licensee for his expenditures does not apply to the assignees of the licensee, who acquire no right under the license by the transfer to them of the licensee's property.

As to the effect of a license to display advertisement or sign on walls of a building, see case note to *Levy v. Louisville Gunning System*, 1 L.R.A. (N.S.) 359.

As to the effect of the incurrance of expense under a parol license to drain water upon licensor's property, see case note to *Jones v. Stover*, 6 L.R.A. (N.S.) 154.

As to the time in which a building may be removed after the revocation of a parol license, see case note to *Shipley v. Fink*, 2 L.R.A. (N.S.) 1002.

right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former. A license is a personal, revocable, and nonassignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein. *Greenwood Lake & Pt. J. R. Co. v. New York & G. L. R. Co.* 134 N. Y. 435, 31 N. E. 874. Section 4198, Rev. Stat., provides that "no lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned, or granted, except by deed, or note in writing, signed by the party so assigning or granting the same, or his agent thereunto lawfully authorized, by writing, or by act and operation of law." This statute would seem to settle the question of the right to a decree for specific performance against the plaintiffs; but it is contended that it is the well-settled law of this state that such an agreement is a parol license, and that such license, when executed, is irrevocable. Mr. Freeman in a note to *Lawrence v. Springer*, 31 Am. St. Rep. 705-715; says: "At common law a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled; for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that, where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable at the option of the licensor; and this although the intention was to confer a continuing right, and money has been expended by the licensee upon the faith of the license. Such license cannot be changed into an equitable right on the ground of equitable estoppel." To the same effect are *Browne*, Stat. of Fr. § 31; *Jones*, Easements, § 84; *Bigelow*, Estoppel, 5th ed. 666.

In *Lawrence v. Springer*, 49 N. J. Eq. 10 L.R.A. (N.S.)

289, 31 Am. St. Rep. 702, 24 Atl. 933, *Beasley*, Ch. J., says: "It has not been, and it cannot be, denied that such a grant as the one in question cannot be enforced in a court of law. Such easements, being incorporeal, lie in grant, and their creation requires an instrument under seal. Nor is it questioned, nor questionable, that a parol imposition of a servitude of this kind upon land is in flat contradiction of the statute of frauds. It is true, indeed, that in one class of cases, as is well known, courts of conscience have felt dispensed from putting in force the provisions of that act. This has been the course pursued where a parol agreement for the purchase of lands, or of some interest in them, has been performed to the extent of possession having been taken in part execution of such contract. But, while this is the undeniable rule in equity, it should be ever borne in mind that its introduction has been regretted by the wisest judges. 'The statute,' says Lord Redesdale, 'was made for the purpose of preventing perjuries and frauds; and nothing can be more manifest to any person who has been in the habit of practising in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been vigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements from the necessity of the case would have been reduced to writing. Whereas it is manifest that the decisions on the subject have opened a new door to fraud.' And these strictures are pointed with the emphatic declaration that 'it is therefore absolutely necessary for courts of equity to make a stand, and not carry the decisions further.' *Lindsay v. Lynch*, 2 Sch. & Lef. 4. And, in the same vein, Judge Story (2 Story, Eq. Jur. § 766) says that 'considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the statute of frauds farther than they were compelled to do by former decisions.' To the same purpose are the criticisms of Chancellor Kent in *Phillips v. Thompson*, 1 Johns. Ch. 149, and of Chancellor Zabriske in *Cooper v. Carlisle*, 17 N. J. Eq. 529." *Pomeroy*, in his work on Specific Performance of Contracts, referring to the doctrine of the irrevocability of a parol license when executed, says that it is opposed to the common-law doctrine concerning licenses as it prevails in England and in most of the American states. In *Rodefer v. Pittsburg*, O. V. & C. R. Co. 72 Ohio St. 272, 70 L.R.A. 844, 74 N. E. 183, the opinion of *Andrews, J.*, in *Crosdale v. Lanigan*, 129 N. Y. 604, 26 Am. St. Rep. 551, 29 N. E. 824, was quoted from

at length with approval, and it is unnecessary to repeat here what was said there. In that opinion he says that it is plainly the rule of the statute, as well as the rule required by public policy, that such a license, though executed, is revocable. See also *Hicks Bros. v. Swift Creek Mill Co.* 133 Ala. 411, 57 L.R.A. 720, 91 Am. St. Rep. 38. 31 So. 947; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104; *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030; *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. 786; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.* 112 Ill. 384, 54 Am. Rep. 243. The cases are too numerous to cite, but may be readily found by reference to the reports and text-books already cited.

The early cases were grounded on some early English cases which were overruled in the leading case of *Wood v. Leadbitter*, 13 Mees. & W. 838. The cases of *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574, and *Hornback v. Cincinnati & Z. R. Co.* 20 Ohio St. 81, are cited as supporting the doctrine of the irrevocability of such a license. The former seems to have been based upon precedents that were in accord with the early English decisions, which, as we have seen, have been overruled. The later case is not authority for the doctrine, but is a case of a parol agreement for the purchase of an interest in lands which has been performed to the extent of possession having been taken in part execution of the contract. The later case decided by the supreme court commission (*Wilkins v. Irvine*, 33 Ohio St. 138) is not in accord with the earlier doctrine, but is in accord with the modern doctrine, and it is there held that "a written license, without seal and unacknowledged, to enter upon and embed water pipes in the land of another, with privilege to enter and repair them, creates no interest in, nor encumbrance upon, the land, such as will disable the owner thereof from making a good and sufficient deed conveying a good title thereto." It may be added that in that case the written license had been executed. And in the opinion it is said (page 144): "It gave the Cleveland Rolling Mill Company no dominion over the land, nor did it create, in its favor, an easement in the land. If its terms had been violated by Brooks or his grantees, the jurisdiction of a court of equity could not have been successfully invoked to enforce a specific performance. The remedy, if any it had, would have been an action for damages."

Judgment affirmed.

Price, Ch. J., and Shauck, Crew, and Spear, JJ., concur.

Davis, J., dissenting:

The contrary rule has been a rule of 19 L.R.A. (N.S.)

property in this state for more than sixty years. *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574. It is in the strictest sense *stare decisis*, and is no longer an open question for the courts. If there is any demand for a change of the law, the legislature alone is competent to decide whether a change so vital to property rights which have been acquired under the existing rule should be made.

WASHINGTON SUPREME COURT.

H. J. MILLS, Respt.,
v.

SEATTLE, RENTON, & SOUTHERN RAILWAY COMPANY, Appt.

(50 Wash. 20, 96 Pac. 520.)

Carrier — ticket — transportation to destination.

1. One holding a street car ticket entitling him to transportation to any one of several points at different distances along the line from the starting point, who boards a car plainly marked as going only as far as the nearest stop to which the ticket entitles him to ride, is not entitled to damages in case the car stops at that point and goes back, and he is ejected therefrom without undue force after being refused a transfer to another car.

Same — passenger — ejection.

2. A street car company cannot eject a trespasser from its car while the car is in motion, so as to endanger life or limb, or wilfully or unnecessarily assault him.

Same — assault — scope of employment.

3. A street car company is liable for the act of one employed to care for its cars, who unlawfully assaults a passenger while attempting to eject him from the car at the express or implied request of the conductor, but not if his act is of his own volition, and beyond the scope of his employment.

(July 11, 1908.)

Case Note. — Rights of passenger who boards car or train destined for a point short of his destination.

In *Gulf, C. & S. F. R. Co. v. Henry*, 84 Tex. 678, 16 L.R.A. 318, 19 S. W. 870, it was held that a ticket which was good for a continuous passage only did not entitle a passenger who voluntarily took passage upon a train which he was informed would not go through to his destination, to be carried the remainder of the journey on the train which he ought to have taken in the first instance.

In *Johnson v. Philadelphia, W. & B. R. Co.* 63 Md. 106, it appeared that plaintiff purchased an excursion ticket which provided that it was good "for a continuous trip only," and "not good to stop off," and

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for assault by defendant's servants upon plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Sachs & Hale for appellant.

Mr. John E. Ryan, for respondent:

When one gets upon a train by mistake, and without inquiring as to its destination, the conductor, when he sees that the passenger is on the wrong train, owes him the duty of informing him of his mistake; and, if the conductor fails to inform him, and accepts his ticket as though the train went to his destination, then he is accepted as a passenger to said destination, and the rule requiring diligence on the part of the passenger is waived.

South & North Ala. R. Co. v. Huffman, 76 Ala. 492, 52 Am. Rep. 349; Boehm v. Duluth, S. S. & A. R. Co. 91 Wis. 592, 65

that he boarded a train which did not run to his destination, and was not advertised to so run, all of which he well knew at and before the time he entered the train. It was held that he could properly be removed from the train upon his refusal to pay fare or produce a proper ticket.

In *Townsend v. New York C. & H. R. R. Co.* 4 Hun, 217, where it appeared that plaintiff took passage on a train which regularly ran to a point short of his destination; that it was customary for passengers going beyond this point to take the next train going in that direction; that plaintiff's ticket was taken up by the conductor on the first train, and he was ejected from the second train because he had no ticket,—the company was held liable. There was no contention that he should have taken a through train in the first instance.

In *Mahoney v. Detroit Street R. Co.* 93 Mich. 612, 18 L.R.A. 335, 32 Am. St. Rep. 528, 53 N. W. 793, plaintiff boarded a street car which did not go to the end of the line, but stopped at the company's barns; he alighted, telling the conductor that he wished to go further, but without asking for a transfer ticket. It was held that he could be lawfully ejected from the next car which he took going toward his destination if he refused to pay fare thereon, and that the second conductor was not obliged to take his statement as evidence of his right to ride.

In *Appleby v. St. Paul City R. Co.* 54 Minn. 169, 40 Am. St. Rep. 308, 55 N. W. 1117, it was held that where the passenger was justified in assuming that the street car on which he paid his fare was to go to the end of the line, but it was stopped and taken off at the power house after the conductor had disappeared, so that he could not get a transfer ticket, he had a right to complete his journey on the next car going in the 19 L.R.A.(N.S.)

N. W. 506; 2 Hutchinson, Carr. § 1002; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458.

Though plaintiff was upon the train by mistake, he was entitled to the treatment due a passenger.

6 Cyc. Law & Proc. p. 536. B, 1; Hutchinson, Carr. § 1002; *Columbus, C. & I. C. R. Co. v. Powell*, 40 Ind. 37; *Wright v. California C. R. Co.* 78 Cal. 360, 20 Pac. 740.

Rudkin, J., delivered the opinion of the court:

The defendant owns and operates a line of electric railway between the city of Seattle and the town of Renton, in King county. Cars starting out from the city of Seattle run to different points or stations on the line of the road, such as Graham avenue, Ocean beach, Rainier beach, and Taylor's mill. Each car has a notice at

same direction, without again paying fare.

As was said in *Roberts v. Koehler*, 12 Sawy. 252, 30 Fed. 94: "A ticket for transportation on a railway between certain termini, which is silent as to the time when or within which it may be used, does not authorize the holder to stop over at any point between such termini, and resume his journey thereon, on the next or any following train. The contract involved in the sale and purchase of such a ticket is an entire one, and not divisible. It is a contract to carry the passenger through to the point of his destination as one continuous service, and not by piecemeal, to suit his convenience or pleasure." And as stated in *Dietrich v. Pennsylvania R. Co.* 71 Pa. 436, 10 Am. Rep. 711, and the cases there cited, it is well settled that one who buys a railroad ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of its trains. It would seem, therefore, that the rights of a passenger who boards a car or train destined by the rules and regulations of the company for a point short of his destination would not be enlarged by the fact that the car or train was not marked. But the fact that its destination was plainly marked upon such car or train might estop him from claiming that he was upon the wrong train by his mistake, or by misdirection of the company's employees.

Upon the question of the rights of a passenger on the wrong train by his own mistake, see case note to *Robertson v. Boston & N. Street R. Co.* 3 L.R.A.(N.S.) 588.

As to the duty of a passenger on the wrong train through misdirection of the carrier's servants, see case note to *St. Louis Southwestern R. Co. v. White*, 2 L.R.A.(N.S.) 110.

the front and rear of the car, showing its destination. The 5-cent fare limit is Graham avenue. Beyond this point, tickets to Seattle and return are sold by the conductors on the several cars. Return trip tickets are not sold to each individual station or stopping place, but one general form of ticket is used for all stations to which the rate or fare is the same, and the tickets are good to the farthest station from the city of Seattle. Thus, passengers purchasing tickets to Seattle and return from Brighton beach, Ocean beach, and Rainier beach will all receive the same form of ticket, and there is nothing on the face of the ticket to mark or indicate the passenger's destination. On the morning of March 25, 1907, the plaintiff in this action took passage on one of the defendant's cars at Rainier beach, and purchased a ticket to Seattle and return. On the evening of that day he boarded another of the defendant's cars at the city of Seattle for the return trip to Rainier beach. The notice at the front and rear of the car thus boarded showed that the destination of the car was Ocean beach, a point about 2 miles nearer Seattle than Rainier beach, and such was its destination in fact. No questions were asked by the plaintiff as to the destination of the car, and no information was given by him as to his own destination. The conductor took up the tickets, and, when the car reached Ocean beach, the plaintiff was informed that the car had reached its destination, and was about to return to the barn, and that he, the plaintiff, must leave the car. The plaintiff refused to leave the car, but demanded from the conductor a transfer or other evidence of his right to take another car to his destination at Rainier beach. This the conductor refused to give, and had no authority to give under the rules of the company. After remaining at Ocean beach for about five minutes, the car started back towards the barn with the plaintiff still on board. Up to this point there was no conflict in the testimony, and no question of fact for the jury to pass upon. When the car had returned to a point near Brighton beach, about 2 miles from Ocean beach, a conflict arose between the plaintiff and the conductor of the car, or a greaser in the employ of the defendant, or between the plaintiff and both the conductor and the greaser, as a result of which the plaintiff was ejected from the car, and assaulted. This action was instituted to recover damages for the wrongful ejection and for the assault, and, from a judgment in favor of the plaintiff, the present appeal is prosecuted.

The following instruction, and others of like import, defining the relative rights and 19 L.R.A. (N.S.)

duties of common carriers and their passengers, were excepted to, and the giving of these instructions is assigned as error: "I instruct you, gentlemen of the jury, that if you find, from a fair preponderance of the evidence in this case, that the plaintiff, on or about the 25th day of March, 1907, had in his possession a ticket entitling the plaintiff to ride as a passenger upon one of the defendant's cars from the city of Seattle to Rainier beach, and that it was printed upon the face of the ticket that the plaintiff was entitled to passage from the city of Seattle to Rainier beach, and if you further find that he went in the car of defendant in good faith, believing that he was entitled to ride upon the car of defendant upon which he entered as a passenger from the city of Seattle to Rainier beach, then he became a passenger of defendant from the city of Seattle to Rainier beach for hire, and was entitled to be transported by defendant as a passenger, and was entitled to all the rights and duties and privileges of a passenger for hire upon that street railway line from the city of Seattle to Rainier beach." These several assignments must be sustained. The appellant was not required to run all of its cars the entire length of its line, nor to provide for the transfer of passengers from one car to another. It might run its cars to such points or stations as would best subserve its own convenience and the convenience of the traveling public, and require passengers to take such cars only as would transport them to their destination without change. This the appellant did, and no more. The respondent took the wrong car by mistake, without fault on the part of the appellant or its agents, and for this mistake and the injury flowing therefrom he alone is responsible. As soon as the car destined for Ocean beach had reached its destination, and the respondent was informed of that fact and requested to leave the car, it was his duty to do so, and, as soon as he was given a reasonable opportunity to leave the car, and refused, the relation of carrier and passenger ceased, and the respondent became a trespasser from that time forward. The appellant thereafter owed him such duty as it owes to trespassers, and none other; and these facts appearing from the uncontroverted testimony, the court should have so charged the jury. These errors call for a reversal of the judgment, but not for a dismissal of the action. As a trespasser, the employees of the appellant might use such force as was reasonably necessary to eject the respondent from the car, in case he refused to leave of his own accord, but they could not lawfully eject him while the car was in motion, so as to endanger life

or limb, nor could they wilfully or unnecessarily assault him with impunity. The rights of common carriers and their employees in ejecting trespassers from cars were thus stated in *Clark v. Great Northern R. Co.* 37 Wash. 537, 79 Pac. 1108, 2 A. & E. Ann. Cas. 760: "The true rule is that, in removing trespassers from a train, the employees of the company may use such force as appears reasonably necessary, under all the circumstances, to accomplish the end in view; and, if the trespasser offers forcible resistance, a jury should not weigh with too much nicety the degree of force resorted to." In this case there was some testimony tending to show that a wilful and unprovoked assault had been committed, and the weight of this testimony was for the jury. The appellant requested the court to charge the jury that it was in no event liable for the assault committed by the employee called the greaser. This employee had nothing to do with the operation of the cars, or with the receiving or discharging of passengers, and for an assault committed by him of his own volition and without the scope of his employment the company, of course, would not be liable. If, on the other hand, this employee was assisting the conductor in ejecting the respondent from the car at the express or implied request of the conductor, the appellant would be liable for his acts in that connection.

The other assignments are not of sufficient importance to call for consideration or discussion; but, for error in the instructions complained of, the judgment is reversed, and the cause remanded for a new trial.

Hadley, Ch. J., and Fullerton, Mount, Root, Dunbar, and Crow, JJ., concur.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON EX REL. J.
G. WOLFE, Resp.,
v.

JOHN PARMENTER, Appt.

(50 Wash. 164, 96 Pac. 1047.)

Statutes—sufficiency of title—error.

1. A provision of a statute exempting certain property from taxation is not insufficiently covered by the title, which states that it relates to revenue and taxation, by the fact that it further states that it is an amendment of a statute, designated by a chapter and year of passage, which designation is clearly erroneous, the statute referred to being on an entirely different subject.
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Tax—exemption of credits—constitutionality.

2. A constitutional provision that all property shall be taxed does not preclude an exemption of credits, where the Constitution also provides that the assessment shall be uniform and equal, and at a just valuation of the property.

Same—exemption of money.

3. Money cannot be exempted from taxation under a constitutional provision requiring all property to be taxed.

Same—credits.

4. Constitutional provisions that a deduction of debts from credits may be allowed in assessing taxes, and that all property must be taxed, do not recognize credits as property, so as to prevent the legislature from exempting credits, where the Constitution also provides that taxation shall be equal and uniform.

Same—separable provision.

5. The inclusion of money, which cannot be exempted from taxation, in a provision of a statute exempting credits, which may properly be exempted, does not invalidate the entire exemption.

(Fullerton, J., dissents in part.)

(August 1, 1908.)

A PPEAL by defendant from a judgment of the Superior Court for Lincoln County in favor of relator in a mandamus proceeding to compel the listing of certain items for taxation. Modified and affirmed.

The facts are stated in the opinion.

Mr. C. A. Pettijohn for appellant.

Messrs. Martin & Wilson for respondent.

Messrs. J. H. Easterday, Peters & Powell, and Hudson & Holt, *amici curiæ*:

Note.—The above decision seems to be one of first impression upon the question of the constitutionality of exemption of credits from taxation, as an extensive search has failed to disclose any other case presenting that question. It will be observed that the court, in *STATE EX REL. WOLFE v. PARMENTER*, does not deduce the power to exempt credits from taxation, notwithstanding a constitutional provision that all property should be taxed, from any conclusion upon the question whether the taxation of both credits and the property represented by them would be double taxation, in violation of constitutional provisions requiring uniformity and equality in the assessment of taxes. Therefore, cases discussing the question of double taxation would be of no assistance in arriving at a decision as to the constitutionality of the exemption of credits. And the same may be said of those cases involving the deduction of the debts owed by the taxpayer from his taxable property.

Double taxation is not contemplated by the Constitution.

Lewiston Water & P. Co. v. Asotin County, 24 Wash. 377, 64 Pac. 544; Ridpath v. Spokane County, 23 Wash. 436, 63 Pac. 261.

Taxation which attempts to tax credits fails to meet the constitutional requirements of uniformity, equality, and justness, because, in so far as such a tax is enforced against credits, it results in double taxation.

People v. Hibernia Sav. & L. Soc. 51 Cal. 243, 21 Am. Rep. 704; Savings & L. Soc. v. Austin, 46 Cal. 416; Cooley, Const. Lim. 7th ed. p. 742; Norris v. Waco, 57 Tex. 635; Daily v. Swope, 47 Miss. 367; 12 Am. & Eng. Enc. Law, 2d ed. p. 272.

Notes, accounts, mortgages, etc., have been considered subjects for express exemption from taxation by law writers and courts, even where, under their Constitutions, it was expressed that "all property, real and personal," is subject to taxation.

State ex rel. Da Ponte v. Board of Assessors, 35 La. Ann. 651; Miller v. Wilson, 60 Ga. 505; Judson, Taxn. ¶ 72, p. 72; First Nat. Bank v. Chehalis County, 6 Wash. 70, 32 Pac. 1051; Washington Nat. Bank v. King County, 9 Wash. 608, 38 Pac. 219.

If the act should be unconstitutional in part, it would not, for that reason, be invalid as to the rest.

State v. Poole, 42 Wash. 192, 84 Pac. 727; State ex rel. Matson v. Superior Court, 42 Wash. 491, 85 Pac. 264; Nathan v. Spokane County, 35 Wash. 26, 65 L.R.A. 336, 102 Am. St. Rep. 888, 76 Pac. 521; Pullman State Bank v. Manning, 18 Wash. 250, 51 Pac. 464.

Clerical errors in titles to amendatory acts are immaterial, provided the court can determine with certainty the statute, section, or law intended to be revised.

Madison, W. & M. Pl. Road Co. v. Reynolds, 3 Wis. 287; Penberthy v. Lee, 51 Wis. 261, 8 N. W. 116; State v. McCracken, 42 Tex. 383; School Directors v. School Directors, 73 Ill. 249; Clare v. State, 68 Ind. 17; Citizens' Street R. Co. v. Haugh, 142 Ind. 254, 41 N. E. 533; Pue v. Hetzell, 16 Md. 539; The Borrowdale, 39 Fed. 376.

Messrs. James B. Howe and R. G. Sharpe also *amici curiæ*.

Hadley, Ch. J., delivered the opinion of the court:

This action was instituted in the superior court of Lincoln county, and it is in the nature of an action in mandamus to require the assessor of that county to list for taxation purposes, for the year 1908, mortgages, notes, accounts, moneys, certificates of deposit, tax certificates, judgments, 19 L.R.A. (N.S.)

bonds, and warrants. In terms the petition asks for a writ of prohibition to prohibit the assessor from allowing the above-mentioned items to become exempt from taxation; but, in effect, the relief sought is affirmative and in the nature of mandamus. The assessor demurred to the petition, on the ground that it does not state facts sufficient to authorize the issuance of a writ. The demurrer was overruled, and, in the absence of further pleading, judgment was entered commanding the assessor to list and assess all the items specified above. The assessor has appealed.

It is urged, in support of the demurrer, that it was the duty of appellant to refuse to list the items mentioned by reason of the act of the legislature as found in chapter 48, at page 69 of the Session Laws of 1907. Section 1 of that act is as follows: "That section 3 of 'chapter 83 of the Laws of 1897, amended June 12, 1901,' is hereby amended to read as follows: Sec. 3. Personal property, for the purpose of taxation, shall be construed to embrace and include, without especially defining and enumerating it, all goods, chattels, stocks, or estates; all improvements upon lands, the fee of which is still vested in the United States, or in the state of Washington, or in any railroad company or corporation, and all and singular of whatsoever kind, name, nature, and description, which the law may define or the courts interpret, declare, and hold to be personal property, for the purpose of taxation, and as being subject to the laws and under the jurisdiction of the courts of this state, whether the same be any marine craft, as ships and vessels, or other property holden under the laws and jurisdiction of the courts of this state, be the same at home or abroad: Provided, that the ships or vessels registered in any customhouse of the United States within this state, which ships or vessels are used exclusively in trade between this state and any of the islands, districts, territories, states of the United States, or foreign countries, shall not be listed for the purpose of or subject to taxation in this state, such vessels not being deemed property within this state: Provided, that mortgages, notes, accounts, moneys, certificates of deposit, tax certificates, judgments, state, county, municipal, and school district bonds and warrants shall not be considered as property for the purpose of this chapter, and no deduction shall hereafter be allowed on account of an indebtedness owed." It will be seen that the effect of the closing proviso of the section is to exempt from taxation the items there enumerated. If, therefore, the statute is a valid one, the appellant did his duty; but, if it violates constitutional limi-

tations, the judgment of the court was right. The constitutionality of the statute is the only question involved in this appeal.

It is contended that the act is invalid because of insufficiency of the title. The title is as follows: "An Act Amending an Act Entitled, 'An Act to Amend Section 3, of Chapter 83 of the Laws of 1897 Relating to Revenue and Taxation,' Passed the Senate and the House, June 12, 1901, Notwithstanding the Veto of the Governor, and Declaring an Emergency." If it is necessary to pay strict regard to everything contained in this title, then it is singularly involved. Reference to chapter 83, p. 221, of the Laws of 1897, to which the title refers as the law amended by this act, discloses that it treats of monuments and notices upon mining claims. It is manifest that the reference to the former statute is a pure error, as the two acts relate to subjects entirely separate and distinct. This title does, however, further state the subject as "relating to revenue and taxation," and the body of the act clearly and succinctly treats of that subject alone. The subject of exemption from taxation treated in the body of the act is included in the general subject specified in the title. We think the erroneous reference to the former statute must be treated as mere surplusage, and, inasmuch as, without that part of the title, there is a clearly-stated and single subject, which is followed by a clear treatment of that subject in the act itself, the statute becomes an independent one, and has the effect of amending any existing statute upon the subject, and of repealing by implication any previously existing provisions in conflict with it. We therefore hold that the act is not invalid by reason of its title.

It is further urged that the act violates §§ 1 and 2 of article 7 of the state Constitution. Section 1 contains, among other things, the following: "All property in the state not exempt under the laws of the United States or under this Constitution shall be taxed in proportion to its value, to be ascertained as provided by law." Section 2 is, in part, as follows: "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property: Provided, that a deduction of debts from credits may be authorized." It is argued that the exemption of the items mentioned in the statute violates the constitutional provision of § 1, quoted above, which requires that

all property in the state shall be taxed except such as is exempt under the laws of the United States, or under the Constitution of the state. It is contended that credits such as mortgages, notes, and accounts are property, and cannot be excluded by the legislature from the subjects of taxation. The argument assumes that all property in the state cannot be taxed without the taxation of credits. Is the assumption correct? The Constitution simply requires that all property shall be taxed, but the method of doing it is left to the legislature. If the method devised by the legislature reaches all property in fact, then there is no violation of the Constitution. It is possible to assess the same property in different ways, any one of which would subject the entire property to the tax. For example, one person may own the fee title to real estate, and another may own an easement or a leasehold therein. All of these are property, but it cannot be successfully maintained that all of them must be taxed in order to satisfy the Constitution. The state taxes the land as an entirety, and leaves the owners of the several interests to make such adjustments as they choose. The constitutional requirement that all property shall be taxed is certainly satisfied through a method by which the total of all wealth in the state is once taxed. Double taxation should be avoided as far as possible, and, in any event, the Constitution should not be so construed as to require it. In an effort to tax all property it is, however, difficult to avoid double taxation in some particulars. The complexity of established business methods is such that property appears and then reappears in representative forms. The actual property of a corporation reappears in the hands of its stockholders in the shape of corporate stock. That the taxation of the corporate property and also of its capital stock amounts to double taxation was recognized by this court in *Lewiston Water & P. Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544. The court observed in that case as follows: "But, as we have seen, the assessment of the capital stock of a domestic corporation which has all its property in which the capital stock is invested already assessed is duplicate taxation, and this latter result will not be inferred without specific legislation. It may be further observed that § 1676, Ballinger's Anno. Codes & Statutes, in providing the method for the assessment of domestic corporations such as this, does not contemplate duplicate taxation." See also *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261. All the provisions of the Constitution on the subject of taxation can-

not be fully and literally met. For purposes of present consideration, these provisions may be stated as follows: "All property" shall be taxed. The assessment shall be "uniform and equal," and a "just valuation" shall be placed upon all property, so that every person shall pay a tax in proportion to the value. No method of taxation in its results can fully accomplish all that the Constitution declare shall be done. As near an approach to a full compliance as is reasonably possible is all that can be expected of the legislature. One requirement of the Constitution is as mandatory in its nature as another. It is just as imperative that taxation shall be uniform and equal upon all property as it is that all property shall be taxed. It is manifest that a system which subjects some property to double taxation is not uniform and equal. Any method which can be devised by the legislature must necessarily be defective in some particulars, and must fail to meet with exactness every standard set by the Constitution. Any method adopted by the legislature which reasonably comprehends the taxation of all property once in some form, and which seeks to accomplish uniformity by avoiding double taxation as far as possible, should receive judicial sanction, for the reason that the constitutional provisions are harmonized by such a method as fully as complete harmony thereunder can be accomplished.

It will be seen that the items specified by the statute of 1907, which shall not be considered as property for the purposes of assessment and taxation, may all be classified as "credits," except the item of "moneys." So far as credits are concerned, if it is demonstrable that the total wealth of the state can be once taxed without the taxation of credits in any form, we think the Constitution is satisfied without the taxation of credits. The multiplicity of credits does not add to the property wealth of the state. If A. buys of B. a piece of real estate, and agrees, by promissory note or otherwise, to pay \$5,000 therefor, there is, as a result, in the hands of B. a credit in the amount of \$5,000; but there is not thereby created \$5,000 more property or wealth. By the transaction the land has passed from B. into the possession and control of A., and is taxable the same as if it had remained with B. The credit in the hands of B. is a matter of no value or consequence except for the prospect or faith that A. will, in the future, deliver to B. \$5,000 in actual money or other property. That money or property that may in the future come to B. is still in the hands of A., or someone else from whom A. will procure it, and it is meanwhile taxable at some place,

wherever it may be, no matter who possesses it or controls it, whether within or without this state. The credit in the hands of B. is simply the right to demand the delivery of \$5,000 worth of property at some time in the future. To tax both this right and the property which it represents is clearly double taxation. A similar illustration applies to a loan of money. At this point it is proper to remark that we think moneys cannot properly be classified with credits, as is done in the statute of 1907. Money in practical commercial operations possesses such value by way of immediate purchasing or exchange powers as in effect robs it of a mere representative character, and clothes it with the dignity of property having intrinsic value. We therefore think that the proviso in question must be held to be inoperative so far as money is concerned, since to exempt it from taxation would amount to a palpable effort to avoid the taxation of all property. Recurring now to the illustration as to a credit created by the loan of money, we will suppose that A. borrows from B. \$5,000 in cash. A., instead of B., becomes the possessor of the money, and either it, or its equivalent in other property which it purchases for A., becomes taxable in the latter's hands. To tax the money in A.'s hands and also the mere right which B. has to call upon A. for its repayment is clearly double taxation. These illustrations, it is believed, should apply to all credits. Credits are, in effect, the mere legal right with which one is clothed to demand the delivery of money or other property in the future; and until such transfer of possession is made, that property is taxed wherever it may be. Thus the total actual property or wealth of the state may be once taxed without the taxation of credits, and the constitutional requirement is thereby fully met.

In *People v. Hibernia Sav. & L. Soc.* 51 Cal. 243, 21 Am. Rep. 704, it was held, under constitutional provisions similar to ours, that credits are not property, subject to taxation within the meaning of the Constitution, which provides for the uniform taxation of all property in the state in proportion to its value. It is not necessary, in order to sustain our statute of 1907, that it should be held, as was done in California, that the legislature cannot, in its discretion, provide for the taxation of credits. It is sufficient to say that the omission of credits from a scheme of taxation does not violate the requirement that all actual property shall be taxed. It is argued that *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243, is decisive of this controversy in favor of respondent. The

act there under consideration exempted from taxation in the hands of each person \$500 of personal property and \$500 of improvements upon land. It will be seen that the act exempted actual property, and its enforcement would have deducted a large amount from the aggregate of the actual property wealth of the state as not taxable, thus plainly violating the requirement that all property shall be taxed. We have seen that the statute under discussion in the case at bar does not prevent the taxation of the total wealth of the state once, but it does prevent double taxation by way of assessing credits. The case cited is therefore not in point upon the question presented here.

It is urged that the makers of our Constitution must have intended to declare that credits are property which must be taxed, from the fact that § 2 of article 7, supra, provides that "a deduction of debts from credits may be authorized." It is insisted that the above words are a clear constitutional recognition of credits as property. If, however, we should recognize the argument as forcible, and should undertake to adopt it, we should at once be met with the requirement in the same section that all taxation shall be uniform and equal. We have seen that the taxation of credits violates uniformity and equality and effects double taxation. The great and principal subject treated in the section is that of uniformity and equality of taxation. It overshadows everything else, and whatever else is mentioned in the section is merely incidental to the main subject. Having reference to the main subject, it cannot be held that uniformity can be preserved if the Constitution means that credits must be taxed. It is our duty to adopt such construction as will most nearly harmonize all provisions in the section, with the evident chief purpose sought to be accomplished.

With the mere policy of the statute the courts have nothing to do, except in so far as the same may throw light upon the legislative intention. It may be stated, in this connection as a matter of common knowledge, that one of the most fruitful sources of inequality in taxation is the attempt to tax credits. Laws for that purpose can never be effectively enforced. Efforts to conceal the existence of the credits are so successful that a few honest persons pay the taxes, and the large majority of holders do not. Moreover, in practical experience, the tax is not really paid by the holder of the credit, but it is paid by his debtor. When mortgages are taxed, the mortgagee seldom pays the tax; but the burden thereof is imposed upon the mortgagor by way of increased rates of interest

or otherwise, and the same may be said as to increased rates of interest imposed upon borrowers generally. Such results cannot well be avoided, and doubtless the legislature had such considerations in mind as supporting the policy of this law. It was no doubt believed that all the wealth of the state can be once taxed without the taxation of credits, and that, with the constitutional requirement as to taxation of all property thus satisfied, uniformity and equality can be the better effected and the abuses above mentioned largely corrected.

We therefore think, for the foregoing reasons, that the statute is not unconstitutional, except in so far as it attempts to exempt moneys from taxation. That, however, does not invalidate the other provisions, as has been often held. The general demurrer was properly overruled, inasmuch as a cause of action was stated so far as the listing of moneys is concerned, but the judgment should be modified so as to command the appellant to list all moneys for taxation, and further provide that all credit items mentioned in the statute of 1907 shall be excluded from the assessment lists.

It is so ordered, and the cause is remanded, with instructions to so proceed. The appellant shall recover the costs on appeal.

Rudkin, Mount, Crow, and Dunbar, JJ. concur.

Fullerton, J., dissenting:

I am compelled to dissent both from the conclusion and judgment in this case. The decision is rested, as I understand it, on three propositions: (1) That credits are not property; (2) that to tax credits violates the principle of equality and uniformity in taxation, required by the Constitution; and (3) that credits are taxed by the taxation of the tangible property of the state. As the questions decided are important, I feel justified in briefly stating the grounds of my dissent.

1. The constitutional provisions on the subject of taxation appropriate to the questions before the court are set out in the majority opinion, and need not be reproduced here. A reading of them makes it at once manifest that it was the purpose and intent of the framers of the Constitution, as well as that of the people who adopted it, to require, for the purposes of revenue, the taxation of all private property in the state, of whatsoever kind or nature, equally and uniformly, in proportion to its value in money. The language is explicit. It admits of no limitation or construction. "All property" is named, and the only exception provided for is that a deduction of debts from credits may be authorized. The questions therefore

naturally arise: What is meant by the word "property"? and in what sense was the word used in the Constitution? That mortgages, notes, accounts, moneys, certificates of deposit, tax certificates, judgments, and state, county, municipal, and school district bonds and warrants are property in the general and popular sense of that term hardly admits of doubt. They are so termed and considered by all English-speaking people, by all law-writers, and by the entire commercial world. They are held by the courts to be protected against spoliation and theft by the statutes which make it a crime to despoil or steal personal property. The question of ownership and title to them is daily the subject of controversy in the civil courts. They are daily the subject of barter and sale in all the marts of commerce. They have value in money, and constitute and make up the most satisfactory character of wealth that mankind possesses. In fine, they have all the attributes of property. These propositions are matters of common knowledge, and citations of authorities are not necessary to establish them. That the word "property" was used in the Constitution in its general sense seems to me, also, to be free from doubt. It is a cardinal rule of construction that the language of a state Constitution, more than that of any other written instrument, is to be taken in its general and popular sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and its words have meaning as they commonly understand them. When, therefore, words are used which have both a general and a technical sense, the former must prevail over the latter, unless the very nature of the subject-matter indicates, or the context suggests, that the technical sense was intended. In the sentence in which the word "property" is used in the constitutional provision quoted, there is no attempt at definition. It is used without connection with any sentence or phrase which limits its meaning. Nor is there elsewhere any limitation upon its meaning. Indeed, there is no reason for concluding that the word was used other than in its general sense. That the makers of the Constitution had the right to provide for the taxation of credits, if they so desired, I think will be conceded. It will be conceded, also, that this could be done by the use of general terms. Therefore, it being true that the obligations here enumerated are "property" in the general sense of that term, and it being true that the Constitution makers used the term "property" in its general sense, it must follow that the Constitution requires the taxation of these obligations. But there is another reason

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more potent to my mind than even the foregoing, which shows that the framers of the Constitution intended to provide for the taxation of credits by the use of the general term "property." They authorized the legislature, when providing the method of taxation, to allow a deduction of debts from credits. Clearly, if it had not been understood that credits were property, and taxable as such, this deduction would not have been authorized.

2. Does the taxation of credits violate the principle of equality and uniformity in taxation required by the Constitution? The affirmative argument is that to tax these obligations is double taxation. Thus it is said that if A. loans B. \$5,000, and takes B.'s obligation to repay that sum, it is double taxation to tax the obligation in A.'s hand and the money in B.'s; but, if this be true, and the obligation be property, I cannot understand how the rule of uniformity and equality is advanced by exempting the obligation. It seems to me that this but further confuses the matter. It cannot be said that the obligation is doubly assessed. If any property is doubly assessed, it is the money, and to exempt the obligation exempts the wrong thing. But it is not sound for another reason. When A., the money lender, loans to B., the borrower, \$5,000, and takes his obligation to repay the loan, A.'s wealth is not thereby decreased \$5,000, nor is B.'s wealth increased \$5,000. The parties have only made an exchange of wealth, and each has exactly the same amount of wealth he had before. If therefore each paid taxes on \$5,000 before the exchange, in justice and equity each ought to pay taxes on a like amount thereafter. The law as it heretofore existed, however, seems to have made A. pay, after the exchange, on \$5,000, and B. on \$10,000. To correct the evil the legislature relieves A. entirely, still leaving B. to pay on double the amount he possesses. This, to my mind, is not equality and uniformity in taxation. Nor do I think any law can equalize taxes which exempts from taxation the creditor class. The burden of double taxation never falls upon them. It falls in every instance upon the property-holding debtor class, since it is the debtor who does not have the absolute interest in the property he possesses. Laws which allow the debtor to deduct from the assessed value of his property debts in good faith owing by him have, for that reason, a sense of equity; but there is no sense of equity or justice in exempting from taxation money and credits.

3. Finally, it is said that credits are taxed in other forms of property, and for that reason their exemption from taxation as credits is justified. The argument in

support of this proposition is that credits are but representations of interests in the tangible property of the state, and that, when the tangible property of the state is taxed, all the wealth within the state is taxed. But I must dissent from this proposition also. It assumes—what is obviously not the fact—that there is no wealth in credits independent of tangible property. Suppose that to-morrow a person should come into this state from some other state, bringing with him stocks and bonds to the value of a million dollars of some solvent railroad corporation whose lines do not touch this state, would anyone say that he had brought no wealth into the state, or that the wealth of the state had not been increased? Or would anyone say that the stocks and bonds were taxed by the taxation of the tangible property of the state? Obviously not. How, then, can it be said that the wealth of the state is taxed by the taxation of its tangible property? It is no answer to say that these bonds are taxed by the taxation of the railroad in another state. This does not satisfy our own laws, which require that all property within the state be taxed. Nor does it satisfy the justice of the matter. So long as this property is within the state, it requires the care and protection of the laws of the state, and it is only right that it should contribute its proportionate share to the maintenance of the state. Furthermore, if credits be property in any form, they must be taxed as property. The Constitution does not recognize vicarious taxation. The requirement that all property must be taxed means that it must be taxed directly, in the form it presents itself when the assessment lists are made up, not in the form of substitutes. Again, it is suggested in this connection, and it is a common argument used in support of laws of this character, that credits escape taxation in the major part through the dishonesty of their holders, and that, when they are found, the tax is paid by the debtors in the way of increased interest; but this does not appear to me to argue in favor of the exemption of credits. If the laws are so lax as to permit credits to escape taxation, the remedy is to reform the law, not to exempt credits. It will not do to say that no tax law can be framed that will reach credits. This is no place to point out remedies, but when the law places the premium upon honesty, instead of upon dishonesty, in these matters, the evil will disappear. But supposing it be true that a goodly part of the credits of the state will escape the assessor under the best framed law, is it not better that the part that can be reached be taxed, than that all be allowed to escape? No one

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pretends that the assessor reaches all of the tangible personal property in the state, yet I have never heard this given as a reason for the exemption from taxation of all tangible personal property.

The claim that the borrower pays the taxes on credits in the way of interest is only true in a general sense. It is true in the sense that the renter pays the taxes on rented land in the way of rents, that the builder pays the taxes on the manufacturing plants when he pays the cost of the building material, that the consumer pays the tax on the products he consumes when he pays the price of the consumed products; but it is true in no other sense. The rate of interest is regulated by law in this state, and it is this law that governs interest rates. Experience has shown that it is only by law that the exaction of excessive and exorbitant interest can be prevented. It is never done by freeing money and credits from taxation. Nor is interest lessened to any material extent thereby. This is so because freedom from taxation is only one, and a minor one, of the many conditions that regulate rates of interest. The maximum rate allowed by law is always exacted if the demand for money at the time justifies it, regardless of other conditions, and the fact that credits are or are not taxed is hardly considered as an element when determining whether the maximum rate shall be exacted.

But these latter considerations are beside the question. If the Constitution declares that notes, accounts, moneys, certificates of deposit, and the like are property, and taxable as such, the legislature is without power to exempt them from taxation, and any statute attempting so to do is void. I believe it has so declared, and for that reason I think the judgment of the lower court should be affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

FANK STEVENSON, Plff. in Err.

(— W. Va. —, 62 S. E. 688.)

Trial — judges — special — regular.

1. It is reversible error for a regular judge, pending the trial of a cause begun

Headnotes by MILLER, J.

Note. — An extensive search has failed to disclose any other case involving the right of an accused person who has pleaded guilty to be present at the examination of witnesses by the court as a preliminary to pronouncing sentence.

and continued before a special judge, duly elected to preside in the absence of such regular judge, on making his appearance at the same term, to assume jurisdiction thereof, proceed with the trial, and pronounce judgment therein.

Criminal procedure—absence of defendant—reception of evidence.

2. It is error, to the prejudice of the prisoner's legal rights, for the court, after receiving a prisoner's plea of guilty of murder in the first degree, and before pronouncing judgment thereon, to proceed, in the absence of the prisoner, to examine witnesses and hear from the special judge who presided at the time of receiving such plea statements respecting the circumstances and facts of the killing, whether such examination be for the personal satisfaction of the judge pronouncing the judgment of the court, or to advise him as to the character of judgment that should be pronounced on said plea.

Plea—withdrawal—discretion of court.

3. It is a matter addressed to the sound discretion of the trial court, reviewable here for any abuse thereof, whether it will permit a defendant to withdraw his plea of "guilty of murder in the first degree," entered after having withdrawn his former plea of "not guilty," and to plead anew his plea of "not guilty," and have a trial thereon before a jury.

(October 6, 1908.)

ERROR to the Circuit Court for Mercer County to review a judgment rendered by the regular judge of that court, sentencing defendant to death following a plea of guilty of murder in the first degree, made before a special judge presiding in the absence of the regular judge. Reversed.

The facts are stated in the opinion.

Statement by Miller, J.:

Fank Stevenson was indicted for murder in the first degree. He entered a plea of not guilty, which was thereafter withdrawn on his motion and a plea of guilty entered. Subsequently, and before any judgment was pronounced by the special judge who had received the plea, the regular judge appeared and assumed the bench, and proceeded in defendant's absence to hear statements of the special judge as to what the witnesses had testified at the time of entering the plea of guilty, and also to hear the sworn statements of a part of the witnesses summoned. Following this, the court, the regular judge presiding, adjudged defendant guilty of murder in the first degree, and sentenced him to be hung; and defendant brings error.

Mr. Hugh G. Woods for plaintiff in error.

Mr. A. M. Sutton, Attorney General, for the State.

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Miller, J., delivered the opinion of the court:

The indictment in the criminal court, returned January 8, 1907, for murder and manslaughter, was in the form prescribed by § 4200, Code 1906, and charged that the defendant, on September 21, 1906, "in the said county of Mercer, feloniously, wilfully, maliciously, deliberately, and unlawfully did slay, kill, and murder one Mose Blagman, against the peace and dignity of the state." January 12, 1907, the prisoner demurred to the indictment, which being overruled, in his own proper person he entered his plea of not guilty, and issue was joined thereon. January 26, 1907, the case was continued generally to April 8, 1907. The record does not show that anything further was done in the case until July 9, 1907, when, the regular judge having failed to attend, the attorneys present and practising in said court by ballot elected John M. McGrath judge to preside in the absence of the regular judge, who, after taking the oath prescribed by law to perform faithfully and impartially the duties of said judge of said court so long as he shall continue to act as such, assumed the bench, and proceeded with the business. Whereupon the defendant moved the court to permit him to withdraw his plea of not guilty, which was granted; and, the plea being withdrawn, in his own proper person the defendant entered a plea of "guilty of murder in the first degree, in manner and form as the state in her said indictment against him hath alleged," and the court took time to consider of its judgment thereon. Subsequently, July 18, 1907, and before any judgment on the defendant's plea of guilty was pronounced by the special judge who had received the plea and taken time to consider of his judgment, Judge Maynard, the regular judge, appeared and assumed the bench, and, as he recites in a bill of exceptions, proceeded in the absence of the prisoner and his counsel, and not in open court, to hear statements of Special Judge McGrath as to what the witnesses had testified at the time of entering the plea of guilty, and also to hear the sworn statements of a part of the witnesses summoned in the case, stating at the same time, however, as further certified in said bill of exceptions, that he had heard the statement of the special judge and of the witnesses examined solely for his personal satisfaction; the judgment pronounced being based solely on the prisoner's plea of guilty, uninfluenced by any statements of the special judge or witnesses examined. Following this proceeding the court, August 1, 1907, the regular judge presiding, the prisoner having nothing to say in opposition

thereto, adjudged him guilty of murder in the first degree, and that he be taken from the jail of the county to the penitentiary of the state, and there confined until October 25, 1907, when he should be hanged by the neck until he be dead. Immediately after judgment was thus pronounced against him, as shown in said bill of exceptions, the prisoner moved the court to set aside "its sentence and judgment, and to permit him to withdraw his plea of guilty and enter a plea of not guilty, and have his case tried by a jury," which motions, being resisted by the attorney of the state, were overruled, and the action of the court thereon was excepted to by the prisoner. On September 7, 1907, the prisoner presented his petition to the circuit court for a writ of error, but, that court being of the opinion that there was no error, the writ was refused. Whereupon, on presentation of his petition to this court, October 17, 1907, the writ was allowed.

Three questions are here presented for our consideration: First. Was it competent for Judge Maynard, the regular judge, to assume the bench and displace Special Judge McGrath while considering of his judgment on the prisoner's plea of guilty, and proceed to pronounce judgment of conviction and sentence? Second. If competent and having jurisdiction to pronounce judgment, was it error to the prejudice of the prisoner's legal rights for Judge Maynard, in the absence of the prisoner and his counsel, to hear the statement of the special judge, and examine witnesses for his personal satisfaction preliminary to pronouncing judgment of conviction and sentence? Third. Did the court err in overruling the prisoner's motion for leave to withdraw his plea of guilty, and plead anew his plea of not guilty, and have his case tried by a jury?

With respect to the first question, the record shows that Special Judge McGrath, in the absence of the regular judge, and pursuant to § 3631, Code 1906, was elected to hold the court generally in the absence of the regular judge, and not specially, to preside in this particular case. Undoubtedly, therefore, the appearance of Judge Maynard, the regular judge, operated to vacate the office of the special judge, without any order to that effect, as to all business except as to those cases the trial of which was already begun and continued before him. *State v. Carter*, 49 W. Va. 709, 39 S. E. 611; 23 Cyc. Law & Proc. pp. 611, 613, and cases cited in notes. How is it as to unfinished business in the hands of such special judge? Does the appearance of the regular judge or the adjournment of the term at which the special judge is elected to preside vacate the office of the special judge entirely? 19 L.R.A. (N.S.)

In *State v. Carter*, supra, it is said: "The appearance of the regular judge would vacate the office of the special without an order to that effect; and, if he was again absent on another day, a new election for a special judge would be necessary. . . . When a special judge fails to attend, or, being present, declines to hold court when he should do so, he thereby vacates his office, except, possibly, as to any unfinished business in his hands, and another person may be selected to hold court in lieu of the regular judge, then absent. The election of a special judge is merely for the time being, or for the disposition of a particular case or cases." There is in this case the suggestion that the appearance of the regular judge, or the absence of or declination to act of the special judge, would not vacate his office as to such unfinished business. In 23 Cyc. Law & Proc. pp. 612, 613, on the authority of the several cases cited in note 58, it is said: "A special judge does not lose jurisdiction to complete the trial of a case because the regular judge returns during the trial and resumes his duties." In *Bohannon v. Tarbin*, 25 Ky. L. Rep. 515, 76 S. W. 46, 49, one of the cases cited in said note, a special judge was elected to preside, as in this case, in the absence of the regular judge. The court there says: "The fact that the regular judge returned before the case was finally disposed of by the special judge in no wise nullified the jurisdiction of the latter. It would create inextricable confusion if, after a special judge, elected because of the absence of the regular judge, had commenced the trial of a case, his jurisdiction to further try it should be ousted by the return of the regular judge. It needs no argument to demonstrate the hardship and expense to litigants which would arise upon the adoption of such a principle." *State v. Moberly*, 121 Mo. 604, 26 S. W. 364, decided that: "Where a special judge was called in at the request of the regular judge, and for a time presided in a case, he acquired jurisdiction to try the case, which could not be divested by the regular judge; and the fact that the latter completed the trial is ground for reversal." But, on the authority of *Hyllis v. State*, 45 Ark. 478, and our own case of *State v. Carter*, supra, the rule of the cases just quoted is modified by the condition: "Unless the special judge was selected to preside only during the regular judge's absence." Our case, however, will not support such an exception to the general rule, when applied to the trial of a case already begun by a special judge; for, as already stated, it is there indicated that the return of the regular judge would not oust the special judge of jurisdiction to try and finally dispose

of any case begun before him. Whether such jurisdiction would end with the term at which such special judge was elected we need not decide, for the question does not arise; all the proceedings here involved having occurred at the same term of the court. We have decided, in *Carper v. Cook*, 39 W. Va. 346, 19 S. E. 379, that a special judge so elected retains jurisdiction to sign bills of exceptions in a case tried before him within thirty days after the adjournment of the term. But seeing there must be a reversal of the judgment on other grounds, and as the question will arise in the further proceedings in the case, it is proper, we think, that we should intimate the opinion that the jurisdiction of a special judge, elected, not to try any particular case, but to preside only in the absence of the regular judge, does end for all purposes with the adjournment of the term at which he was elected, except as to the matter of signing bills of exceptions in cases tried and finally determined by him. Authorities do hold, however, that such special judge may adjourn the hearing of a case beyond the regular term without losing jurisdiction thereof. 23 Cyc. Law & Proc. p. 612, and cases cited in note 54. The fact that the term of a regular or special judge has ended or expired before a trial begun is completed will not preclude his successor, the regular or a newly-elected judge, from trying the case, but he would have to try it *de novo*. 23 Cyc. Law & Proc. p. 565. It is said at the page just cited, on the authority of *Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258, and *Re Sullivan*, 143 Cal. 402, 77 Pac. 153, that "a judge who did not hear the evidence cannot render a valid judgment in a cause, notwithstanding the testimony may have been written down and preserved."

In answer to the second inquiry, it is argued that, as the prisoner had withdrawn his plea of not guilty after being warned by court and counsel of the effect thereof, and voluntarily entered his plea of guilty of murder in the first degree, as charged in the indictment, without offering anything in mitigation of his crime; and, as this plea was tendered to the court, and not personally to the special judge presiding at the time, it was perfectly competent for the regular judge, on appearing, to pronounce the judgment of conviction and sentence complained of without further inquiry as to the facts; the effect of a confession being to supply the want of evidence. In the able and well-considered case of *Green v. Com.* 12 Allen, 155, it was ruled that the plea of guilty of murder in the first degree did

have that effect, and, when tendered to single justice, judgment of conviction and sentence, without the intervention of a jury to try the degree of the crime, might be pronounced against him, although, without such plea, and upon a plea of not guilty in a capital crime, the trial could only be had, as provided by statute, before a full court composed of all the judges. The statute of Massachusetts, as does our statute, requires the jury to find the degree of the crime; and it was argued in that case, and decided adversely to the proposition, that, as all murder was presumed to be murder in the first degree, the court could not accept the plea of guilty in the first degree; and, as the jury in a trial of the issue on a plea of not guilty were required on the evidence to find the degree of murder, all the court could do was to accept the plea of confession, and impanel a jury to try the degree of the crime. Our statute (§ 4584, Code 1906) provides that: "If the accused plead guilty of murder in the first degree, sentence of death or confinement in the penitentiary for life shall be pronounced upon him by the court, as may seem right, in the same manner and with like effect as if he had been found guilty by the verdict of a jury." There is here given to the court a discretion either to pronounce judgment of death or imprisonment for life; certainly not an arbitrary discretion, but a reasonable discretion, and as may seem right. How is the court to be informed as to the right of the matter? The court's decision of this question is of the most vital importance to the prisoner. With him it is veritably a question of life and death. In this case the court presided over by the special judge had pursued the only practical method known to the law to inform itself as to what judgment should be rendered. It had, in the presence of the prisoner, examined the witnesses in open court, and the judge had taken further time to consider of the judgment to be pronounced. If such proceeding is necessary to advise the court, it is a part of the trial, and it follows as a necessary corollary that it must take place in the presence of the prisoner; for we have held that the prisoner must be present during the whole of his trial,—a constitutional right which cannot be waived or taken away from him by the court. *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791; *State v. Conkle*, 16 W. Va. 736; *State v. Sutfin*, 22 W. Va. 771; *State v. Greer*, 22 W. Va. 800; *State v. Parsons*, 39 W. Va. 464, 19 S. E. 876; *State v. Sheppard*, 49 W. Va. 582-611, 39 S. E. 676. The statute (§ 4567, Code 1906) provides that: "A

person indicted for felony shall be personally present during the trial therefor. . . .” And, as Judge Brannon says, in *State v. Parsons*, supra: “The great weight of authority is that he must be present when any step affecting him is taken, from arraignment to judgment, inclusive.” If, therefore, as already stated, a judge who did not hear the evidence cannot render a valid judgment in a cause notwithstanding the testimony may have been written down and preserved, or make any findings of fact in a cause tried by his predecessor, upon what principle can we sustain the judgment of conviction and sentence in this case? It is practically conceded by the attorney general, on the authorities cited, that the judgment must be reversed on this ground.

As to the third question, the motion of the prisoner to withdraw his plea of guilty, and plead anew his plea of not guilty and have a trial before a jury, no grounds for the motion were assigned. The motion was not made until the prisoner had been advised of the judgment against him upon his plea of guilty. Under such circumstances, he would be quite willing to try his chances again before a jury. But this motion would, at least at that term, have been properly addressed to the special judge engaged in the trial of the case. It is quite likely that the real ground of the prisoner's motion was his surprise at the severity of punishment, or that the special and regular judge should have made some investigation of the aggravating circumstances of his crime. It is no abuse of the discretion of the court, however, to refuse the withdrawal of a plea under such circumstances. 12 Cyc. Law & Proc. pp. 350-352, and cases cited. It is, generally speaking, a matter addressed to the sound discretion of the court, subject to review on writ of error, whether it will allow such a plea to be withdrawn. But in capital cases it is said, in 4 Bl. Com. 329, the court “is usually very backward in receiving and recording such confession out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment.” If, therefore, the motion had been properly addressed to the proper trial judge, and overruled, no good ground for the motion appearing, the judgment could not be reversed on that account.

For the reasons assigned, we reverse the judgment of the Criminal Court, and, entering such judgment as the Circuit Court should have entered, the case will be remanded to the said Criminal Court, to be therein further proceeded with according to the principles announced and directions given herein.

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ALABAMA SUPREME COURT.

BIRMINGHAM RAILWAY, LIGHT, & POWER COMPANY, Appt.,
v.

W. H. SAWYER.

(— Ala. —, 47 So. 67.)

Carrier — employee — passenger.

The rights of a section man on a street railway, who is injured while riding to his work from his home, on the company's car, without paying fare, in accordance with a custom of the company to carry such employees free upon their displaying badges furnished to them, are not those of a passenger, but merely of an employee.

(June 18, 1908.)

Case Note. — Employee of railroad, or street railway as a passenger while being carried to or from work.

This note is supplementary to the subject note to *Texas & P. R. Co. v. Smith*, 31 L.R.A. 321. As therein stated, there is a conflict among the cases upon this question. Since the publication of that note, a number of cases have broadly held that an employee, while being transported to or from his work without paying fare, is not a passenger, but an employee.

Thus it has been held that a section hand was not a passenger while riding as an employee of defendant, without paying any fare, on its car, to or from his home, from or to the place where he was working on the track. *Chicago Terminal Transfer R. Co. v. O'Donnell*, 114 Ill. App. 345, affirmed in 213 Ill. 545, 72 N. E. 1133; *Indianapolis & G. Rapid Transit Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145; *Southern Indiana R. Co. v. Messick*, 35 Ind. App. 676, 74 N. E. 1097.

In *Wright v. Northampton & H. R. Co.* 122 N. C. 852, 29 S. E. 100, it was held that a section master who, after finishing his day's work, was permitted to ride on his employer's train to his sleeping place, without paying or being expected to pay his fare, was not a passenger.

In *Ionnone v. New York, N. H. & H. R. Co.* 21 R. I. 452, 46 L.R.A. 730, 79 Am. St. Rep. 812, 44 Atl. 592, it was held that one employed to shovel snow from the track, and carried by a train toward his home after his day's work was done, the ride being a privilege incidental to his contract of service, without any charge or deduction from his wages, was not a passenger, but a fellow servant of the trainmen.

The decision in *Kilduff v. Boston Elev. R. Co.* 195 Mass. 307, 9 L.R.A. (N.S.) 873, 81 N. E. 191, that the employee, a track laborer, was still an employee, and not a passenger, while being transported from his place of work to his home, after his day's work was done, seems to have turned upon the fact that the car in which he

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Tillman, Grubb, Bradley, & Morrow for appellant.

Messrs. Powell & Blackburn for appellee.

Tyson, Ch. J., delivered the opinion of the court:

In each of the counts it is alleged that plaintiff was a passenger on defendant's car at the time he was injured. It is scarcely necessary to say that this is a material allegation, and must be proven. If the relation of the parties as that of carrier and and passenger was not shown, but that of

master and servant, or that of a mere licensee, of course, there could be no recovery in this case. In short, the plaintiff cannot be permitted to allege one relation and prove another. If the plaintiff was riding on the car by virtue of his employment and in that relation to defendant, or if he was accorded the privilege of riding solely on account of his being an employee, it is obvious that the rules of evidence governing the defendant's liability and the measure of damages recoverable would be entirely different from those that would obtain and control in the case of a passenger. If a passenger, as alleged, upon mere proof of the collision and injury, his prima facie right of recovery was established under those counts charging simple negligence. On the other hand, if he was riding as an employee, in addition to showing a collision and injury, he would have to adduce some evidence tending

was being transported was a special car, in which only the laborers who were working on that particular job were allowed to ride, and the track where the accident occurred had not been opened to the public.

In a number of jurisdictions, it has been held that where a servant performs all his work at a fixed place, doing no service for the master on the train, he is to be treated as a passenger while the master is carrying him to and from his work as a part of the contract of employment. *Hebert v. Portland R. Co.* 103 Me. 315, 69 Atl. 266 (car greaser); *Doyle v. Fitchburg R. Co.* 166 Mass. 492, 33 L.R.A. 844, 55 Am. St. Rep. 417, 46 Atl. 611 (freight clerk); *New York, L. E. & W. R. Co. v. Burns*, 51 N. J. L. 340, 17 Atl. 630 (gang laborer); *Enos v. Rhode Island Suburban R. Co.* 28 R. I. 291, 12 L.R.A.(N.S.) 244, 67 Atl. 5 (stationary flagman).

And, under these circumstances, this rule has been applied where the master carried the servant as a mere gratuity. *Carswell v. Macon, D. & S. R. Co.* 118 Ga. 826, 45 S. E. 695 (a telegraph lineman); *St. Louis, C. & St. P. R. Co. v. Waggoner*, 90 Ill. App. 556 (night telegraph operator); *Louisville & N. R. Co. v. Scott* (Louisville & N. R. Co. v. Weaver) 103 Ky. 392, 50 L.R.A. 381, 56 S. W. 674 (station agent); *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 51 L.R.A. 886, 58 S. W. 861 (a depot night watchman); *Indianapolis Traction & Terminal Co. v. Romans*, 40 Ind. App. 184, 79 N. E. 1068 (a car repairer).

In the last preceding case emphasis was placed upon the fact that the gratuity had grown to be a custom, and that the free tickets given the employees at the end of the day's work could be used at other hours and in going elsewhere than home.

Where, however, the servant's work is not confined to a fixed place, and to discharge the duties of his peculiar employment it is necessary that he should be carried from one place to another, as occasion

may require, he is in the service of the company, and not a passenger while being thus transported.

It was so held in *Louisville & N. R. Co. v. Stuber*, 54 L.R.A. 696, 48 C. C. A. 149, 108 Fed. 934, of one whose duty it was to supervise and keep in repair the water tanks and pumping machinery at the water stations along the line.

In *Travelers' Ins. Co. v. Austin*, 116 Ga. 266, 59 L.R.A. 107, 94 Am. St. Rep. 125, 42 S. E. 522, of a paymaster traveling from station to station for the purpose of paying off employees of the company.

In *Shannon v. Union R. Co.* 27 R. I. 475, 63 Atl. 488, of a switch cleaner being carried from one switch to another.

In *St. Louis, I. M. & S. R. Co. v. Harmon*, 85 Ark. 503, 109 S. W. 295, of a section hand being carried from one place of work to another.

In *Sanderson v. Panther Lumber Co.* 50 W. Va. 42, 55 L.R.A. 908, 88 Am. St. Rep. 841, 40 S. E. 368, of a foreman of a lumber camp, being carried from the camp to the mill, to obtain feed for the horses under his charge.

In *St. Clair v. St. Louis & S. F. R. Co.* 122 Mo. App. 519, 99 S. W. 775, of a tool-house foreman being carried from the place of a wreck to headquarters. This case explains the apparent contrary holding in *Haas v. St. Louis & Suburban R. Co.* 111 Mo. App. 706, 90 S. W. 1155.

But in *Harris v. Puget Sound Electric R. Co.* (Wash.) 100 Pac. 838, it was held that a gang foreman, whose duties required him to be at different places on the line of railway, was a passenger while riding to a place of work on a pass furnished him as a portion of the consideration for his services.

In *Williams v. Oregon Short Line R. Co.* 18 Utah, 210, 72 Am. St. Rep. 777, 54 Pac. 991, it was held that one employed to begin work as a brakeman at a distant point on the railroad, to which he was given a free pass, was a passenger while being transported to that point.

to show negligence; or if as a licensee, the only duty defendant owed him was not to wantonly or intentionally injure him, or to exercise due care to avert the injury after his danger became apparent. *McCauley v. Tennessee Coal, Iron, & R. Co.* 93 Ala. 356, 9 So. 611. Besides, the degree of care required with respect to plaintiff as passenger and that of an employee would be entirely different. As a passenger the defendant, as a carrier, owed him the highest degree of care; as his employer it only owed him the duty of exercising reasonable care not to injure him. It thus becomes apparent that the question whether or not plaintiff was a passenger is an important one.

Was he a passenger? According to his own testimony, which was in no wise disputed, he was riding as an employee of defendant on the car, going to his work from his home. He was at the time one of the section hands, engaged in putting in cross ties on the roadbed of defendant's track. He was furnished a badge by the defendant, which was an insignia of his employment by it, and which entitled him to be carried free upon its cars. He said: "I was riding on my badge the day I got hurt, and did not pay any fare. I was riding as an employee or workman for the company." He also testified "that it was the rule of the company to take the workmen from home to the place they went to work, and to take them back, without charging them any fare, and, I being a workman and having my badge, they carried me without making me pay any fare." On this state of facts, which, as we have said above, are without dispute, we are constrained to hold that plaintiff was not a passenger, but was in the exercise of a mere privilege connected with his employment. *Wright v. Northampton & H. R. Co.* 122 N. C. 852, 29 S. E. 100; 6 Cyc. Law & Proc. p. 543, § 4, and cases cited in note; *Elliott, Railroads*, 2d ed. § 1578a; *Labatt, Mast. & S.* pp. 1825-1829, § 624, (b), (c), and notes; *Dresser, Employers' Liability*, p. 75, § 13; *Roberts & W. Duty & Liability of Employers*, p. 183.

It is obvious, for another reason, on the facts stated by plaintiff, that there was no contract, either express or implied, that the relation of carrier and passenger should obtain between him and defendant. Indeed, the presumption that such relation existed between them was affirmatively negated by his testimony. The affirmative charge, requested by defendant, should have been given.

Reversed and remanded.

Haralson, Simpson, and Denson, JJ.,
concur.
19 L.R.A. (N.S.)

ALABAMA SUPREME COURT.

ANNIE DICKSON, by Next Friend, et al.,
Appts.,
v.

GEORGE WOOLSEY VAN HOOSE et al.

(— Ala. —, 47 So. 718.)

Deed — life estate — fee — construction.

A fee will pass by a deed from a man who, having received an absolute conveyance of real estate from his wife, recites in the deed that he is entitled to a life estate in the property by right of survivorship under the laws of the state, which interest he has agreed to sell, and grants to his grantee, his heirs and assigns, forever, all the right he has in the property, to have and to hold the life estate and interest which the grantor has, and no more.

(November 26, 1908.)

CROSS APPEALS from a judgment of the Tuscaloosa County Court partitioning certain lands formerly belonging to Barton F. Dickson, deceased; plaintiffs appealing from so much of the decree as recognized any right of defendants in the property and defendants appealing from so much as gave plaintiffs a one-third interest therein. Reversed.

Statement by Denson, J.:

The record presents no disputed evidence of fact. The plaintiffs sue as heirs at law of Barton F. Dickson, who died May 10, 1904. The defendants claim through a deed executed on December 4, 1883, by B. F. Dickson to one George A. Searcy, and from him by mesne conveyances to the present defendants. They also claim through a deed from Cadet Fiquet and W. F. Fiquet, and by limitation and prescription. The history of the property is briefly as follows: Charles J. Fiquet, the former owner of the property, died in 1867, and left the property by will to his wife, Mary A., his son, Cadet D., and his daughter, Kate E., Fiquet, jointly. In June, 1881, Kate E. Fiquet married B. F. Dickson, who, previous to his marriage to Kate E., renounced all his marital rights in her property. Subsequent to the marriage, and before her death, she, by proper deed of conveyance, conveyed this property to her husband, B. F. Dickson, and she died in 1882. Dickson at once took possession of the property, and afterwards conveyed it to George A. Searcy, from whom by mesne conveyances it reached Van Hoose and Perkins.

Note. — For discussion of the effect of other language in a deed to cut down the estate conveyed by the granting clause, see case note to *Carl-Lee v. Ellsberry*, 12 L.R.A. (N.S.) 956.

In 1888, upon a written declaration by Mary A. Fiquet that a partition of the property had been made, giving to Kate E. Fiquet these stores, but that no conveyance had been made by herself and Cadet D. Fiquet to Kate E., Van Hoose purchased from Cadet D. and W. F. Fiquet all their interest in the property, present and prospective, and received a warranty deed therefor. The present plaintiffs are the children of B. F. Dickson by his second marriage, and they base their claim upon the introductory recitals of the deed from Dickson to Searcy, which they claim show a reservation in Dickson, their father, of a reversionary interest in the property. After the institution of another suit in equity against Mrs. Whittaker to quiet her claim, an instrument was filed for record purporting to be a conveyance from Mary A. and Cadet Fiquet to Kate E. Fiquet, and dated January 1, 1881. It does not appear from the record where this deed came from nor by whom it was filed. It further appears that since March, 1883, defendants and their privies have been in continuous, adverse possession under claim of fee-simple ownership. The trial court held that a one-third interest in the property was in Van Hoose and Perkins by virtue of their purchase from Cadet and W. F. Fiquet, and that there was a reservation in the deed from Dickson to Searcy to the heirs of Dickson after the termination of the life estate. The holding of a two-third's interest in defendants and cross appellants seems to have been upon the theory that Van Hoose purchased Cadet D. Fiquet's one-third interest in fee without notice of the unrecorded deed from him to his sister Kate E., and that, by the recital of the deed to Searcy, plaintiffs' ancestor, Dickson, caused Van Hoose to purchase from Cadet D. and W. F. Fiquet their ostensible interest as heirs of their deceased sister.

Mr. Henry Flitts, for appellants:

The clear intention of the testator appears to have been to grant a life estate only; and in such case any repugnant or contradictory recitals should be rejected, and effect given to the true intent.

13 Cyc. Law & Proc. pp. 604, 606; Devlin, Deeds, § 835; Bell v. Hogan, 1 Stew. (Ala.) 537; Campbell v. Noble, 110 Ala. 394, 19 So. 28; Powell v. Glenn, 21 Ala. 458; McWilliams v. Ramsay, 23 Ala. 816; Bodine v. Arthur, 91 Ky. 53, 34 Am. St. Rep. 162, 14 S. W. 904; Fogarty v. Stack, 86 Tenn. 610, 8 S. W. 846; Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984; Williams v. Bentley, 27 Pa. 294; Berridge v. Glassey, 112 Pa. 442, 56 Am. Rep. 322, 3 Atl. 583; Rupert v. Penner, 35 Neb. 587, 17 L.R.A. 827, 53 N. W. 598; 19 L.R.A. (N.S.)

Riggin v. Love, 72 Ill. 553; Cholmondeley v. Clinton, 2 Jac. & W. 91; Coleman v. Beach, 93 N. Y. 545; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256.

Messrs. Ormond Somerville, J. J. Mayfield, and Daniel Collier for appellees.

Denson, J., delivered the opinion of the court:

Charles J. Fiquet died in Tuscaloosa county in 1867, leaving a last will and testament. He left surviving him a widow and several children. He devised the property here in dispute to his widow, Mary Ann, his son, Cadet D., and his daughter Kate E., Fiquet. On January 1, 1881, according to plaintiffs' contention, Mary Ann and Cadet D. conveyed their interests in the property to Katie E. In June, 1881, Katie E. Fiquet intermarried with Barton F. Dickson; he having, at a time shortly prior to the marriage, but in contemplation of it, renounced his marital rights in the property of the said Katie E. It is shown by the evidence that, subsequent to the marriage, Katie E. executed to her husband, the said Barton F. Dickson, an absolute conveyance of all of her property, and that she died without issue in January, 1882. Dickson took possession of the property after his wife's death, and on the 4th of December, 1883, sold and conveyed the property involved in this litigation to George A. Searcy, whence, by mesne conveyances, defendants claim to have title to the property. Barton F. Dickson married a second time. He died May 10, 1904, leaving surviving him three children by the second wife, who are the plaintiffs in this case, and who claim title to the property sued for as the only heirs at law of their father.

Under the proof contained in the record, whether or not they have shown title to the property depends upon the construction which should be placed upon the deed executed by Dickson to Searcy; the precise point being whether that deed conveys only an estate terminable on the death of the grantor or an estate in fee. That the deed may be the more easily referred to, and its contents better kept in mind, we transcribe it here: "Whereas the late Mrs. Katie E. Dickson, now deceased, was seised and possessed in her lifetime in fee of the real property hereinafter described—the same then being a part of the corpus of her statutory separate estate under the laws of Alabama. And whereas Barton F. Dickson, who was the husband of the said Mrs. Kate E. Dickson, dec'd, has survived her; and under and by virtue of the laws of said state became entitled to the use and occupation of said real property for and during the term of his

natural life; and (since the death of said Mrs. Katie E. Dickson), he has been in the quiet and undisturbed possession and enjoyment of the same. And whereas said Barton F. Dickson has agreed to sell to said Geo. A. Searcy his life estate and interest in the real property aforesaid. This indenture made and entered into between Barton F. Dickson, party of the first part, and George A. Searcy, party of the second part, witnesseth: That said party of the first part, for and in consideration of the sum of two thousand five hundred dollars, lawful money of the United States of America, to him in hand paid by the party of the second part, at or before the enrolling and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto said party of the second part and to his heirs and assigns forever, all of the right, title, interest, estate, possession, claim and demand whatsoever, as well in law as in equity (of, in, and to the following described real property) of said party of the first part, and of every part and parcel thereof, with the appurtenances, that is to say: That portion [here follows the description of the property conveyed, it being all the property in dispute, which description we omit]. To have and to hold all and singular the life estate and interest which said party of the first part hath in the above mentioned and described premises together with the appurtenances, and no more, unto said party of the second part, his heirs and assigns forever. In witness whereof, said party of the first part hereunto sets his hand and seal this 4th day of December, 1883."

It is true the real inquiry in the construction of a deed is to establish the intention of the parties, especially that of the grantor; but a corollary to this rule is that the intention must, if possible, be gathered from the language used in the instrument submitted for construction, and that, when it can in this way be ascertained, arbitrary rules are not to be resorted to. If, however, two conflicting intentions are expressed, there is no alternative but to construe the deed by these rules even though they may be denominated arbitrary. 17 Am. & Eng. Enc. Law, p. 2; 13 Cyc. Law & Proc. p. 604 (11); 2 Devlin, Deeds, 1st ed. §§ 836, 837; Campbell v. Gilbert, 57 Ala. 569; Campbell v. Noble, 110 Ala. 394, 19 So. 28; May v. Ritchie, 65 Ala. 602; Green Bay & M. Canal Co. v. Hewett, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382; Maker v. Lazell, 83 Me. 562, 23 Am. St. Rep. 795, 797, 22 Atl. 474; Wilkins v. Norman, 139 N. C. 40, 111 Am. St. Rep. 767, 51 S. E. 797; Robinson v. Payne, 58 Miss. 690. 19 L.R.A. (N.S.)

Looking alone to the granting clause in the deed in judgment, we think variant, judicial opinions in respect to its meaning an impossibility. Indeed, it will not admit of, nor does it call for, construction. It is couched in language fully and accurately expressive of an intention to convey to the grantee every interest the grantor owned in the lands conveyed, and to vest in the grantee a fee-simple estate.

But the plaintiffs insist that the part of the deed which precedes the granting clause manifests an intention of the grantor to convey the interest he owned in the lands or to which he was, by curtesy, entitled as tenant for life; and, further, that this theory is strengthened and made more tenable by the habendum clause. If this be true, then, bearing in mind what has been said of the granting clause, two conflicting intentions are expressed, and the deed should be construed according to the well-recognized rules of interpretation. Authorities, *supra*. One of the cardinal rules is that deeds of bargain and sale founded upon a valuable consideration are to be construed most strongly against the grantor and in favor of the grantee. *Seay v. McCormick*, 68 Ala. 549; 2 Devlin, Deeds, § 848, and cases cited in note 2 to the text; *Lamb v. Medsker*, 35 Ind. App. 662, 74 N. E. 1012; *Whetstone v. Hunt*, 78 Ark. 230, 93 S. W. 979. 8 A. & E. Ann. Cas. 443; *Eudd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321. Another is that the granting clause in a deed determines the interest conveyed, and that, unless there be repugnancy, obscurity, or ambiguity in that clause, it prevails over introductory statements or recitals in conflict therewith, and over the habendum, too, if that clause is contradictory or repugnant to it. *Webb v. Webb*, 29 Ala. 588, 606; *McMillan v. Craft*, 135 Ala. 148, 33 So. 26; *Gould v. Womack*, 2 Ala. 83; *Kershaw v. Boykin*, 1 Brev. 301; *Huntington v. Havens*, 5 Johns. Ch. 23; *Green Bay & M. Canal Co. v. Hewett, supra*; 13 Cyc. Law & Proc. pp. 619, 666; 9 Am. & Eng. Enc. Law, p. 139, and cases cited on note 1 to text on page 140; 17 Am. & Eng. Enc. Law, p. 8, and cases cited in note 6; Devlin, Deeds, 2d ed. § 838a; *Wilkins v. Norman, supra*; *Berridge v. Glassey*, 112 Pa. 442, 56 Am. Rep. 322, 3 Atl. 583; *Whetstone v. Hunt*, 78 Ark. 230, 93 S. W. 979, 8 A. & E. Ann. Cas. 443; 3 Washb. Real Prop. 6th ed. § 2360. The reason underlying the rule that introductory statements and recitals must yield to the granting clause is that they are nonessential to the validity of the deed, while the granting clause is its very essence. It has been said that the habendum must give way, because the granting clause is necessary to make the deed effective, while the habendum

clause is not. *Ratliffe v. Marrs*, 87 Ky. 26, 7 S. W. 395, 8 S. W. 876. And by another court it has been said: "It is a rule in the construction of deeds that of two repugnant clauses therein the first shall prevail against the second; and, in accordance with this rule, . . . the meaning of the premises shall not be changed by the words of the habendum, that is, as to irreconcilable differences." *Chamberlain v. Runkle*, 28 Ind. App. 599, 63 N. E. 486; *Hunter v. Patterson*, 142 Mo. 310, 44 S. W. 250; *Budd v. Brooke*, supra. If, as contended by appellants, the habendum attempts to qualify and limit the estate granted to a life estate, then there can be no doubt that it irreconcilably conflicts with, and is repugnant to, the granting clause, for that clause is without any ambiguity or obscurity, and unequivocally conveys all the estate owned by the grantor in the premises to the grantee absolutely. Upon the premises stated, and proceeding in accordance with the rules and principles enunciated, it seems clear that the prefatory recitals and the habendum should yield to the granting clause in the deed here considered, and consequently that the deed should be held to convey all the interests of every description that the grantor owned in the premises to the grantee absolutely.

What has been written is not in conflict with any of our own decisions relied on by the appellants' counsel, when they are properly interpreted and applied. The cases referred to, it will be found upon investigation, enunciate correct rules in either of two categories: (1) When the granting clause is either silent or ambiguous; and (2) when it is necessary to give explanation or definition of words that are used in the premises of a deed. Thus the word "heirs" used in the premises may be construed by the aid of the habendum to mean "children," and vice versa. But the cases are not in point where there appears an irreconcilable conflict between the granting and habendum clauses. *McCombs v. Stephenson* (Ala.) 44 So. 867; *Southern R. Co. v. Hays*, 150 Ala. 212, 43 So. 487; *Havens v. Sea Shore Land Co.* 47 N. J. Eq. 365, 20 Atl. 497; *Linville v. Greer*, 105 Mo. 380, 65 S. W. 579. But, if we take the deed and construe it by its "four corners," without resorting to any rule that requires the exclusion of any part of it, there may still be legitimately evolved from it, we think, an intention on the part of the grantor to vest in the grantee every interest he owned in the premises conveyed. Its several parts, read together, are consonant with this idea. The deed evinces care and precision in its preparation. Besides, the evidence without conflict shows that it was drawn by a trained lawyer. It should

be construed in all its parts "with respect to the actual, rightful state of the property at the time at which the deed was executed." 2 Devlin, *Deeds*, § 851, and cases cited in note 3 to the text. Of necessity, the plaintiffs' contention that the title is in them depends on the fact, or the assumption of the fact, that Barton F. Dickson had an interest in the land other than that of an estate by curtesy. Indeed, the uncontradicted testimony, as we have already recited, shows that he renounced his marital rights in the property of his wife, Katie E., and that subsequently she executed to him a deed to all of her property. And this was the status of the property at the time of her death, and at the time the deed to Searcy was executed. Dickson owned an absolute estate. All this being true, it seems that while the deed may manifest doubt in the minds of the grantor and scrivener as to the exact status of the grantor's title to the property, and the extent of his interest, yet it evinces an intention to pass to the grantee all the interest he possessed, whether as tenant by curtesy or otherwise. "Life estate" would have covered all the estate the surviving husband owned, if he claimed only an estate by curtesy; and the words "and interest" would, in such a state of the case, have been wholly unnecessary; but, having title otherwise than by curtesy, it was necessary to employ other words than "life estate" to cover and convey such title, and the words "and interest" are apt to designate and effectuate a conveyance of whatever other estate or ownership he had in the property. *Smith v. Crosby*, 86 Tex. 15, 40 Am. St. Rep. 818, 23 S. W. 10. Thus reading and construing the deed, we conclude that it was the purpose of the grantor to convey his life estate, if no more than that he owned, but, in all events, to vest the grantee with all the title he owned. This seems to be the predominant intention as reflected by the granting clause, and we think the habendum is reconcilable with this view. Such is the result obtained from the construction of the deed by its four corners, and the attendant circumstances (shown without conflict in the testimony) abundantly support the conclusion. It follows that the plaintiffs are without title to the property sued for, and cannot take anything by their appeal. It also follows that the court erred in adjudging plaintiffs entitled to recover an undivided one-third interest in the property sued for, together with damages for detention.

Upon the cross appeal the judgment of the trial court is reversed, and a judgment will be here rendered to the effect that plaintiffs are not entitled to recover, and adjudg-

ing the costs of the suit in the court below, together with the costs of these appeals (direct and cross), against them.

Reversed and rendered on the cross appeal.

Tyson, Ch. J., and Simpson and Anderson, JJ., concur.

ARKANSAS SUPREME COURT.

F. F. KITCHENS, Public Administrator,
Appt.,
v.

CHARITY JONES et al.

(— Ark. —, 113 S. W. 29.)

Widow's allowance—surplus from foreclosure.

The surplus arising from a foreclosure sale of decedent's real estate after his death is not to be regarded as personalty within the operation of a statute allowing the widow and minor children a certain sum out of personalty left by him.

(October 12, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Phillips Coun-

Case Note.—*Is surplus realized upon foreclosure sale of real estate after mortgagor's death to be deemed real or personal property?*

As, at the decease of a mortgagor, his equity of redemption in encumbered land descends as realty, the surplus arising from a subsequent foreclosure sale will possess the same character and descend to his heirs or devisees, instead of to his personal representatives. *Wright v. Rose*, 2 Sim. & Stu. 323; *Bourne v. Bourne*, 2 Hare, 35; *Matson v. Swift*, 8 Beav. 374; *Shaw v. Hoadley*, 8 Blackf. 165; *Varnum v. Meserve*, 90 Mass. 158; *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 7 Am. Dec. 478; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293; *Fliess v. Buckley*, 90 N. Y. 286, affirming 22 Hun, 551; *Delafield v. White*, 7 N. Y. S. R. 301 (affirmed in 43 Hun, 641); *Cox v. McBurney*, 2 Sandf. 561; *Snow v. Warwick Inst. for Sav.* 17 R. I. 66, 20 Atl. 94; *Re Knapp*, 25 Misc. 133, 54 N. Y. Supp. 927; *Chaffee v. Franklin*, 11 R. I. 578; *Allen v. Allen*, 12 R. I. 301.

While the doctrine above stated was applied in *Varnum v. Meserve*, supra, it was also held that the mortgagor's personal representative might recover such surplus where the mortgage stipulated that the surplus arising from the sale, if any, should be paid to the mortgagor or his assigns. The contrary, however, was held in *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293.
19 L.R.A. (N.S.)

ty allowing petitioners a sum out of the estate of John Jones, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Campbell & Stevenson and J. M. Vineyard, for appellant:

The surplus after the sale of the equity of redemption was realty.

11 Am. & Eng. Enc. Law, 2d ed. pp. 210, 211; *State use of Ashley v. Lawson*, 6 Ark. 269; *Hannah v. Carrington*, 18 Ark. 100; 1 Jones, Mortg. § 611; *Casborne v. Scarfe*, 1 Atk. 603; *Clark v. Reyburn*, 8 Wall. 318, 19 L. ed. 354.

Mr. M. L. Stephenson, for appellees:

The decree of the chancellor converted the estate into personalty, and as such the widow and minors are entitled to the statutory allowance.

Turner v. Davis, 41 Ark. 282; *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56; *Coolidge v. Burke*, 69 Ark. 237, 62 S. W. 583; *Re Simmons*, 55 Ark. 485, 18 S. W. 933; *Loftis v. Glass*, 15 Ark. 681; 9 Cyc. Law & Proc. p. 822.

Hill, Ch. J., delivered the opinion of the court:

John Jones died in April, 1906, leaving a widow and children, some of whom were minors. At the time of his death he was

It was held in *Beard v. Smith*, 71 Ala. 568, in harmony with *KITCHENS v. JONES*, that, as such surplus is realty, the mortgagor's widow is not entitled to have a deficiency in the statutory amount of the deceased's personalty, to which she is entitled, made up therefrom.

So, a husband's estate by the curtesy may be set off to him in the surplus arising from a foreclosure sale of his wife's realty, made after her death, under a deed of trust in which he joined, as such surplus is deemed realty. *Robinson v. Lakeman*, 28 Mo. App. 135.

A surplus arising from a foreclosure sale made after the mortgagor's decease will be treated as realty, in which his widow is entitled to dower, irrespective of whether she was a party to the mortgage. *Cornog v. Cornog*, 3 Del. Ch. 407; *Mantz v. Buchanan*, 1 Md. Ch. 202; *Hinchman v. Stiles*, 9 N. J. Eq. 361, S. C. 454; *Hawley v. Bradford*, 9 Paige, 200, 37 Am. Dec. 390; *Tabele v. Tabele*, 1 Johns. Ch. 45; *Titus v. Neilson*, 5 Johns. Ch. 452; *Smith v. Jackson*, 2 Edw. Ch. 28; *Matthews v. Dur- yee*, 4 Keyes, 525, affirming 45 Barb. 69; *Clarkson v. Skidmore*, 46 N. Y. 297; *Fox v. Pratt*, 27 Ohio St. 512; *Society for Savings v. Drake*, 10 Ohio C. C. 59; *Reed v. Morrison*, 12 Serg. & R. 21; *George v. Cooper*, 15 W. Va. 666; *Sheppard v. Sheppard*, 14 Grant, Ch. (U. C.) 174; *Thorpe v. Richards*, 15 Grant, Ch. (U. C.) 403.

And this doctrine was applied in *Pickett v. Buckner*, 45 Miss. 226, notwithstanding

the owner of certain real estate in the city of Helena, which was encumbered by a deed of trust. Default had occurred in the performance of the conditions of the deed of trust before his death, and, after his death, the deed was foreclosed in the chancery court, and the property sold by a commissioner of the court to satisfy the mortgage debt. The proceeds of the sale paid off the mortgage and left a surplus of \$554.57, which was turned over by the commissioner in chancery to Kitchens, public administrator, who was administering the estate of Jones. The land was not the homestead of the deceased. The dower rights of the widow had been released in the trust deed. This surplus was the only asset of the estate, which was insolvent. Charity Jones filed a petition in the probate court of Phillips county, representing that she was the widow, and that there were minor children, of the said John Jones, deceased; that the estate of her husband exceeded \$300 in value; and she prayed that the sum of \$300 be paid to her out of said fund for the use of herself and minor children. Trial was had in the probate court, and, on appeal, in the circuit court, upon an agreed statement of facts. The circuit judge granted the petition, and the administrator has appealed.

This appeal involves a construction of § 3 of Kirby's Digest, which reads as follows: "When any person shall die leaving a widow and minor children, or widow or minor children, and it shall be made to appear to the court that the personal estate of such deceased person does not exceed in value the sum of \$300, the court shall make an order vesting such personal property absolutely in the widow and minor children, or widow or minor children, as the case may be, when the court is satisfied that reasonable funeral expenses of such persons not to exceed \$25 have been paid or secured; and

in all cases where the personal estate exceeds in value the sum of \$300, the widow and minor children, or widow or minor children, as the case may be, may retain the amount of \$300 out of such personal property at its appraised valuation." In *Wilson v. Masie*, 70 Ark. 25, 65 S. W. 942, it was held that this statute repealed the pre-existing statutes upon this subject, and effected a change in the law from an estimate of the whole mass of the decedent's property to an estimate of the personal property alone in making this allowance to the widow and minor children. This case, therefore, turns upon the character of the estate of Jones in the mortgaged property. In *State use of Ashley v. Lawson*, 6 Ark. 269, the court said: "The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law, and is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an estate of inheritance at law." The nature of the equity of redemption is thus stated in the encyclopædia: "An equity of redemption is an estate in the mortgaged property, and is subject to all the incidents of ownership. It may be conveyed or devised. It descends to the owner's heirs or personal representatives according to the nature of the mortgaged property, and is subject to curtesy and homestead." 11 Am. & Eng. Enc. Law, 2d ed. pp. 209, 210. The text is well supported by authority, including several Arkansas cases cited in the note. It is clear, therefore, that the equity of redemption left by Jones at his death was real property, and descended as real property descends.

The question remains whether its conversion into cash through the foreclosure of the mortgage changed its character within the meaning of this statute. The argument is made that the power of conversion is well

the legal title to encumbered realty is vested in the mortgagee.

Notwithstanding a widow who joined in a mortgage of partnership realty is entitled to dower in the surplus from a foreclosure sale of partnership realty, made after the death of one copartner, still, as to partnership creditors, such surplus will be regarded as personalty. *Smith v. Jackson*, 2 Edw. Ch. 28.

But the delay of a widow in asserting her dower right to such surplus until after a portion has been paid by the sheriff, who made the sale, to a judgment creditor of the husband, will defeat her right thereto in the absence of fraud or collusion against her, as it is then impossible to restore the judgment creditor to *statu quo*, as his judgment lien cannot be restored. *Gemmill v. Richardson*, 4 Del. Ch. 599.

The following cases rest upon statutory 19 L.R.A. (N.S.)

authority for endowing a widow in the surplus arising from a foreclosure sale subsequent to the mortgagor's death. *Virgin v. Virgin*, 189 Ill. 144, 59 N. E. 586, affirming 91 Ill. App. 188; *Ratliffe v. Mason*, 92 Ky. 190, 17 S. W. 438, modifying 14 S. W. 960; *Burrall v. Bender*, 61 Mich. 608, 28 N. W. 731; *Hall v. Marshall*, 139 Mich. 123, 111 Am. St. Rep. 404, 102 N. W. 658; *Burnet v. Burnet*, 46 N. J. Eq. 144, 18 Atl. 374.

And this doctrine was applied in *Gwynne v. Estes*, 14 Lea, 662, under such a statute, notwithstanding the mortgage expressly stipulated that any surplus should be paid to the mortgagor.

And dower may be set out in the proceeds of such a sale where the husband died after a decree for, but prior to, the sale. *Holden v. Dunn*, 144 Ill. 413, 19 L.R.A. 481, 33 N. E. 413.

established, and that the chancery court had the right to convert the realty into personality; and, having that right, that it changed the character of the property. A consideration of the cases cited may be useful. *Coolidge v. Burke*, 89 Ark. 237, 62 S. W. 583, and *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56, were cases where the surviving partner converted partnership assets from one class of property to another, and it was held that the property passed in its converted state.

The same principle was recently recognized in *French v. Vanatta*, 83 Ark. 306, 104 S. W. 141. There is a radical difference between those cases and this. The estate of a partner does not take a share of the partnership assets until the partnership is wound up; and a surviving partner, or a court, in order to wind it up, may convert it, and naturally the asset coming from the partnership should descend in the form in which it falls into the estate. But in the case at bar the right of the widow and minor heirs accrued, under the plain terms of the statute, at the time of the death of the husband and father, and not at a later time, when, in the course of the administration of his estate, his property has been changed from realty to personality. In *Loffis v. Glass*, 15 Ark. 680, and *Turner v. Davis*, 41 Ark. 270, the interest under consideration was the proceeds of a sale of real estate, and not the real estate itself; and it was held that the interest was personality. That is not true here, for the inheritance was not of the proceeds, but of the land itself, subject to the mortgage, which could have been discharged at any time by the payment of the mortgage debt. In *Re Simmons*, 55 Ark. 485, 18 S. W. 933, after stating the rule that, where a conversion is rightfully made, whether by court or trustee, all the consequences of conversion must follow, the court, through Chief Justice Cockrill, said: "It may be that this statement of the rule is subject to the explanation or qualification that the conversion takes effect only to the extent of the purpose for which conversion was required, where, for example, a surplus remains from the proceeds of land sold to satisfy a decree of foreclosure. In such a case the conversion to raise a surplus over the decree and costs was not required, and was probably not intended by the court; and the rights of the parties in interest, it is held, remain the same as if no conversion had taken place, although the sale was rightful." This statement of the principle is absolutely conclusive here, and is in accord with the authorities, as will be seen by those cited in the opinion.

Mr. Woerner thus states the same principle: "By the sale the real estate is converted into money. But the conversion is

complete and effectual only to the extent and for the purposes for which the sale was authorized, whether by the will or by the order of the court. So far as these purposes do not extend, and in so far as any of them do not take effect, in fact or in law, the property retains its former character in respect of the rights of its owner, and passes accordingly. The surplus of the proceeds of a sale ordered for the payment of debts remaining after the debts and expenses of administration have been discharged retains the character of real estate for the purpose of determining who is entitled to receive it, and goes to the persons to whom the real estate would have gone but for the conversion." 2 *Woerner, American Law of Administration*, § 481. The status of the decedent's estate is fixed under this statute when he dies, and the allowance contemplated by it must be made out of the personal property as it then existed, and not from the proceeds of realty which may thereafter assume personal form. In this case his equity of redemption descended at his death to his widow and children, according to the statute of descents and distribution, as realty. Its subsequent conversion to pay the debt against it does not let them in to share in it as personal property, for the only purpose of the conversion was to pay the mortgage debt, and not to change the status of the property.

The judgment is reversed and the cause remanded, with directions to enter a judgment in conformity to this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

THOMAS B. WALKER, Plff. in Err.,
v.

SHASTA POWER COMPANY.

(87 C. C. A. 660, 160 Fed. 856.)

Eminent domain — private use — effect on right.

1. That a corporation seeking by right of eminent domain property necessary to enable it to generate a supply of electricity has power to serve a private use will not defeat its application for property which

Case Note. — Eminent domain; generation of electricity for sale to public for the purposes of power as a public purpose.

The question as to the effect of mingling a private with a public purpose on the right to exercise the power of eminent domain is not within the scope of this note.

As shown in the note to *State ex rel. Tacoma Industrial Co. v. White River Power Co.* 2 L.R.A.(N.S.) 842, there is a de-

house and installed therein machinery sufficient to generate electricity by the use of the water to the extent of more than 2,000 horse power, and constructed a pole line about 27 miles in length for the purpose of transmitting the electricity thus generated to a substation which it had constructed in the city of Redding. In the substation it had installed machinery and had extended pole lines therefrom throughout the city of Redding for the purpose of distributing electricity. It commenced the present suit for the purpose of condemning a right of way for its ditch and flume over the lands of the plaintiff in error. It alleged in the bill that

its purpose was to supply, by means of electricity and electric power, the necessary public needs in the county of Shasta and elsewhere in the state of California for light, heat, and power, and to supply a necessary public use as aforesaid; that it would be impossible to utilize its water for said necessary public use except by taking the same out of Bear creek, and conducting the same, by means of its ditch, along its surveyed and established ditch line, over and across the land of the plaintiff in error; and further alleged that a large part of the public in general and a large proportion of the inhabitants and citizens, residents, house-

self into a public service corporation by a mere offer to serve the public and submit to legislative control.

So the same court, in *State ex rel. Shropshire v. Superior Ct.* (Wash.) 99 Pac. 3, held that the supplying of water for boilers in order to generate steam for power purposes for private manufacturing concerns is not a public purpose, and rejected the contention that, when water is furnished to a mill proprietor, it is furnished to an inhabitant for his use just as in the case of furnishing to a home.

State ex rel. Harris v. Olympia Light & P. Co. 46 Wash, 511, 90 Pac. 656, is not opposed to the other decision on this point, as the court there merely upheld the right to condemn land for purposes of furnishing electric power to operate a street railway, the operation of which itself is a public purpose; rejecting the contention that the right of eminent domain should not be permitted for such purpose because the corporation's articles authorize the furnishing of power to individuals, which is not a public use, and because it is possible for the corporation successfully to evade detection in case such power is furnished to individuals after condemnation for a public use.

The decision in *State ex rel. Dominick v. Superior Ct.* (Wash.) 100 Pac. 317, is merely to the effect that the fact that a corporation seeking to exercise the power of eminent domain will sell and deliver a portion of its electrical power to third persons and corporations, to be by them used for public and municipal lighting and in the operation of railroads and railways,—purposes which, in themselves, are public,—does not afford a sufficient reason for denying to it the right of eminent domain. The court said it was unnecessary to determine to what extent a public service corporation may use electricity generated for public purposes for purposes previously denominated private, or whether it may acquire property by condemnation to generate electricity to be disposed of, independently of its necessities as a public service corporation, under the act of March 13, 1907, which provides that, under certain conditions, a corporation authorized to condemn property for the purpose of generating electrical power for certain public purposes 19 L.R.A. (N.S.)

therein mentioned may sell electric light outside the limits of a municipality, and electric power both inside and outside such limits, to private consumers, from the electricity generated and transmitted by it for public purposes and not needed by it therefor. The court remarked, however, that it was questionable whether the legislature by that act intended merely to enlarge or extend the uses that might be made of electricity generated for public purposes, and not needed therefor, or whether it intended to enlarge the power of eminent domain itself; adding that, if the former was intended, the act would seem to be entirely free from constitutional objection, while, in the latter case, its validity would be very questionable. In view of the previous rulings of the court. The court, however, did not undertake to decide either the purpose of the legislature or the validity of the act.

The Virginia court of appeals in *Miller v. Pulaski* (Va.) 63 S. E. 880, adhering to its decision in *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194, while conceding that the furnishing of light to the inhabitants of a town is a public use, held that the furnishing of electric light or power to "other persons, companies, or corporations" is not a public use for which the power of eminent domain may be exercised.

The furnishing of electricity for the use of inhabitants in a thickly-settled and extensive territory, for illuminating purposes and for the use of extensive street surface railroads, constitutes a public use for which the power of eminent domain may be exercised. *Re Niagara, L. & O. Power Co.* 111 App. Div. 686, 97 N. Y. Supp. 853.

The decision in *Re East Canada Creek Electric Light & P. Co.* 49 Misc. 505, 99 N. Y. Supp. 109, is merely to the effect that the furnishing of light to a municipality is a public purpose for which a private corporation may exercise the power of eminent domain.

As to effect of offer to serve public on right to resort to eminent domain in aid of attempt to transmute water power into electricity for sale, see case note to *Jones v. North Georgia Electric Co.* 6 L.R.A. (N.S.) 122.

holders, and freeholders within the county of Shasta and elsewhere in the state of California, are not supplied with electricity or electric current for heat, light, or power, and the supplying of electricity and electric current for heat, light, and power to the public in general, and to the inhabitants, citizens, residents, householders, and freeholders within the county of Shasta and elsewhere in the state of California, is and was, at all of the times therein mentioned, a public necessity, and that the right of way over the said land of said defendant, T. B. Walker, sought to be condemned, is necessary for said public use. The answer denied, on information and belief, that the defendant in error was organized for the purpose set forth in the complaint, and denied, upon information and belief, that its purpose was "to generate or transmit or furnish electricity or electric current to the public in general or to all inhabitants or persons within the county of Shasta or elsewhere in the state of California for the necessary public use or use of light or power or heat," and alleged that the plaintiff in error "believes, and upon information and belief alleges, that it is the purpose of the corporation to sell electricity and electric current to such persons as the board of directors shall deem proper," etc.; "that it is not the purpose of said plaintiff to furnish electricity or electric current to every individual member of the community in the county of Shasta, or any community, who shall demand or request the delivery thereof, but that said corporation only proposes to deliver electricity and electric current which it does not use itself, and to deliver such portions which it does not use itself only to such persons and in such locality and in such manner as the board of directors of said plaintiff shall deem proper." Upon the issues and evidence the court found as facts, among others, that the defendant in error, immediately after its organization in 1904, acquired the right to divert and use 3,000 inches, measured under a 4-inch pressure, of the waters of Hat creek and other creeks in the county of Shasta, and commenced the construction of its ditches as alleged in the bill, and as set forth in the statement of the facts; "that said plaintiff is not engaged in any private business, nor has it for its own private purposes any use for any of said electricity except such as may be necessary for the heat and light of its said works, which are incidental to the said public use aforesaid; that it is necessary for said plaintiff to conduct water by means of said ditches, flumes, and pipe lines at large expense as above found to its said water house, and to use the said water to operate such machinery for the purpose of supplying 19 L.R.A. (N.S.)

the public of said Shasta county as hereinbefore found, and for such public uses as hereinbefore found." The court decreed to the defendant in error a right of way for its ditch across the lands of the plaintiff in error upon payment to him of the sum of \$742.30 and the costs of suit.

The final order of condemnation recites: "It is hereby ordered, adjudged; and decreed that the strip of land hereinafter described, being the land described in the complaint herein, as sought to be taken by the plaintiff, be and the same is hereby finally condemned for the use of plaintiff for a right of way for the ditch described in the complaint herein, and for the purpose of construction, maintenance, and operation thereon of said ditch and the running of water therein, and for the purpose of using the same by plaintiff in the construction, maintenance of said ditch, and the running of water across the said land of said defendant in the said ditch, solely for the public use described in said complaint and the findings and judgment heretofore made and entered herein." Upon the trial there was no evidence showing, or tending to show, that the defendant in error was engaged in any private business or intended to engage therein. It offered to prove as part of its case that it did not intend to engage in any private business, and it adduced testimony that it had not erected any works or engaged in any private enterprise to use any portion of the power, light, or heat. On the trial, for the purpose of showing that it had deprived itself of the power to engage in the private enterprise permitted by its articles of incorporation, it offered in evidence amended articles of incorporation which it had adopted since the commencement of the suit, in which it had eliminated from its powers the power to engage in any private enterprise whatever. Objection to such evidence was made on the ground that the amendment was made subsequent to the commencement of the suit, and the objection was sustained. The allegations of the bill that a large part of the public in general, and a large portion of the citizens, residents, householders, and freeholders within the county of Shasta and elsewhere in the state of California, were not supplied with electricity or electric current for light, heat, or power, and that the supplying of the same for such purposes to the public in general and to the inhabitants, citizens, etc., within the county of Shasta and elsewhere in the state of California, was, at all of the times mentioned, a public necessity, was denied in the answer.

Argued before Gilbert and Ross, Circuit Judges, and De Haven, District Judge.

Messrs. A. E. Bolton and Reid & Dozier, for plaintiff in error:

To invoke eminent domain the use must be a public use.

1 Lewis, Em. Dom. 24 ed. 418; Consolidated Channel Co. v. Central P. R. Co. 51 Cal. 271; Lorenz v. Jacob, 63 Cal. 76; Amador Queen Min. Co. v. Dewitt, 73 Cal. 485, 15 Pac. 74; Cummings v. Peters, 56 Cal. 593; Gilmer v. Lime Point, 18 Cal. 252; Turlock Irrig. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379; Spring Valley Waterworks v. San Mateo Waterworks, 64 Cal. 131, 28 Pac. 447; People ex rel. Robinson v. Pittsburgh R. Co. 53 Cal. 697; State v. Hazelton & L. R. Co. 40 Ohio St. 504; Sholl v. German Coal Co. 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; Nickey v. Stearns Ranchos Co. 126 Cal. 152, 58 Pac. 459; Laguna Drainage Dist. v. Charles Martin Co. 144 Cal. 216, 77 Pac. 933; Lindsay Irrig. Co. v. Mehrtens, 97 Cal. 680, 32 Pac. 802.

Whether there is a public need which is to be supplied by the proposed use is a question for the jury.

People ex rel. Bingham v. Brighton, 20 Mich. 71; Rensselaer & S. R. Co. v. Davis, 43 N. Y. 145; Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 420; San Mateo County v. Coburn, 130 Cal. 634, 63 Pac. 78, 621; Cummings v. Peters, 56 Cal. 597.

The person from whom land is taken can raise the question that the property is not being applied to a public use.

Re Niagara Falls & W. R. Co.; Cummings v. Peters; and San Mateo County v. Coburn,—supra; Spring Valley Waterworks v. San Mateo Waterworks, 64 Cal. 130, 28 Pac. 447; People ex rel. Bingham v. Brighton, supra; Harding v. Goodlett, 3 Yerg. 40, 24 Am. Dec. 546.

If the purposes of a corporation combine both a public and private use, it cannot exercise the right of eminent domain.

Lewis, Em. Dom. 2d ed. § 206; Re Albany Street, 11 Wend. 152, 25 Am. Dec. 618; Atty. Gen. v. Eau Claire, 37 Wis. 437; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Buckingham v. Smith, 10 Ohio, 288; Spaulding v. Lowell, 23 Pick. 71; Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 380; Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; State ex rel. Tacoma Industrial Co. v. White River Power Co. 39 Wash. 648, 2 L.R.A.(N.S.) 842, 82 Pac. 153, 4 A. & E. Ann. Cas. 987; Coates v. Campbell, 37 Minn. 498, 35 N. W. 367; Brown v. Gerall, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; Hildreth v. Montecito Creek Water Co. 139 Cal. 24, 72 Pac. 395; 19 L.R.A.(N.S.)

Gaylord v. Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 525, Re Barre Water Co. 62 Vt. 27, 9 L.R.A. 195, 26 Atl. 109; Tyler v. Beach, 44 Vt. 650, 8 Am. Rep. 398; Sherman v. Buick, 32 Cal. 253, 91 Am. Dec. 577; Board of Health v. Van Hoesen, 87 Mich. 533, 14 L.R.A. 114, 49 N. W. 894; Re Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 45.

Messrs. Solinsky & Wehe and Brainard & Kimball, for defendant in error:

The generation of electricity for public use makes a case of necessity for which private property may be taken.

Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 5 L.R.A.(N.S.) 638, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182; Lewis, Em. Dom. § 131a; Hollister v. State, 9 Idaho, 8, 71 Pac. 541; Salt Lake City v. Salt Lake City Water & Electrical Power Co. 24 Utah, 249, 61 L.R.A. 648, 67 Pac. 672, 25 Utah, 441, 71 Pac. 1007; Denver Power & Irrig. Co. v. Denver & R. G. R. Co. (Denver Power & Irrig. Co. v. Colorado & S. R. Co.) 30 Colo. 204, 60 L.R.A. 383, 69 Pac. 568; Rockingham County Light & P. Co. v. Hobbs, 72 N. H. 531, 60 L.R.A. 581, 58 Atl. 46.

The court properly refused to permit plaintiff in error to show ownership of the water claimed by defendant in error to be in third parties, not parties to the action.

St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659; Grande Ronde Electrical Co. v. Drake, 46 Or. 243, 78 Pac. 1031; California Southern R. Co. v. Kimball, 61 Cal. 90; 2 Lewis, Em. Dom. § 395; Stoughton v. Paul, 173 Mass. 148, 53 N. E. 272.

Whether or not a corporation is using the heat, light, and power for its own private purposes or the public is a question of fact for the court to determine.

Denver R. Land & Coal Co. v. Union P. R. Co. 34 Fed. 386; Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790; Lake Koen Nav. Reservoir & Irrig. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; Santa Cruz v. Enright, 95 Cal. 110, 30 Pac. 197; Grande Ronde Electrical Co. v. Drake, supra.

The courts will not heed an allegation that the corporation may not fully perform its public duties.

Randolph, Em. Dom. § 50; Lombard v. Stearns, 4 Cush. 60; Re Staten Island Rapid Transit Co. 103 N. Y. 259, 8 N. E. 548; San Mateo County v. Coburn, 130 Cal. 635, 63 Pac. 78, 621; Gaylord v. Sanitary Dist. 204

Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522.

Gilbert, Circuit Judge, delivered the opinion of the court:

The question first to be determined is whether the use for which condemnation is sought is a public use. Section 1238 of the Code of Civil Procedure of California makes provision for the exercise of the right of eminent domain in behalf of public uses, and enumerates, among other public uses, the following: "Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for the supplying of mines, quarries, railroads, tramways, mills, and factories with electrical power; and also for the supplying electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns; [and also for furnishing electricity for lighting, heating, or power purposes to individuals or corporations] together with lands, buildings, and all other improvements in or upon which to erect, install, place, use, or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth."

There can be no doubt that within this provision the furnishing of electricity as it is proposed to be furnished by the defendant in error is a use for which the legislature intended that the right of eminent domain might be exercised. The purpose of the statute is to remove obstacles in the way of development and progress in the state, and it is in harmony with the Constitution and with § 1001 of the Civil Code, which gives to any person, without further legislative action, the power to acquire property for any of the uses specified in § 1238, "either by consent of the owner or by proceedings had under the provisions of title 7, part 3 of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title, is 'an agent of the state' or a 'person in charge of such use' within the meaning of those terms as used in such title."

The legislature cannot by its enactments make that a public use which is essentially a private use, and the question whether the use is public in its nature is a judicial question, to be determined by the courts. But it is the general rule that, where it is uncertain and doubtful whether the use to which the property is proposed to be devoted is of a public or a private character, the legislative determination of the question is of persuasive force, and the courts will 19 L.R.A. (N.S.)

not undertake to disturb the same. It has been so held in California. *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L.R.A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675; *San Mateo County v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621. And it has been generally held by the courts that the generation of electric power for distribution and sale to the public on equal terms is a public enterprise, and that water used for that purpose is devoted to a public use. *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 531, 66 L.R.A. 581, 58 Atl. 46; *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541; *Grande Ronde Electrical Co. v. Drake*, 46 Or. 243, 78 Pac. 1031; *Re Niagara, L. & O. Power Co.* 111 App. Div. 686, 97 N. Y. Supp. 853; *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 429, 5 L.R.A. (N.S.) 638, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182. In the case last cited the supreme court of Minnesota said: "Electric lighting is universally recognized as a public enterprise, in aid of which the right of eminent domain may be invoked."

In *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 531-535, 66 L.R.A. 581, 58 Atl. 46, the court said: "Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires a large capital to collect, store, and distribute it for general use. The cost depends largely upon the location of the power plant. A water-power or a location upon tide-water reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain, for the acquisition of necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing, and distributing electricity for the purposes of supplying power and heat to all who may desire it is a public use similar in character to the use of land for collecting, storing, and distributing water for public needs,—a use that is so manifestly public 'that it has been seldom questioned, and never denied.'"

But both private purposes and public uses are contemplated in the articles of incorporation of the defendant in error, as those articles stood at the time of the commencement of the suit. On that ground its power to exercise the right of eminent domain for the promotion of the public purposes is challenged, the contention being that, when such purposes are so blended, the want of power to exercise the right of eminent domain for the private purpose excludes its exercise for any public use. But the question whether the exercise of the

right of eminent domain is to be denied or withheld is not to be tested solely by the description of the objects and purposes set forth in the articles of incorporation. It may be governed by evidence *aliunde* showing the actual purpose in view. *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 15 N. E. 429. "The fact that the charter powers of a corporation to which the power of eminent domain has been delegated embrace both private purpose and public use does not deprive it of the right of eminent domain in the promotion of the public use." 15 Cyc. Law & Proc. p. 579; *Lake Koen Nav. Reservoir & Irrig. Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *Cole v. Cumberland County*, 78 Me. 532, 7 Atl. 397; *Brown v. Gerald*, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785. Cases are cited which are said to hold the contrary; but they are all cases in which there is absence of proof of the actual purpose of the plaintiff in the condemnation proceedings to sever the public use from the private use, and to exercise the right of eminent domain solely for the former. Thus, in *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194, the corporation was created by a special act of the general assembly and given authority to manufacture and generate electrical or other power, light, or heat, and utilize and transmit and distribute the same to any place or places for its own use or for the use of other individuals and corporations. The company proceeded to condemn lands and water rights for that purpose "for the company's use or for the use of other individuals or corporations." The court held that, since it had power under its charter to devote only a share, or none at all, of its products to public use, the public could not be said to have such a definite right to the use of its product as to render constitutional the provision giving it the right of eminent domain. Said the court: "In such a case the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking of private property for a private use."

So, in *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379, the plaintiff in the condemnation suit was incorporated under an act which authorized it to acquire water rights and water for private and public purposes. In its petition for condemnation it alleged that it required certain lands "for the purposes of its incorporation, and that the taking thereof is necessary for the public use and benefit." The court denied the right of condemnation, 19 L.R.A. (N.S.)

saying: "After the water power is erected, though it may be used for a public purpose, relator has the option to use it entirely for private purposes."

But in that case the court sustained the doctrine that land can be taken under the power of eminent domain for a legitimate purpose, even though a private purpose will be thereby incidentally served. In *Gaylord v. Sanitary Dist.* 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522, the petitioner in condemnation proceedings alleged in his petition that he was about to build a public gristmill under an act of the legislature authorizing the condemnation of private property for the purpose of public mills and machinery other than public gristmills, and that he was also about to construct other machinery and operate a mill and other public machinery. The court held that to constitute a public use such as will justify the taking of private property, the contemplated improvement must be one which the public to some extent will have a right to use, and not one which is merely a benefit to the public, and that authority to condemn private property for public use does not justify the taking of such property for a public and also a private use. Of similar import are *Atty. Gen. v. Eau Claire*, 37 Wis. 400, and *State ex rel. Harris v. Superior Ct.* 42 Wash. 660, 5 L.R.A. (N.S.) 672, 85 Pac. 666, 7 A. & E. Ann. Cas. 748. In the latter case the testimony was to the effect that the condemnation was sought for the purpose of obtaining additional power, "not only for use in operating the light plant and electric car system, but for the purpose of selling power to the different manufactories and for different purposes." The court held that, for all these purposes, the petitioner was not entitled to exercise the right of eminent domain, since the use was not a public one. We find no case which holds that the bare fact that a corporation has, in enumerating its functions, expressed a purpose of engaging in a private enterprise as well as serving a public use, shall deprive it of the right to exercise eminent domain for the public use. Not only is there no authority for such a proposition, but there is no reason for it. Why should the fact that the defendant in error here was incorporated under articles giving it the power to serve a private use be an obstacle to its condemnation of property necessary, and which it proposes and proves shall be used exclusively, for a public service? The fact that it has such power imposes no greater or additional burden or servitude upon the property which it seeks and proposes to take for the public use only.

On the trial the plaintiff in error offered to prove the rights of others to use for ir-

rigation the waters of Hat creek and Lost creek, and to show that, under the appropriation of the defendant in error, there was no water subject to appropriation. This evidence was excluded as irrelevant and immaterial, and we find no error therein. In the first place, the plaintiff in error had not put in issue the allegation of the bill that the defendant in error was the owner of 3,000 inches of water. The denial was "that the plaintiff in error is the owner, or ever was the owner of, or entitled to, 3,000 miner's inches or any water or waters which are to be conducted by plaintiff, or can be conducted by plaintiff, by means of its ditch or flume, or at all, into Bear creek." This did not put in issue the allegation that the defendant in error was the owner of the water which it claimed to have appropriated. Again, if an issue had been raised upon that allegation, the question of the rights of other appropriators of the water was not before the court. The owners of such rights were not parties to the suit. The use intended to be subserved through the condemnation proceedings being a public use, the defendant in error could, if necessary, institute further suits for the condemnation of the rights of other appropriators.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

COLORADO SUPREME COURT.

JAMES K. SCOTT, Plff. in Err.,

v.

AVERY B. TUBBS.

(43 Colo. 221, 95 Pac. 540.)

Jury — misconduct — new trial.

A verdict recovered by a party who, pending the action, took jurors to the bar to drink in the absence of other jurors and the officers in charge of them, will be set aside at the instance of the other party; and he will be required to pay the costs regardless of the absence of wrongful intent or the fact that the verdict was not influenced thereby.

(April 6, 1908.)

ERROR to the Summit County Court to review a judgment in favor of petitioner in a proceeding to secure a right of way for an irrigating canal by right of eminent domain. Reversed.

The facts are stated in the opinion.

Mr. James F. Callbreath, Jr., for plaintiff in error.

Steele, Ch. J., delivered the opinion of the court:

The action was brought under the statute 19 L.R.A. (N.S.)

entitled "Eminent Domain," and had for its purpose the condemnation of the plaintiff in error's land to the use of the defendant in error for an irrigating canal. A jury assessed the plaintiff's damages at \$40. Judgment was entered upon the verdict. The costs, amounting to \$303.50, were taxed against the plaintiff in error. Several assignments of error are discussed in the brief, but we shall ignore all but one,—that relating to the improper conduct of the jury. Before proceeding to a consideration of the assignment of error mentioned, we direct attention to the opinion of this court in the case *Colorado Fuel & Iron Co. v. Four Mile R. Co.* 29 Colo. 90, 66 Pac. 902, wherein the statutes providing for the summoning of a jury in proceedings under the eminent-domain act are construed. Upon the day set for the hearing, at the request of petitioner, it was ordered that the jury inspect the premises sought to be condemned. After the examination of the premises, and before returning to the court room, four of the jurors, apart from the officer in charge of the jury, went to a saloon in company of the petitioner, defendant in error here, and at his invitation drank with him at the bar of the saloon. This was conclusively shown by the affidavits filed in support of the motion for a new trial. Two of the jurors state in

Case Note. — Treating jurors as ground title for new trial or reversal.

The word "treating," as used in the title of this note, has been taken to include what is ordinarily known as a treat, that is, something furnished by way of entertainment, as, for instance, drinks, cigars, food, and lodging. The question of the effect of furnishing free conveyances or extending other civilities to jurors has not been included.

This question has been considered in a large number of cases, and for the most part there is uniformity in the decisions. The great weight of authority holds with *SCOTT v. TUBBS*, that a verdict rendered by a jury any of whose members has been treated by one having an interest in the case must be set aside, and in nearly all cases the rule is applied without regard to its actual influence on the verdict.

Treat by party.

The above principle was applied in the following cases where the treat was by a party. *Phillipsburg Bank v. Fulmer*, 31 N. J. L. 52, 86 Am. Dec. 193; *Bender v. Buehrer*, 8 Ohio C. C. 244; *Goodright v. M'Causland*, 1 Yeates, 372, 1 Am. Dec. 306 (*dictum*); *Redmond v. Royal Ins. Co.* 7 Phila. 187; *Keegan v. McCandless*, 7 Phila. 248; *Myntatt v. Hubbs*, 6 Heisk. 320; *Sexton v. Lelievre*, 4 Coldw. 11; *Palm v. Chernowsky*, 28 Tex. Civ. App. 405, 67 S. W. 165; *Harvester Co. v. Hodge*, 6 Pa. Dist. R. 378; *Pickens v. Coal River Boom & Timber Co.* 58 W. Va. 11, 50 S. E. 872, 6 A. & E. Ann. Cas.

their affidavit that the petitioner took them to a saloon and treated them, but that their verdict was not influenced thereby, and that they did not know they had been doing wrong. The court offered to set aside the verdict and to grant a new trial upon the payment of the costs by the respondent, but the respondent refused to take a new trial upon the terms proposed. Judgment was then entered, and the respondent appealed.

A new trial should have been granted, and the petitioner should have been required to pay the costs. Such action on the part of the petitioner and the jurors cannot be tolerated, and to excuse such conduct would be to render a trial in a court of justice a farce. It may be that the petitioner and jurors were entirely innocent of any wrong intent, and that no wrong or injustice was in fact done, but the opportunity for wrongdoing under the conditions shown in the affidavit is so great that we must, in order to maintain the integrity of judicial procedure, reverse the case. Jurors who separate from the other jurors and the officer in whose charge they are, and accept enter-

tainment from one of the parties while they are considering the case, are guilty of such misconduct that a verdict rendered by them has not the appearance even of being fair and impartial. And a party who so far forgets his position as a litigant as to furnish entertainment for jurors who are to pass upon the merits of the controversy in which he is engaged should not complain if a verdict in his favor by jurors with whom he has been in such close communication and to whom he has furnished drink is set aside on motion of his adversary. Nor should the court consider whether the verdict was or was not influenced by the petitioner. The conduct complained of is so manifestly improper that there is but one course open. Nor shall we consider what other courts have done under similar circumstances. Questions like these cannot be determined by the weight of authority, unless there be a doubt in our minds as to the course for us to pursue; and, as no doubt exists, we shall reverse the judgment.

Goddard and Bailey, JJ., concur.

285 (*dictum*); Marshall v. Watson, 16 Tex. Civ. App. 127, 40 S. W. 352; Harrison v. Rowan, 4 Wash. C. C. 32, Fed. Cas. No. 6,142 (*dictum*); Re Fairmount Park, 6 Phila. 285; Wright v. Eastlick, 125 Cal. 517, 58 Pac. 87; Pelham v. Page, 6 Ark. 535 (*dictum*); Walker v. Walker, 11 Ga. 203; Burke v. McDonald, 3 Idaho, 296, 29 Pac. 98; Huston v. Vail, 51 Ind. 299; Perry v. Bailey, 12 Kan. 539 (*dictum*); Studley v. Hall, 22 Me. 198; Harrington v. Hamm, 153 Mich. 600, 117 N. W. 62; Vose v. Muller, 23 Neb. 171, 36 N. W. 583; Sacramento & M. Min. Co. v. Showers, 6 Nev. 291; Drake v. Newton, 23 N. J. L. 111; R. v. Burdett, 12 Mod. 111; Vollrath v. Crowe, 9 Wash. 374, 37 Pac. 474 (*dictum*).

In Doud v. Guthrie, 13 Ill. App. 653, the jury was permitted to view the premises at the entire expense of one of the parties, upon the refusal of the other to contribute, including conveyance, entertainment, and treats. The court, in remanding the cause for a new trial, made the following comment: "A trial attended with such concomitants was worse than a farce, and to suffer a verdict obtained under such circumstances to stand would be a reproach to the administration of the law."

Producing in court and offering to the jury refreshments is improper and reprehensible conduct on the part of a litigant, and demands a reversal of the judgment rendered. Lyons v. Lawrence, 12 Ill. App. 531.

Entertaining a juror for the night at the house of one friendly to a party, at the latter's instance, is a ground for reversing a judgment, even though the juror was uninfluenced thereby in his opinion of the case. Cottle v. Cottle, 6 Me. 140, 19 Am. Dec. 200.

Where counsel for one party refused to share the expense of providing meals for the

jury, and, no provision for them having been made, the other party furnished and paid for the same, such circumstances furnish ground for setting aside the verdict, although it does not appear that it was determined thereby. Johnson v. Hobart, 45 Fed. 542.

A new trial was granted in Detroit & T. Shore Line R. Co. v. Campbell, 140 Mich. 384, 103 N. W. 856, because, while viewing land taken in condemnation proceedings, the jury were furnished with cigars, meals, and even drinks, by the plaintiff's representatives.

But Gould v. Gould, 3 N. S. 87, holds that the fact that a party to an action had entertained one of the jurymen over night and furnished him with spirituous liquors at his own cost is not sufficient ground for new trial.

That one of the jurors drank liquors at the instance and solicitation of a defendant in an action does not necessitate a reversal of the verdict rendered against a codefendant. Webster County v. Hutchinson, 60 Iowa, 721, 9 N. W. 901, 12 N. W. 534.

The treating of jurymen, by a party, with cigars and peanuts, is not regarded as a good ground for setting aside a verdict, in Drainage Comrs. v. Knox, 237 Ill. 148, 86 N. E. 636.

In McCarty v. McCarty, 4 Rich. L. 594, the court holds that the exercise of a sound discretion would not authorize the avoidance of a verdict eminently just, although there was evidence tending to show that some of the jurors were drinking with one of the parties to the action, and that the latter paid for the drinks ordered.

The furnishing of cigars by a party to the members of a jury during the progress of a trial was characterized as improper and

reprehensible in *Wichita & W. R. Co. v. Fechheimer*, 49 Kan. 643, 31 Pac. 127; but the court said: "Unless such conduct may have influenced the jury in some manner, it should not destroy their verdict afterward rendered. In this case nearly all the evidence . . . was in parol, and it was heard by the judge of the trial court, who heard all the testimony given during the whole progress of the case; and, evidently he did not believe that the transaction with reference to these cigars had any influence upon the verdict of the jury, and we think it should not have had any such influence; and, therefore, with some hesitancy and some reluctance, we must say that we cannot hold that the court below erred in overruling the defendant's motion for a new trial, founded upon this ground."

Providing food and liquor to jurors at the request of an engineer, who, with the sheriff, was in charge of the jury for the purpose of viewing the defendant's premises, does not furnish sufficient reason for setting aside a verdict where nothing was shown to indicate that what was done by the defendant was done with the intention of influencing the jury. The facts that he refrained from conversing with them, that he did not volunteer to furnish them food and drink, and did so only after being informed by the engineer that nothing he might do there would influence them, and that he remained in the room only when it was unavoidable, are considered by the court sufficient indications that no influence on the jury was intended or resulted. *Marsh v. Clark County*, 11 Ohio Dec. Reprint, 442.

Although conceding that the act of a party in treating a juror before the verdict and taking him out to dine was improper and censurable, yet the court, in *Vaughn v. Dotson*, 2 Swan, 348, refused to award a new trial because what was done was the result of inadvertence merely, without design to bias the juror or seduce him from his duty, and because it was equally plain that it had no effect to taint or infect the verdict.

The verdict of a jury in assessing damages for injuries resulting from the raising of a milldam ought not to be set aside because the jurors, while viewing the property, drank moderately at the expense of one of the parties before they were sworn, and afterward when they had finished their inspection, where there was no appearance of corruption, and the opposite party consented and joined with them. *Coleman v. Moody*, 4 Hen. & M. 1.

The entertainment of a jury by a party was, in *Patton v. Hughesdale Mfg. Co.* 11 R. I. 188, said to have been highly improper; but a new trial was denied, it not appearing that the party had any intention to bias the jury, or took any advantage of the opportunity to influence any of them, and as the opposing party, though knowing of what had taken place, made no objection thereto until after the verdict had been returned.

The fact that two jurors dined and slept at the house of the defendant during the 19 L.R.A. (N.S.)

trial was held insufficient to warrant the reversing of a verdict, in *Morris v. Vivian*, 11 L. J. Exch. N. S. 387.

In *McNeil v. Moore*, 14 N. B. 234, where a jury were viewing land and had refreshments at the house of one of the parties, it was held that a verdict in favor of that party must be set aside.

And in *Ferguson v. Troop*, 15 N. B. 183, a verdict was set aside, although no improper motives were attributed, because, during the progress of the trial, the jury viewed the property, and, while there, went into the defendant's house by his invitation and had lunch.

But in *Spence v. Trenholm*, 12 N. B. 77, the court takes the view that a verdict should not be interfered with because a jury, while viewing the premises, supped and lodged at the house of one of the parties, where all improper interference with the jury was negated, and the other party was in no way prejudiced by what took place.

The furnishing to jurors of cider belonging to a party, but without his knowledge, is not ground for a new trial where no injury resulted therefrom. *Tripp v. Bristol County*, 2 Allen, 556.

Where a party, in reply to a request by some of the jurors to entertain them over night, replied that he could not under the circumstances, but would be glad to at any other time, it was held that such fact did not warrant a new trial of the case. *Southwestern R. Co. v. Mitchell*, 80 Ga. 438, 5 S. E. 490.

So, where a treat was good-naturedly forced upon a party by a crowd in which two of the jurors, of whose presence he was not aware, participated, it was held there was not sufficient ground for a new trial. *Kennedy v. Holladay*, 105 Mo. 24, 16 S. W. 688.

In *Platt v. Threadgill*, 80 Fed. 192, an action involving the value of cigars, a verdict was reversed because one of the parties treated some of the jurors to cigars during the progress of the trial. The decision, however, turned upon the improper influence indirectly brought to bear by means of the treat after an attempt to produce the cigars before the jury had failed, rather than on the impropriety of the act as a treat.

Treat by attorney.

The more generally accepted rule, *viz.*, requiring a new trial where a jury has been treated, is applied in the following cases where the treat was by a party's attorney: *Nadeau v. Theriault*, 37 N. B. 498; *Stewart v. Woolman*, 26 Ont. Rep. 714; *People v. Montague*, 71 Mich. 447, 39 N. W. 585; *Stallord v. Oskaloosa*, 57 Iowa, 748, 11 S. W. 668; *Rainy v. State*, 100 Ga. 82, 27 S. E. 709; *Walker v. Hunter*, 17 Ga. 364; *Steenburgh v. McRorie*, 60 Misc. 510, 113 N. Y. Supp. 1118. See also *Grottkau v. State*, 70 Wis. 462, 36 N. W. 31.

A verdict is reversed in *Demund v. Gowen*, 5 N. J. L. 687, because the attorney for the plaintiff handed in at the window of the jury room food and liquor for the jurors.

The furnishing of intoxicating liquors to a juror by a party's counsel is held insufficient as a ground for a new trial in *Pittsburg, C. & St. L. R. Co. v. Porter*, 32 Ohio St. 328, where it is shown that the treating of the juror was casual, and not intended to bias his action, and that it had no improper influence on his mind as a juror.

In *Doe ex dem. Pritchard v. Roe*, 3 Penn. (Del.) 128, 50 Atl. 217, where one of the counsel treated two jurors publicly during the progress of the trial, the necessity for a new trial was avoided only because there was full and detailed explanation of all the circumstances of the treating, made before the court on oath by the counsel, one of the jurors, and by the saloon keeper. Such conduct, the court remarks, "is most reprehensible, and we cannot too strongly condemn such an example of culpable imprudence and impropriety."

Where it was shown by affidavits that one of the jurors in the case took dinner and supper with one of the counsel for plaintiff during the progress of the trial, but that there were no communications between the juror and counsel on the subject of the action; and, further, that they were engaged in some other business relation when the juror was called in the case, which fact was known to the defendant's counsel long before the trial was closed, as was also the fact that the juror had dined and supped with the plaintiff's counsel; and also that the juror had previously accepted an invitation to stop there while in the city, but had left after the jury was impaneled and after the two meals,—the court held that no improper influence or prejudice was shown, and refused to interfere with the verdict. *Koester v. Ottumwa*, 34 Iowa, 41.

In *McLaughlin v. Hinds*, 151 Ill. 403, 38 N. E. 136, the court refused to set aside a verdict where members of a jury met the attorneys for the respective parties in a saloon and were treated by them to liquor and cigars. The conduct of the attorneys was condemned, but the court was not disposed to give either side any benefit or advantage because of the improper conduct of the other.

A new trial was denied in *People v. Lyle*, (Cal.) 4 Pac. 977, where a district attorney treated and dined some of the jurors during the trial of a case, because it was clear that the person against whom the verdict was rendered had not been injured by the misconduct.

Treat by persons interested.

A new trial was granted in *McGill Bros. v. Seaboard Air Line R. Co.* 75 S. C. 177, 55 S. E. 216, because the claim agent of the defendant company entertained one of the jurors over night at his hotel during the progress of the trial, and, after the verdict, received all the jurors in his room and treated them to liquor. The treating after the trial was taken into consideration as showing the motive for the free entertainment because all parties knew that the trial of another case in which the railroad was interested was to take place at once. 19 L.R.A. (N.S.)

Where a juror, pending the trial in which he was engaged, took dinner with and at the expense of the plaintiff's brother, who was conducting the case, it was necessary to set aside the verdict because of the possible improper influence. *Gulf, C. & S. F. R. Co. v. Matthews*, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

A verdict attacked for influencing a juror was upheld in *Brookhaven Lumber & Mfg. Co. v. Illinois C. R. Co.* 68 Miss. 432, 10 So. 66, upon the following facts, in the language of the court: "It is the case of an old man who was infirm and who had been habituated to drink, weakly and unwisely seeking a glass from his neighbor and friend, and whose want, in the absence of means to meet it by his friend, was supplied to the extent of a single draught by an employee of the appellee, at the request of the juror's friend. That the act of supplying the drink to the juror was not done with any purpose to affect the juror's mind touching the case being then tried, and that it did not so affect it, was so found by the trial judge in denying the motion, and in this action of the court we see no error."

Where a person who was aiding the plaintiff in the conduct of a trial, and who had a case against the same defendant founded upon the same facts, treated a juror to liquor and cigars, there was sufficient reason to sustain a motion for a new trial. *Central R. Co. v. Hammond*, 109 Ga. 383, 34 S. E. 594.

A judgment was reversed and a new trial ordered in *People v. Myers*, 70 Cal. 582, 12 Pac. 719, because the sheriff who was in charge of the jury, and who had the expectation of a reward upon the conviction of the accused, conducted the jurymen to public saloons, and furnished them liquor at his own expense.

A verdict was set aside and a new trial granted in *Armour v. Boswell*, 6 U. C. Q. B. O. S. 352, where it was shown that the jury, while deliberating, were furnished with provisions and spirituous liquors by persons known to be friendly to one of the parties.

The fact that defendant's son, who was also his attorney, entertained one of the jurors at his house after the trial but during the term, furnishes no ground for a new trial. *Todd v. Gray*, 16 S. C. 635.

There was no sufficient cause to set aside a verdict because an employee of one of the parties, having met two of the jurors accidentally, took refreshments with them and and paid for the same without their knowledge, where there was no pretense that the parties were at all implicated, nor the slightest ground to believe that the two jurors were influenced by the occurrences in question. *Eakin v. Morris Canal & Bkg. Co.* 24 N. J. L. 538.

A treat to cigars furnished jurors by the son of one of the parties to an action does not furnish sufficient ground for reversing a verdict. *Larson v. Levy* (Tex. Civ. App.) 37 S. W. 52.

Furnishing food and drink to the members

of a jury by the inhabitants of a town, which was a party defendant in a lawsuit, without improper purpose or influence, is not such an entertainment or treat as comes within the prohibition of a statute providing for a new trial in case any party obtaining a verdict in his favor shall give a juror victuals or drink by way of treat. *Carlisle v. Sheldon*, 38 Vt. 440.

In *Schissler v. Cheshire*, 7 Nev. 427, a person who had mapped the premises involved in the litigation accompanied the jury to view the property, on being appointed to do so by the court at the request of the party who had ordered the map; the jury were treated by him during the return trip. It was held that his relation to the party and interest in the case were not sufficient to warrant a reversal of the verdict on that account.

It is not ground for a new trial that the jury were lodged for the night at the house of one whose brother had furnished money to secure defendant's arrest and otherwise aided in the prosecution of the case, where the one so lodging the jury was the jailer, and it was the usual custom for juries to be lodged at his house. *Dumas v. State*, 63 Ga. 601.

Treat by witnesses.

Thompson v. Com. 8 Gratt. 657, holds that sufficient ground for a new trial is not presented where an expert medical witness innocently and inadvertently treats the jurors during the progress of the trial.

And it was held in *State v. Minor*, 106 Iowa, 642, 77 N. W. 330, that the mere fact that a material witness treated some of the jurors will not warrant the inference of any wrongdoing requiring a verdict to be set aside.

There is no ground for a new trial where a witness who is in no way interested in the suit gives a treat to part of the jurors. *Harris v. Harris*, Ir. Rep. 3 C. L. 294.

Treat where both parties implicated.

A verdict said to be decidedly wrong upon the evidence was reversed in *Kellogg v. Willder*, 15 Johns. 455; and the action of the justice in permitting each of the parties to treat the jurors to whisky during the trial was termed "gross misconduct."

It is held in *Copper Queen Min. Co. v. Arizona Prince Copper Co.* 2 Ariz. 10, 7 Pac. 718, that the "feasting and wining" of a jury at the joint expense of the parties to an action is not a sufficient ground of reversal where no member of the jury was intoxicated or rendered unfit for the intelligent, fair, and impartial performance of his duty.

A new trial was denied in *Dennison v. Collins*, 1 Cow. 111, where liquor was furnished to the jurors; but it did not appear that it was provided by one party more than the other.

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The court in *Bradshaw v. Degenhart*, 15 Mont. 267, 48 Am. St. Rep. 677, 39 Pac. 90, refused to allow a new trial where the jury had been treated by the plaintiff, because the defendant in the case was present at the time and likewise partook of the plaintiff's hospitality.

Treat after verdict rendered.

Treating a jury to cigars immediately after they have returned a verdict for the party so treating is a violation of the statute prohibiting a successful party from furnishing victuals or drink to jurors by way of treat during the term; and in such a case a new trial will be granted. *Baker v. Jacobs*, 64 Vt. 197, 23 Atl. 588; *Shattuck v. Wrought Iron Range Co.* 69 Vt. 468, 38 Atl. 72.

But a new trial was denied in *Western U. Teleg. Co. v. Pells*, 2 Tex. App. Civ. Cas. (Willson) 40, where a party treated the jurors to liquor after the return of the verdict, because it was not shown that the jury had probably been influenced by the impropriety to the injury of the defendant's rights.

The fact that refreshments furnished to a jury during a cause were afterward paid for by a party is no ground for setting aside the verdict where there is no evidence that they were ordered by the party; nor should a verdict be reversed because treats were furnished after it was rendered. *Richmond v. Wise*, 1 Vent. 124.

There was not sufficient ground for a new trial where a sheriff furnished cigars to a jury before the rendition of their verdict, the same, so far as they knew, to be paid for upon his own account, although as a matter of fact the bill for the cigars was later sent to one of the parties to the action and paid. *Gurney v. Minneapolis & St. C. R. Co.* 41 Minn. 223, 43 N. W. 2.

In *Vane v. Evanston*, 160 Ill. 616, 37 N. E. 901, it appeared that a jury, while inspecting premises at a distance from the courthouse, were furnished lunch at the expense of one of the litigants, but it was not affirmatively shown that such fact was known to the jury until after their verdict was rendered and they had been discharged: the party's attorney who ordered the lunch was also absolved from any intentional wrongdoing. The court held that cause sufficient for setting aside the verdict was not shown.

Treating jurors who complained of being sick, to soda water and acid phosphate after they had been discharged for the term, is not a sufficient ground for granting a motion for a new trial. *Grace v. Martin*, 83 Ga. 245, 9 S. E. 841.

Pinkston v. Mercer, 112 Ga. 365, 37 S. E. 305, holds that there is not sufficient ground for a new trial where a party, after the jury has agreed to a verdict which has been sealed and delivered to the foreman, though not published, extends hospitality to one of the jurors.

GEORGIA SUPREME COURT.

W. S. HUBBARD, Plff. in Err.,
v.
CENTRAL OF GEORGIA RAILWAY COM-
PANY.

(— Ga. —, 63 S. E. 19.)

Employers' liability act — railroads — defect in way or track.

Under the construction placed by the supreme court of Alabama upon the subsection of the employers' liability act of that state (Code 1896, § 1749; Code 1907, § 3910), which provides that an employer is liable for a personal injury received by his employee, "when the injury is caused by any defect in the ways, works, machinery, or plant connected with or used in the business of . . . the employer," a wire stretched over and across the track of a railroad company, not sufficiently high above a freight car running on the track to permit an employee standing on the top of such car to safely pass under the wire does not constitute a "defect in the way or track," where there is nothing to indicate that such wire is not a mere movable object temporarily placed to near the track.

(November 11, 1908.)

ERROR to the Superior Court for Chat-ham County to review a judgment sustaining a demurrer to the complaint in an action filed to recover damages for the loss of services of complainant's minor son alleged to have been caused by defendant's negligence. Affirmed.

Statement by Fish, Ch. J.:

W. S. Hubbard brought an action against the Central of Georgia Railway Company for the recovery of damages for the loss of services of his minor son, D. E. Hubbard. The substance of the petition, now material,

Headnote by FISH, Ch. J.

Case Note. — What constitutes a defect in the "ways" of a railroad company within the employers' liability act?

This specific question is covered in a note to Coley v. North Carolina R. Co. 57 L.R.A. 817, upon the general subject of statutory liability of employers for defects in the condition of their plant. A few additional cases upon the specific question have been decided since the preparation of that note.

Thus, if a railroad company permits another company to erect a bridge over its track, and continues to operate its trains under said bridge, a defect in the bridge will constitute a defect in the "ways" of the former company. Central R. Co. v. Alexander. 144 Ala. 257, 40 So. 424.

A box car placed on a side track for use as a baggage room, and so near the main line on which passenger trains are run 19 L.R.A. (N.S.)

was: Plaintiff's son was in the employment of the defendant as a flagman, and, while standing on the top of a freight car of defendant, in the discharge of his duties, in the state of Alabama, was struck by a wire stretched over and across the track upon which the car was running, and thereby pulled from the train and injured in the manner, described, causing the loss of services as set forth. By amendment it was alleged that the wire so stretched by the agents or employees of the defendant, or permitted to be so stretched by some other persons with the consent and knowledge of the defendant, was not of sufficient height above the top of a freight car, to permit a man standing thereon to safely pass under the wire, which fact defendant knew, or by the exercise of ordinary care should have known; and that defendant was negligent in allowing the wire to be so stretched and to remain so stretched. The petition further alleged:

"Par. 8. Your petitioner shows that the said D. E. Hubbard was, at the time of said accident, entirely free from fault; and that the accident and injuries resulted from a failure on the part of the officers, agents, servants, and employees of said defendant company to exercise ordinary and reasonable care to prevent said accident. . . .

"Par. 10. Your petitioner shows that the law of the state of Alabama governing in such cases is as follows: 'Vol. 1. Civil Code of Alabama 1896, § 1749: Liability of the Master or Employer to a Servant or Employee for Injuries.—When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee, as if he were a stranger, and not engaged in such service or employment, in the cases following: 1. When the injury is caused by reason of any defect in the condi-

that there is insufficient space to handle baggage from the box car to the baggage car of a train, does not constitute a defect in the ways, works, etc., as the term is used in the employers' liability act. Southern R. Co. v. Shook, 150 Ala. 361, 43 So. 579.

Where a post used for supporting a chute connected with a stone crusher was so close to the side of a railroad track that it left but 7½ inches between it and passing cars, that fact, together with the requirement of starting cars at that point, necessitating watching the car ahead, controlling the break, and instantly passing the post, constituted a defect in the ways, works, and plant of the defendant company. Day v. Dominion Iron & Steel Co. 36 N. S. 113.

tion of the ways, works, machinery, or plant connected with or used in the business of the master or employer. . . . But the master or employer is not liable under . . . subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.' . . .

"Par. 12. Your petitioner shows that said injury was caused by reason of a defect in the condition of the way connected with and used in the business of the defendant company; said defect being the wire stretched across said way in the manner heretofore shown.

"Par. 13. Your petitioner alleges that said accident and injuries arose from a defect of the way hereinbefore mentioned, and that said defendant company, its officers, agents, and employees intrusted with the duty of seeing that the way was in proper condition, were negligent in not discovering and remedying said defect. . . .

"Par. 15. Your petitioner alleges that each and all of said acts or failure in connection with the stretching of said wire above described constituted negligence on the part of the defendant company, and was the cause of said accident and injuries."

The petition was demurred to on several grounds, one of which was: "Because it appears by the petition that the wire alleged to have been stretched across this defendant's track was a foreign substance or obstacle having no connection with or relation to the defendant's track, and was not a defect in the ways, works, machinery, or plant connected with or used in the business of this defendant." This ground was sustained, and the petition dismissed, whereupon the plaintiff excepted.

Messrs. Twiggs & Gazan, for plaintiff in error:

The wire is such a defect in the "ways, works, machinery, or plant" as to make the railroad company liable for the injuries sustained by the plaintiff.

Reno, *Employer's Liability Acts*, § 55; *Central R. Co. v. Alexander*, 144 Ala. 257, 40 So. 424; *Louisville & N. R. Co. v. Banks*, 104 Ala. 508, 16 So. 547; *East Tennessee, V. & G. R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280.

Messrs. Thomas E. Watson and Green & Watson also for plaintiff in error.

Messrs. Lawton & Cunningham, for defendant in error:

The wire was not a defect in the condition of the ways, works, machinery, or plant 19 L.R.A. (N.S.)

connected with or used in the business of the master or employer.

2 Labatt, *Mast. & S.* pp. 926-930; *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 89; *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185, 20 So. 325; *Southern R. Co. v. Moore*, 128 Ala. 434, 29 So. 659; *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 737; *Louisville & N. R. Co. v. Banks*, 104 Ala. 508, 16 So. 547.

Mr. H. W. Johnson also for defendant in error.

Fish, Ch. J., delivered the opinion of the court:

As will have been noticed, in reading the above statement of facts, the case was not laid upon any alleged common-law liability of a master to his servant for injuries caused by a defect in the premises or appliances of the business, but was expressly and specifically predicated, in the petition, alone upon the statute of Alabama, which was in terms set forth, and the liability claimed was definitely based upon that portion of subdivision 1 of the statute, quoted, which provides that the employer shall be liable when a personal injury received by his employee—is caused by reason of any defect in the condition of the way connected with or used in the business of the employer. This will be seen by reference to paragraphs 12 and 13 of the petition, which are quoted above. Counsel for plaintiff in error, in their brief filed in this court, say: "This action is based on subsection 1 of the statute of Alabama, contained in § 1749 of the Civil Code of Alabama of 1896, which subsection makes the master liable to answer in damages to a servant injured while in the employment of the master, 'when the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer,' and that 'the sole question now presented for determination is whether or not, under the facts alleged, the wire was such a part of the 'ways, works, machinery, or plant' of the defendant as to enable the plaintiff to maintain his action." While the ground of the demurrer was, in view of the allegations of the petition, somewhat broader than was necessary, still the demurrer went to the very foundation upon which the petition rested; and, it having been sustained, the real and the only question presented for adjudication by the writ of error is whether the wire, stretched above and across the track of the defendant as alleged, was a defect in the condition of the way connected with or used in the business of the defendant.

Counsel for plaintiff in error do not con-

GEORGIA SUPREME COURT.

W. S. HUBBARD, Plff. in Err.,
v.
CENTRAL OF GEORGIA RAILWAY COM-
PANY.

(— Ga. —, 63 S. E. 19.)

Employers' liability act — railroads — defect in way or track.

Under the construction placed by the supreme court of Alabama upon the subsection of the employers' liability act of that state (Code 1896, § 1749; Code 1907, § 3910), which provides that an employer is liable for a personal injury received by his employee, "when the injury is caused by any defect in the ways, works, machinery, or plant connected with or used in the business of . . . the employer," a wire stretched over and across the track of a railroad company, not sufficiently high above a freight car running on the track to permit an employee standing on the top of such car to safely pass under the wire does not constitute a "defect in the way or track," where there is nothing to indicate that such wire is not a mere movable object temporarily placed to near the track.

(November 11, 1908.)

ERROR to the Superior Court for Chat-ham County to review a judgment sustaining a demurrer to the complaint in an action filed to recover damages for the loss of services of complainant's minor son alleged to have been caused by defendant's negligence. Affirmed.

Statement by Fish, Ch. J.:

W. S. Hubbard brought an action against the Central of Georgia Railway Company for the recovery of damages for the loss of services of his minor son, D. E. Hubbard. The substance of the petition, now material,

Headnote by Fish, Ch. J.

Case Note. — What constitutes a defect in the "ways" of a railroad company within the employers' liability act?

This specific question is covered in a note to *Coley v. North Carolina R. Co.* 57 L.R.A. 817, upon the general subject of statutory liability of employers for defects in the condition of their plant. A few additional cases upon the specific question have been decided since the preparation of that note.

Thus, if a railroad company permits another company to erect a bridge over its track, and continues to operate its trains under said bridge, a defect in the bridge will constitute a defect in the "ways" of the former company. *Central R. Co. v. Alexander*, 144 Ala. 257, 40 So. 424.

A box car placed on a side track for use as a baggage room, and so near the main line on which passenger trains are run 19 L.R.A. (N.S.)

was: Plaintiff's son was in the employment of the defendant as a flagman. and, while standing on the top of a freight car of defendant, in the discharge of his duties, in the state of Alabama, was struck by a wire stretched over and across the track upon which the car was running, and thereby pulled from the train and injured in the manner, described, causing the loss of services as set forth. By amendment it was alleged that the wire so stretched by the agents or employees of the defendant, or permitted to be so stretched by some other persons with the consent and knowledge of the defendant, was not of sufficient height above the top of a freight car to permit a man standing thereon to safely pass under the wire, which fact defendant knew, or by the exercise of ordinary care should have known; and that defendant was negligent in allowing the wire to be so stretched and to remain so stretched. The petition further alleged:

"Par. 8. Your petitioner shows that the said D. E. Hubbard was, at the time of said accident, entirely free from fault; and that the accident and injuries resulted from a failure on the part of the officers, agents, servants, and employees of said defendant company to exercise ordinary and reasonable care to prevent said accident. . . .

"Par. 10. Your petitioner shows that the law of the state of Alabama governing in such cases is as follows: 'Vol. 1. Civil Code of Alabama 1896, § 1749: Liability of the Master or Employer to a Servant or Employee for Injuries.—When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee, as if he were a stranger, and not engaged in such service or employment, in the cases following: 1. When the injury is caused by reason of any defect in the condi-

that there is insufficient space to handle baggage from the box car to the baggage car of a train, does not constitute a defect in the ways, works, etc., as the term is used in the employers' liability act. *Southern R. Co. v. Shook*, 150 Ala. 361, 43 So. 579.

Where a post used for supporting a chute connected with a stone crusher was so close to the side of a railroad track that it left but 7½ inches between it and passing cars, that fact, together with the requirement of starting cars at that point, necessitating watching the car ahead, controlling the break, and instantly passing the post, constituted a defect in the ways, works, and plant of the defendant company. *Day v. Dominion Iron & Steel Co.* 36 N. S. 113.

tion of the ways, works, machinery, or plant connected with or used in the business of the master or employer. . . . But the master or employer is not liable under . . . subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.' . . .

"Par. 12. Your petitioner shows that said injury was caused by reason of a defect in the condition of the way connected with and used in the business of the defendant company; said defect being the wire stretched across said way in the manner heretofore shown.

"Par. 13. Your petitioner alleges that said accident and injuries arose from a defect of the way hereinbefore mentioned, and that said defendant company, its officers, agents, and employees intrusted with the duty of seeing that the way was in proper condition, were negligent in not discovering and remedying said defect. . . .

"Par. 15. Your petitioner alleges that each and all of said acts or failure in connection with the stretching of said wire above described constituted negligence on the part of the defendant company, and was the cause of said accident and injuries."

The petition was demurred to on several grounds, one of which was: "Because it appears by the petition that the wire alleged to have been stretched across this defendant's track was a foreign substance or obstacle having no connection with or relation to the defendant's track, and was not a defect in the ways, works, machinery, or plant connected with or used in the business of this defendant." This ground was sustained, and the petition dismissed, whereupon the plaintiff excepted.

Messrs. Twiggs & Gazan, for plaintiff in error:

The wire is such a defect in the "ways, works, machinery, or plant" as to make the railroad company liable for the injuries sustained by the plaintiff.

Reno, *Employer's Liability Acts*, § 55; *Central R. Co. v. Alexander*, 144 Ala. 257, 40 So. 424; *Louisville & N. R. Co. v. Banks*, 104 Ala. 508, 16 So. 547; *East Tennessee, V. & G. R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280.

Messrs. Thomas E. Watson and Green & Watson also for plaintiff in error.

Messrs. Lawton & Cunningham, for defendant in error:

The wire was not a defect in the condition of the ways, works, machinery, or plant 19 L.R.A. (N.S.)

connected with or used in the business of the master or employer.

2 Labatt, Mast. & S. pp. 926-930; *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 89; *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185, 20 So. 325; *Southern R. Co. v. Moore*, 128 Ala. 434, 29 So. 659; *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 737; *Louisville & N. R. Co. v. Banks*, 104 Ala. 508, 16 So. 547.

Mr. H. W. Johnson also for defendant in error.

Flsh, Ch. J., delivered the opinion of the court:

As will have been noticed, in reading the above statement of facts, the case was not laid upon any alleged common-law liability of a master to his servant for injuries caused by a defect in the premises or appliances of the business, but was expressly and specifically predicated, in the petition, alone upon the statute of Alabama, which was in terms set forth, and the liability claimed was definitely based upon that portion of subdivision 1 of the statute, quoted, which provides that the employer shall be liable when a personal injury received by his employee—is caused by reason of any defect in the condition of the way connected with or used in the business of the employer. This will be seen by reference to paragraphs 12 and 13 of the petition, which are quoted above. Counsel for plaintiff in error, in their brief filed in this court, say: "This action is based on subsection 1 of the statute of Alabama, contained in § 1749 of the Civil Code of Alabama of 1896, which subsection makes the master liable to answer in damages to a servant injured while in the employment of the master, 'when the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer,'" and that "the sole question now presented for determination is whether or not, under the facts alleged, the wire was such a part of the 'ways, works, machinery, or plant' of the defendant as to enable the plaintiff to maintain his action." While the ground of the demurrer was, in view of the allegations of the petition, somewhat broader than was necessary, still the demurrer went to the very foundation upon which the petition rested; and, it having been sustained, the real and the only question presented for adjudication by the writ of error is whether the wire, stretched above and across the track of the defendant as alleged, was a defect in the condition of the way connected with or used in the business of the defendant.

Counsel for plaintiff in error do not con-

tend, nor did the petition allege, as we have already noted, that the wire was part of the works, machinery, or plant of the defendant. The Alabama statute under consideration (Code 1896, § 1749; Code 1907, § 3910), "as far as it goes," as was said in *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. 140, "is a substantial copy of the English act entitled the 'Employers' Liability Act' of 1880." See copies of both acts. 2 Labatt on Master & Servant, 1926-1930. The supreme court of that state has dealt with the statute in question in a number of cases. In *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 89, plaintiff, a switchman in the employment of the defendant railroad company, while performing his duties on a car forming a part of a train moving on defendant's main line, was injured by being struck by a refrigerator car which had been left on what was known as the "cold-storage track," in close proximity to the main line. On the point as to whether the proximity of the refrigerator car to the track on which defendant's train was being operated constituted a defect in that track, the court, speaking through McClellan, J., after stating that the statute was substantially copied from the English employers' liability act, said: "It is the settled construction of the act in that country that no mere obstruction on or too near to the 'ways' is a defect therein within subsection 1. The presence of no foreign body or substance on or dangerously near to the track of a railway, which does not affect the track itself or its condition inherently considered, but is only an obstacle with which moving trains would collide, can be said to constitute a defect in the track. There must be some inherent condition, of a permanent nature, of the ways, works, machinery, or plant, which unfits the thing for its uses; some weakness of construction with reference to the proposed uses (as where the ordinary appliances for drawing buckets of water from a well are used to lower and hoist men); some inadaptation to its purposes (as where the sides of a coke lift are not sufficiently fenced to safely hoist its burden, *Heske v. Samuelson*, L. R. 12 Q. B. Div. 30); some break or misplacement of the parts, or the absence of some part; some innate abnormal quality of the thing which renders its use dangerous (as the viciousness of a horse constituting 'plant' in the business of a wharfinger, *Yarmouth v. France*, L. R. 19 Q. B. Div. 647); some obstacle in the way of use or obstruction to use which is a part of the thing itself, or of the condition of the thing itself, as holes in or ice upon a way, or the like,—to constitute a defect in the ways, works, machinery, or plant, under the statute." The learned justice then quoted the following language of Stephen 19 L.R.A. (N.S.)

J., in *McGiffin v. Palmer's Shipbuilding & I. Co. L. R. 10 Q. B. Div. 5*: "I do not think we ought to put so wide a construction on the words 'condition of the way' as to include obstacles lying upon the way, which obstacles do not in any degree alter the powers of the way, or alter its fitness for the purposes for which it is generally employed, and cannot be said to be incorporated with it. It seems to me, therefore, that the presence of this piece of tap on the road cannot be called a defect in the way." Judge McClellan further said: "In the case from which this language is taken, a workman was killed in consequence of a way, along which it was his duty to draw a bogie loaded with puddled iron at white heat, being obstructed. The obstruction consisted of a piece of tap or slag which had been placed by a fellow laborer so near to the tramway on which the bogie ran as to collide with it. This was held not to be a defect in the way or in the condition of the way. . . . This is in principle precisely our case. We think the doctrine of this case eminently reasonable and sound, and we adopt it; and this notwithstanding a contrary doctrine—that coal left too near a railway track constituted a defect therein—appears to have been taken for granted in the case of *Highland Ave. & Belt R. Co. v. Walters*, 91 Ala. 435, 8 So. 357. Clearly a movable object, temporarily placed in dangerous proximity to a railroad track, is not a defect in the condition of such track, within the English doctrine, which we adopt as the sounder and better. The track itself is in the same condition after as it was before the object was so placed. A car left standing on the main line of a railway is certainly as obstructive of its use as one too near it on a side track; yet it would be absurd to say that the track under that car, the 'way' upon which it stands, and which was constructed especially to support it, is rendered defective when it is only subserving the uses for which it was intended."

In *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185, 20 So. 325, it was held: "A foreign substance, having no other connection or relation with the track of a railroad than arises from its having been left in dangerous proximity thereto, is not a defect in the condition of any such track or roadway; and when, in an action against a railroad by the administrator of a deceased employee to recover damages, the complaint alleges that the intestate's death was due to a defect in the condition of defendant's railroad track, in that an oil box, which was part of a car, had been left so near the track as to cause the deceased to be thrown from the footboard of

the engine, where he was standing, as his duty required, does not aver a defect in the condition of the track, but simply an extraneous obstruction, and is, therefore, insufficient as alleging a cause of action under the first clause of § 2590 [1749] of the Code, which provides that the employer is liable for injury to his employees when the injury is caused by any defect in the condition of the ways, works, machinery, or plant used in or connected with the business of the employer." In the opinion of the court, speaking of the first count in the complaint, it was said: In drawing this count, the pleader obviously intended to present a case under clause 1 of § 2590 [1749] of the Code. It is clear—confessed, indeed—that this count is not good under that subdivision, because it shows that the oil box was a foreign substance, having no other connection or relation with or to the track than arose from its having been left in dangerous proximity thereto, and hence was not a defect in the condition of the track (the track was not at all defective), but a mere extraneous obstruction to the proper and safe use of the track, as would have been a car standing upon it when this engine was moving along there. *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 246, 12 So. 88." In *Southern R. Co. v. Moore*, 128 Ala. 434, 29 So. 659, it was held that a rope used for lowering timber in the construction of a trestle along a railroad track, by means of which heavy timbers were put in their places, was in no sense a part of the ways, works, machinery, or plant of the railroad company; and that the count in the complaint basing a right of action on a defect in the rope did not state a cause of action under subdivision 1 of the employers' liability act (Code 1896, § 1749). In *Northern Alabama R. Co. v. Mansell*, 138 Ala. 548, 36 So. 459, the action was against a railway company for the wrongful death of an employee, resulting from his being struck by a stock gap, or a wire thereon, placed too near the railroad track. When struck the employee, in the discharge of his duty, was standing upon the lower step of a passenger coach and leaning out to watch a hot box thereunder. It was held that, in the absence of imputation of negligence or other wrong to any fellow servant of the employee, the action was not brought under the statute embodied in Code 1896, chap. 43, but should be regarded as brought under Id. § 27, which gives to a personal representative the right to maintain an action for a wrong causing the death of his intestate, and under which the liability of the defendant is to be determined by the rules of the common law. It was held in *Southern R. Co. v. Shook*, 150 Ala. 19 L.R.A. (N.S.)

361, 43 So. 579, that "the placing by a railway company of a box car on a side track, to be used as a baggage room, so close to the main track that there was insufficient space for an employee to transfer baggage between such car and trains on the main track was at most an obstruction, and in no sense a defect in the ways, works, etc., within the Employer's Liability Act, Code 1896, § 1740, subdiv. 1." The cases of *Louisville & N. R. Co. v. Bouldin* and *Kansas City, M. & B. R. Co. v. Burton*, supra, and *Birmingham Furnace & Mfg. Co. v. Gross*, 97 Ala. 220, 12 So. 30, were cited in support of the ruling.

Counsel for plaintiff in error cite the case of *East Tennessee, V. & G. R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280, where in it was held: "The supply pipe of a water tank, hanging over or near a railroad track, is a part of its ways, works, machinery, or plant, as those words are used in the statute (Code 1896, § 2590 [1749]; and if it hangs so near to the track that a brakeman, passing under it in the discharge of his duties, is struck and injured or killed, not being guilty of contributory negligence, an action for damages lies against the railroad company." This case is not referred to in any of the later decisions which we have cited from that court; but it will be noted that in this earlier case it was held that the supply pipe projecting from a water tank was a part of the "ways, works, machinery, or plant" of the defendant company. All four of the instrumentalities named in the statute are specified, and it is impossible to say with certainty to which instrumentality it was intended to refer the pipe which caused the injury. See *Labatt, Mast. & S.* 1953. So, in *Alabama Consol. Coal & I. Co. v. Hammond* (Ala.) 47 So. 248, it was held, by a majority of the court, that the evidence in that case showed that a wall of a stone quarry was a part of the "ways or works" of the master within the meaning of the employers' liability act (Ala. Code 1907, § 3910, subdiv. 1). Whether such wall was held to be a part of the ways, or to be a part of the works, the decision leaves in doubt. Another case cited for plaintiff in error is *Louisville & N. R. Co. v. Banks*, 104 Ala. 508, 16 So. 547. There the plaintiff's intestate, a brakeman in the employment of the defendant railroad company, was killed by being knocked from the top of a freight train by a low overhead bridge across defendant's track; the bridge in its low condition having been maintained for many years. It does not appear from the report of the case that the declaration was framed under the employers' liability act. There is no express ruling that the low bridge constituted a defect in the "ways" of the defendant, and the only implication, if, indeed,

there be any at all, looking in that direction, is contained in the statement by the court of the following legal proposition: "Another principle which may be regarded as finally settled is that if an employee knows of the existence of dangers arising from defects in ways, works, and machinery of the company, and continues in its service after the lapse of a reasonable time for the defects to be remedied or removed, he assumes this additional risk, though not incident to his original employment." The court then stated the same legal principle in another form, without referring to the "ways."

Another case cited for plaintiff in error is *Central R. Co. v. Alexander*, 144 Ala. 257, 40 So. 424, wherein it was held: "Where defendant company continued to operate trains under a bridge, which it had permitted another company to erect and maintain over its tracks, a defect in such bridge was a defect in the 'ways' of defendant." Here, as in the case of *Louisville & N. R. Co. v. Banks*, supra, the overhead bridge was a structure of so permanent a nature and so affecting the track itself, or its condition relatively to the operation of trains thereon, as to render the bridge, in view of what was said in *Kansas City, M. & B. R. Co. v. Burton*, supra, and other cases cited, a part of the track or way over and across which it was constructed. The case is clearly distinguishable from the cases to which we have called attention, wherein it was held that movable objects, temporarily placed dangerously near a railroad track, do not constitute a defect in the track. In the case at bar it does not appear from the petition whether the wire stretched over and across the railroad track was merely a movable object, temporarily placed there, or was an object of a permanent nature affecting the track itself, or its condition relatively to its use in the operation of trains; and, as the demurrer raised the point that it did not appear from the petition that the wire had any connection with or relation to the railroad track, the demurrer was properly sustained, under the construction which the supreme court of Alabama has placed upon the employers' liability act of that state, which construction this court will follow. *Krogg v. Atlanta & W. P. R. Co.* 77 Ga. 203, 4 Am. St. Rep. 79.

The judgment sustaining the demurrer contained the recital, "It being conceded that the wire in question was erected by a telephone company to be used in its business," and counsel for plaintiff in error argued the case before this court as if the statement in such recital were a fact to be considered in reviewing the judgment on the demurrer; but, as the office of the demurrer was to test the legal sufficiency of the petition upon the facts as they were therein al-

leged, its scope could not, by an agreement or concession which neither amended nor purported to amend the petition, be extended to cover questions not raised by the allegations of the petition. *Constitution Pub. Co. v. Stegall*, 97 Ga. 405, 24 S. E. 33; *Shuler v. State*, 125 Ga. 778-783, 54 S. E. 689, and cases cited.

Judgment affirmed.

All the Justices concur.

Petition for rehearing denied December 10, 1908.

IDAHO SUPREME COURT.

S. V. OSBURN, Respt.,

v.

OREGON RAILROAD & NAVIGATION COMPANY, Appt.

(— Idaho, —, 98 Pac. 627.)

Railroad — fires — evidence — sufficiency.

1. In an action against a railroad company for damages caused by fire set from an engine running on defendant's road, where the engine that must have set the fire is identified, and it is shown by defendant's witnesses that the particular engine that set the fire is no better than any of its other engines, it is not error to admit evidence of the setting of other fires a short time previous to the destruction of plaintiff's property.

Same — locomotives.

2. Under such conditions and circumstances, the reasonable inference of fact would be that the identified engine would be as likely to throw igniting sparks and live coals, and set the fire, as was any of the other of the company's engines that are shown to have emitted sparks and fire about the same time.

Same — presumptions — burden of proof.

3. In an action against a railroad company for the destruction of property by fire set by sparks emitted from the company's locomotive, it is sufficient to establish a prima facie case for the plaintiff to show that fire had been communicated from the company's engine to his property, which resulted in its damage or destruction; and such proof, when made, raises the presumption of negligence of the company either in the construction and equipment, or management and operation, of its engine, and casts the burden upon the de-

Headnotes by AILSHIE, Ch. J.

Note.—As to effect of presumption of fact that fire was set by locomotive to carry the question of negligence to the jury, see case note to *Continental Ins. Co. v. Chicago & N. W. R. Co.* 5 L.R.A. (N.S.) 99.

defendant of rebutting this presumption of negligence.

Same — circumstantial evidence — presumption.

4. In such case, the fact of the setting of the fire by defendant's locomotive having been proven by circumstantial evidence does not prevent the presumption of negligence on the part of the defendant arising under the rule casting the burden of rebutting such presumption on the defendant. A fact may be established just as fully by circumstantial evidence as by direct and positive evidence. In the former case, however, the proof of the one fact inevitably resulted and is inferred from the proven existence of certain other facts. It does not arise, however, by operation of law or as a presumption thereof.

Presumption — rebuttal — burden of proof.

5. When the presumption of negligence which thus arises, the burden of rebutting which rests on the defendant, is repelled and rebutted by proof of proper construction and the use of proper appliances and careful management and operation, the plaintiff cannot recover without producing proof of actual negligence or want of ordinary care.

Same — negligence — gist of action.

6. In cases for damages caused by fires set from locomotives of a railroad company, negligence is the gist of the action.

Same — evidence — sufficiency.

7. Facts in this case examined and considered, and held sufficient to go the jury.

(December 1, 1908.)

APPÉAL by defendant from a judgment of the District Court for Shoshone County in plaintiff's favor, and from an order denying a new trial in an action brought to recover damages for the alleged negligent burning of plaintiff's barn. Affirmed.

The facts are stated in the opinion.

Messrs. W. W. Cotton, Carlton Fox, and W. A. Robbins, for appellant:

Where the engine which alone could have caused the fire is identified, testimony that other engines of the defendant, at other times and places, set fire or threw igniting sparks, is neither competent nor relevant to the issue, without proof that they were in the same condition and operated in the same way as was the engine charged when the fire occurred.

Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co. 52 C. C. A. 95, 114 Fed. 133; Shelly v. Philadelphia & R. R. Co. 211 Pa. 160, 60 Atl. 581; McFarland v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.) 88 S. W. 450; Henderson v. Philadelphia & R. R. Co. 144 Pa. 461, 16 L.R.A. 299, 27 Am. St. Rep. 652, 22 Atl. 851; San Antonio & A. P. R. Co. v. Home Ins. Co. (Tex. Civ. App.) 70 S. W. 19 L.R.A. (N.S.)

999; Texas Midland R. Co. v. Moore (Tex. Civ. App.) 74 S. W. 942; Crissey & F. Lumber Co. v. Denver & R. G. R. Co. 17 Colo. App. 275, 68 Pac. 675; Collins v. New York C. & H. R. R. Co. 109 N. Y. 243, 16 N. E. 50.

Before the presumption of negligent construction or operation of defendant's locomotive arises, plaintiff must prove that defendant's locomotive set the fire, otherwise there would be a presumption on a presumption, which is not allowable.

Finkleston v. Chicago, M. & St. P. R. Co. 94 Wis. 270, 68 N. W. 1005; Gracy v. Atlantic Coast Line R. Co. 53 Fla. 350, 42 So. 903; Gainesville, J. & S. R. Co. v. Edmondson, 101 Ga. 747, 29 S. E. 213; Wick v. Tacoma Eastern R. Co. 40 Wash. 408, 82 Pac. 711; Minneapolis Sash & Door Co. v. Great Northern R. Co. 83 Minn. 370, 86 N. W. 451; Flanagan v. Chicago, M. & St. P. R. Co. 65 Minn. 112, 67 N. W. 794; Stratton v. Union P. R. Co. 7 Colo. App. 126, 42 Pac. 602; Denver, T. & G. R. Co. v. DeGraff, 2 Colo. App. 42, 29 Pac. 664; Denver & R. G. R. Co. v. Morton, 3 Colo. App. 155, 32 Pac. 345; Megow v. Chicago, M. & St. P. R. Co. 86 Wis. 466, 56 N. W. 1099; Peffer v. Missouri P. R. Co. 98 Mo. App. 291, 71 S. W. 1073.

When the presumption of negligent construction and operation is repelled by proof of proper construction and use of proper appliances and careful management, recovery cannot be had without proof of negligence or want of ordinary care.

Alabama G. S. R. Co. v. Taylor, 129 Ala. 238, 29 So. 673; Preece v. Rio Grande Western R. Co. 24 Utah, 493, 68 Pac. 413; Menominee River Sash & Door Co. v. Milwaukee & N. R. Co. 91 Wis. 447, 65 N. W. 179; Creighton v. Chicago, R. I. & P. R. Co. 68 Neb. 456, 94 N. W. 527; Missouri P. R. Co. v. Stafford (Tex. Civ. App.) 31 S. W. 319; Gainesville, J. & S. R. Co. v. Edmondson, supra; Louisville & N. R. Co. v. Marbury Lumber Co. 125 Ala. 237, 50 L.R.A. 620, 28 So. 438; Missouri, K. & T. R. Co. v. Fulmore (Tex. Civ. App.) 29 S. W. 688.

Messrs. A. G. Kerns and H. E. Worstell, for respondent:

Proof prima facie showing that fire has been communicated from an engine of the railroad company to property, resulting in the damage or destruction thereof, raises a presumption of negligence in the construction or management of the engine, and casts upon the defendant the burden of rebutting it.

Koontz v. Oregon R. & Nav. Co. 20 Or. 3, 23 Pac. 820; Richmond v. McNeill, 31 Or. 342, 49 Pac. 879; Spaulding v. Chicago & N. W. R. Co. 30 Wis. 110, 11 Am. Rep. 550;

negligence is the gist of all such actions. 3 Elliott, Railroads. 2d ed. § 1221. This proposition cannot be determined solely upon the failure of the plaintiff to produce rebuttal evidence. It may be rebutted or actual or positive negligence may be disclosed by the defendant's own witnesses either on direct or cross examination. In the case at bar the plaintiff did not produce any rebuttal testimony. In the first place, however, the plaintiff, as we have above recited, showed by a number of witnesses that within a comparatively short period of time immediately preceding the fire defendant's locomotive had emitted great quantities of sparks and live coals. One witness stated that he had seen live coals as big as the end of his finger emitted and thrown as much as 30 to 50 feet distant from the track, and other witnesses testified to extinguishing fires as far as 100 feet distant from the track. This evidence tended to show a habit of negligence on the part of the company about that time and in that vicinity. It also tended to establish the possibility, capacity, and tendency of defendant's locomotives of the same class generally to emit sparks and set fires. It tended to establish either negligent construction and equipment and maintenance of its engines, or else negligent handling and operating of the same. The train, in pulling out of Osburn on the morning of August 4, 1907, was on a down grade, and was pulling only about 300 tons. It was shown by defendant's employees that this engine was capable of pulling 1,500 tons. It therefore stands admitted that it was not overloaded. It left Osburn at the rate of about 30 miles an hour. Witnesses generally testified that the engine was working hard, and throwing smoke and sparks very freely. Whether this was the exercise of reasonable care in its operation was properly a question for the jury. One witness who was present at the depot, and who had at some time past been a brakeman, testified that in his opinion the engineer threw the throttle wide open as he pulled out of the station; that the engine worked as if that had been done. The engineer testified that he had the throttle half open. The inspector who testified that he had inspected the smokestack and spark arrester that morning at Wallace says that it was in good condition. He also stated that he did not know that the engineer stopped at the roundhouse to get a bolt, and that, if he had inspected it, there would have been no bolt needed. He said, however, that it was not his business to inspect the mechanical part of the engine, and that he had nothing to do with the eccentric bolts. The engineer testified that he stopped in the

lower yards at Wallace that morning before pulling out in order to get a bolt which he needed. It appears from the evidence of the different witnesses that a bolt called an "eccentric bolt" was either broken or missing in this engine. Taking all these circumstances, we think there was sufficient evidence tending to show actual negligence, either in the maintenance and equipment of the engine and appliances or in its operation and management, to go to the jury on the general issue of defendant's negligence. The evidence in this case is by no means satisfactory or convincing to us, but, under the rule, we think there was such a conflict as the jury were entitled to settle and determine, and that their determination is binding on this court.

The judgment should be affirmed, and it is so ordered. Costs in favor of respondent.

Sullivan and Stewart, JJ., concur.

Petition for rehearing denied December 21, 1908.

ILLINOIS SUPREME COURT.

WILLIAM J. BELL et al., Appts.,

v.

PEOPLE OF THE STATE OF ILLINOIS
EX REL. THOMAS B. CARRELL, County Collector.

(237 Ill. 332, 86 N. E. 593.)

Tax — oil lease — statutory construction.

1. A statute providing that any mining right may be conveyed by lease, and that such conveyance shall be considered as separating such right from the land so that it may be taxed separately, applies to an oil lease.

Same — commercial use.

2. That at the time of the passage of a statute providing for the taxation of mining rights gas and petroleum were not extensively used as articles of commerce does not prevent the application of the statute to the right to mine such products.

Same — real property.

3. Where an oil and gas lease conveys a freehold, it should be assessed for taxation as real estate.

Same — assessment — revision.

4. That in assessing a mining right un-

Note. — See case note to Wolfe County v. Beckett, 17 L.R.A.(N.S.) 688, as to interest of one other than the owner of soil in mineral *in situ* as independent subject of taxation, and case note to Hancock County v. Imperial Naval Stores Co. 17 L.R.A.(N.S.) 693, as to interest of one other than the owner of the soil in growing trees or timber or their products as separate subject of taxation.

der an oil and gas lease no assessment is made of the royalty belonging to the owner of the real estate will not invalidate the assessment against the lessee in the absence of anything to show that he was not assessed only what the officers considered the full value of his right under the lease.

(December 15, 1908.)

APPEAL by defendants from a judgment of the Cumberland County Court directing the sale of certain property for nonpayment of taxes. Affirmed.

The facts are stated in the opinion.

Messrs. Golden, Scholfield, & Scholfield, for appellants:

The statute with respect to mining rights does not authorize the taxation of an oil or gas lease, or the oil or gas underlying a tract of land.

Smoot v. Consolidated Coal Co. 114 Ill. App. 512; Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Kelly v. Keys, 213 Pa. 295, 110 Am. St. Rep. 547, 62 Atl. 911.

Oil and gas leases are regarded as of a character so intangible and fleeting as not to constitute property liable to taxation.

Rawlings v. Armel, 70 Kan. 778, 79 Pac. 683; Dickey v. Coffeyville Vitrified Brick & Tile Co. 69 Kan. 106, 76 Pac. 398; Kansas Natural Gas Co. v. Neosho County, 75 Kan. 335, 89 Pac. 750; State v. South Penn Oil Co. 42 W. Va. 80, 24 S. E. 688; Kitchen v. Smith, 101 Pa. 452; Jones v. Wood, 9 Ohio C. C. 560, affirmed in 54 Ohio St. 627, 47 N. E. 1119; Moore's Appeal, 4 Pa. Dist. R. 703; Carter v. Tyler County Ct. 45 W. Va. 806, 43 L.R.A. 725, 32 S. E. 216.

Mr. Walter Brewer, for appellee:

Oil and gas are minerals and, while in the rock and sand *in situ*, are a part and portion of the realty; and embraced in the comprehensive idea which the law attaches to the word "land."

Wilson v. Youst (Wilson v. Hughes) 43 W. Va. 826, 39 L.R.A. 292, 28 S. E. 781; Funk v. Haldeman, 53 Pa. 248; Stoughton's Appeal, 88 Pa. 201; Blakley v. Marshall, 174 Pa. 429, 34 Atl. 564; State v. South Penn Oil Co. 42 W. Va. 81, 24 S. E. 688.

Whenever a conveyance of oil is made, it is, in effect, the grant of part of the corpus of the estate, and not a mere incorporeal right.

Wilson v. Youst (Wilson v. Hughes) 43 W. Va. 834, 39 L.R.A. 292, 28 S. E. 781; Funk v. Haldeman, 53 Pa. 229; Williamson v. Jones, 39 W. Va. 231, 25 L.R.A. 222, 19 S. E. 436; Wolfe County v. Beckett, 22 Ky. L. Rep. 167, 17 L.R.A.(N.S.) 688, 105 S. W. 448; Harvey Coal & Coke Co. v. Dillon, 59 19 L.R.A.(N.S.)

W. Va. 605, 6 L.R.A.(N.S.) 628, 53 S. E. 941.

The oil right is subject to taxation.

Caldwell v. Copeland, 37 Pa. 427, 78 Am. Dec. 436; Re Major, 134 Ill. 19, 24 N. E. 973; Consolidated Coal Co. v. Baker, 135 Ill. 545, 12 L.R.A. 247, 26 N. E. 651; Sholl Bros. v. People, 194 Ill. 24, 61 N. E. 1122; Re Maplewood Coal Co. 213 Ill. 283, 72 N. E. 786; Wilson v. Youst (Wilson v. Hughes) 43 W. Va. 839, 39 L.R.A. 292, 28 S. E. 781; Blakley v. Marshall, supra.

Carter, J., delivered the opinion of the court:

This is an appeal from a judgment of sale entered in the county court of Cumberland county for taxes levied on a mining right in 80 acres of land in that county. The right is based on a certain instrument known as an "oil and gas lease," dated October 27, 1905, signed by Charley M. and Rachel E. Queen, granting to one Priddy, his heirs, successors, and assigns, in consideration of \$1 and the covenants of said lease, "all the oil and gas in and under the following described premises, together with the exclusive right to enter thereon at all times for the purpose of drilling and operating for oil, gas, or water, and to erect, install, and maintain all buildings and structures, machinery and appliances, and lay all pipes necessary for the production, storage, and transportation of oil, gas, or water upon and from said premises. Excepting and reserving, however, to the lessor the one-eighth ($\frac{1}{8}$) part of all oil produced and saved from said premises, to be delivered in the pipe line with which the lessee may connect his wells. . . . To have and to hold the above premises for the term of one year, and so long thereafter as oil or gas is found on said premises in paying quantities." The lease also contains provisions, among others, as to the payment of rent in case only gas is found, or in case the well is not completed within sixty days. It appears from the stipulation of facts filed by the parties hereto in the trial court that the lease had been duly assigned to and was owned by the Campbell Oil Company, the members of which are appellants herein, and that said company had drilled a well on said land which was then producing oil in paying quantities; also, that the owner of the fee had paid the taxes on the fee, amounting to \$14.10.

Sections 6 and 7 of chapter 94 (Hurd's Rev. Stat. 1905, p. 1399), in relation to taxing mining rights in this state, are as follows:

"Sec. 6. Any mining right, or the right to dig for or obtain iron, lead, copper, coal, or other mineral from land, may be con-

veyed by deed or lease, which may be acknowledged and recorded in the same manner and with like effect as deeds and leases of real estate.

"Sec. 7. When the owner of any land shall convey, by deed or lease, any mining right therein, such conveyance shall be considered as so separating such right from the land that the same shall be taxable separately; and any sale of the land for any tax or assessment shall not include or affect such mining right."

Appellants contend that the term "other mineral," in said § 6, only includes such minerals as are *ejusdem generis* with iron, lead, copper, and coal, and does not include oil and gas. They also contend that as this statute was passed in 1861, and as oil and gas had not at that time been the subject of legislation or court action, the legislature could not have intended those products to be included in the term "other mineral." We are unable to agree with these contentions. Section 6, above quoted, provides that "any mining right" may be conveyed by lease, and § 7 provides that, when such mining right has been conveyed, it shall be considered as so separated from the land that it is taxable separately. Does this oil lease properly come within the term "mining right?" A mine is an excavation in the earth for the purpose of obtaining minerals (2 Bouvier's Law Dict. Rawle's ed. 413), an excavation, properly under ground, for the purpose of taking out some useful product (Standard Dict.) A mining right may properly be deemed a right to excavate in the earth for the purpose of obtaining minerals or other useful products. In some of the states petroleum forms a very valuable part of the natural wealth, and has been given careful consideration by the courts, and they have uniformly held, so far as the authorities we have examined show, that it should be classed as a mineral. Stoughton's Appeal, 88 Pa. 198; Murray v. Allred, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355; Gill v. Weston, 110 Pa. 312, 1 Atl. 921; Williamson v. Jones, 39 W. Va. 231, 25 L.R.A. 222, 19 S. E. 436; Wilson v. Youst (Wilson v. Hughes) 43 W. Va. 826, 39 L.R.A. 292, 28 S. E. 781; Kelley v. Ohio Coal Co. 57 Ohio St. 317, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399; Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564; 2 Bouvier's Law Dict. 545. The case of Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696, is cited by appellants as tending to uphold the contrary view. While it holds that the reservation of "other minerals" in a deed did not include petroleum in that instance, it expressly states, "it is true that petroleum is a mineral. No discussion is needed to prove that 19 L.R.A. (N.S.)

fact." This court has recently decided that oil and gas are classed as minerals, though they may have peculiar attributes not common to other minerals which have a fixed and permanent situs. Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53. It is true that, when the statute above quoted was passed, petroleum was not as extensive an article of commerce in this state as it has since become. That, however, does not exclude it from the act any more than it would gold, mica, or some other mineral that might be discovered. In Gill v. Weston, supra, the same argument was advanced, and the court there said: "It matters not that the act of 1855 was passed before petroleum was discovered. It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands."

Manifestly, the mining right created by this lease is property and should be taxed. Appellants have cited authorities holding that it is not such a right that it can be taxed as real estate. State v. South Penn Oil Co. 42 W. Va. 80, 24 S. E. 688; Kansas Natural Gas Co. v. Neosho County, 75 Kan. 335, 89 Pac. 750; Kitchen v. Smith, 101 Pa. 452; Wood v. Jones, 54 Ohio St. 627, 47 N. E. 1119. Some of these authorities tend to hold that it cannot be taxed at all except as the oil and gas are taken from the land, and then they must be taxed as personal property. It should be noted that, although the leases in those cases are substantially like the one here in question, the statutes in those states are quite different from the one here under consideration. The West Virginia court holds in the case just cited from that state that the lease does not convey a freehold interest. This court has held, under provisions in a lease substantially like this, that it conveyed a freehold interest. Bruner v. Hicks, 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888; Poe v. Ulrey, supra. In discussing the above sections of the statute in Re Major, 134 Ill. 19, 24 N. E. 973, we have held that, even though there was no evidence that coal existed under the land, whatever there was of coal or mineral underlying certain land was reserved by the conveyance there in question, and the lease could be taxed. Similar leases affecting rights as to coal have been held to so separate a mining right therein that it should be taxed separately. Consolidated Coal Co. v. Baker, 135 Ill. 545, 12 L.R.A. 247, 26 N. E. 651; Sholl Bros. v. People, 194 Ill. 24, 61 N. E. 1122; Re Maplewood Coal Co. 213 Ill. 283, 72 N. E. 786. Oil and gas, like salt water and other liquids and gaseous bodies, are dif-

ferent in their action from solid minerals, such as coal and iron, and this difference might, under certain conditions, require the application of different rules as to solid minerals than as to liquid or gaseous ones. *Watford Oil & Gas Co. v. Shipman*, supra. But such is not the case here. Whatever may have been decided in other jurisdictions, it is clear under the decisions in this state that this lease conveys such a mining right in the land here in question that it can properly be taxed separately, and that, as it involves a freehold, it should be assessed as real property.

Appellants contend that the board of review improperly assessed the entire mining right to appellants. So far as the record discloses, there is nothing to show that the board did not assess to appellants only what was considered the fair value of the mining right obtained by them under the lease. As to whether the one eighth of oil reserved by the owners of the fee did or should cause the tax on the fee to be made higher is a question not raised on this record.

The judgment of the County Court will be affirmed.

KANSAS SUPREME COURT.

O. BRICE-NASH, Plff. in Err.,
v.
BARTON SALT COMPANY.

(— Kan. —, 98 Pac. 768.)

Injury to servant — nondelegable duty — warning.

Where the method adopted by a salt company for carrying on its business involves the occasional dislodging of masses of salt, thereby covering the floor of a room with fragments moving with such force as to expose to danger employees who are there in the discharge of their duties, and the

Headnote by MASON, J.

Note. — Upon the question as to whether the duty to warn servants of transitory dangers is a delegable one, see subject note to *Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 33, 120 (referred to in the foregoing opinion); and also the case note to *Illinois Steel Co. v. Ziemkowski*, 4 L.R.A.(N.S.) 1161, upon the question whether a servant charged with the duty to warn other servants of danger is a vice principal.

And the specific question whether the duty of a railroad or street railway company with respect to signals or warnings is a delegable one is treated in a case note to *Carter v. McDermott*, 10 L.R.A.(N.S.) 1103, supplementing the note in 54 L.R.A. 124, on that point.
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only adequate way to protect them from such danger is to warn them just before such dislodgment, the giving of such warning is a nondelegable duty of the employer, and its omission imposes a liability for any consequent injury to an employee, regardless of any question of coerservice.

(December 12, 1908.)

ERROR to the District Court for Reno County to review a judgment sustaining a demurrer to plaintiff's evidence in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. F. Dumont Smith and Fairchild & Lewis, for plaintiff in error:

The plaintiff, a bookkeeper, was not a fellow servant with the foreman of the packing room.

Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339; *Missouri, K. & T. R. Co. v. Quinlan*, 77 Kan. 126, 93 Pac. 632; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Missouri P. R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 352; *Atchison, T. & S. F. R. Co. v. Moore*, 31 Kan. 197, 1 Pac. 644; *Donnelly v. Cudahy Packing Co.* 68 Kan. 653, 75 Pac. 1017; *Oliver v. Roach*, 31 Ky. L. Rep. 284, 102 S. W. 274; *Trickey v. Clark*, 50 Or. 516, 93 Pac. 457; *St. Louis & S. F. R. Co. v. Burgess*, 72 Kan. 454, 83 Pac. 991.

It was incumbent upon the foreman to warn the plaintiff of the approaching danger, as representative of the defendant.

Hannibal & St. J. R. Co. v. Fox, 31 Kan. 586, 3 Pac. 320; *Harper v. Iola Portland Cement Co.* 76 Kan. 612, 93 Pac. 179, 343; *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 484; *McGuire v. Quincy, O. & K. C. R. Co.* 128 Mo. App. 677, 107 S. W. 411; *Hendrickson v. United States Gypsum Co.* 133 Iowa, 89, 9 L.R.A.(N.S.) 555, 110 N. W. 322; *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *Lebbering v. Struthers*, 167 Pa. 312, 27 Atl. 720; *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801; *Deep Min. & Drainage Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210; *Texas & P. R. Co. v. Nix* (Tex. Civ. App.) 23 S. W. 328; *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632; *Polaski v. Pittsburgh Coal Dock Co.* 134 Wis. 259, 14 L.R.A.(N.S.) 952, 114 N. W. 437; *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L.R.A. 97, 26 Am. St. Rep. 621, 48 N. W. 222; *Anderson v. Northern Mill Co.* 42 Minn. 424, 44 N. W. 315; *Eidner v. Three Lakes Lumber Co.* 45 Wash. 323, 88 Pac. 326; *Atchison, T. & S. F. R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343; *Missouri, K. & T. R. Co.*

v. Green, 75 Kan. 504, 89 Pac. 1042; Kansas City, M. & O. R. Co. v. Loosley, 76 Kan. 103, 90 Pac. 990; Electric Plaster Co. v. Reedy, 74 Kan. 57, 85 Pac. 824; Coffeyville Vitrified Brick & Tile Co. v. Shanks, 69 Kan. 306, 76 Pac. 856; Lewis v. Seifert, 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514; 26 Cyc. Law & Proc. p. 1152.

Messrs. William Warner, O. H. Dean, W. D. McLeod, and H. C. Timmons for defendant in error.

Mason, J., delivered the opinion of the court:

C. Brice-Nash sued the Barton Salt Company for damages on account of injuries received while in its employ. A demurrer to his evidence was sustained, and he prosecutes error. The evidence tended to establish these facts: The defendant is engaged in manufacturing, refining, and selling salt. The plaintiff was its bookkeeper. His duties required him at times, for the purpose of procuring information, to go into the packing room, which was partly filled with salt, which rose nearly perpendicularly to the height of about 12 feet. The practice was for the workmen from time to time to pick the face of the salt with long bars until it caved off in quantities suitable for packing in sacks and barrels. When they were looking for a fall while the plaintiff was present, they would tell him to look out.—to keep away. On the day of the accident he came into the packing room to inquire about a shipment. He spoke with Mr. Swofford, the foreman of the room, and Mr. White, a workman there. He noticed that the salt was undermined. They told him that they had been trying to get it down, but did not say they were then looking for it to fall. He understood they were not looking for a fall. While he was standing with his back to the salt, talking with Swofford, who faced it, White prodded it with his bar, nothing having been said about resuming work, and no warning having been given, and it caved off, catching the plaintiff, throwing him against a post, and causing him serious injury.

The principal contention of the defendant is that Swofford and White, whose failure to give warning of the resumption of work and the consequent caving off of the salt is the negligence complained of, were fellow servants of the plaintiff, and that his recovery was properly denied on that account. Whether the relation each bore to their common employer was such as to bring them within the scope of the rule invoked need not be determined, for we hold that the evidence would have justified a finding that the defendant owed a positive and nondelegable duty to the plaintiff, under the cir-

cumstances stated, to give him warning that an immediate fall of the salt was to be expected.

A situation involving a somewhat similar question was presented in *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 Atl. 835; the decision of the supreme court being indicated by the seventh paragraph of the syllabus, reading as follows: "Where the system of the working of a stone quarry was one whereby no protection was afforded to the workmen engaged in another portion of the quarry apart from the blasting from injury from flying stones, caused by the explosions of the blasts in the rock, except the warning word 'fire' given at the time the fuse was communicated to the explosives of the blast; and one of the rules of the master was that no employee should leave his work to seek safety from the dangers of the blast until the warning 'fire' was given by the foreman, whose duty it was to light the fuse,—it became and was the duty of the master, in the exercise of reasonable care, to have such warning announced sufficiently long enough before the explosion for such workmen or employees, in the exercise of ordinary care, to reach a place of safety; and this duty, being delegated to such boss or foreman, does not relieve the master from the liability to answer for the neglect of the boss or foreman to perform that duty. This neglect is not an incidental act of the coservice." The case was taken to the court of appeals and errors, and there affirmed; the grounds of the decision being thus stated (61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764): "Two views are suggested,—one, on behalf of the plaintiff, that the giving of proper warning was an essential part of the duty owed by the employer to the workman of taking reasonable care that the places where the workmen were engaged should be kept safe, and therefore if, through negligence, the proper warning was not given, the employer's duty was not performed; the other, on behalf of the defendant, that the giving of the warning was only incidental to the foreman's work in preparing the blast and lighting the fuse, in which work the foreman was clearly a fellow servant of the plaintiff, engaged in a common employment, and therefore his negligence in that incidental service was not chargeable upon the common master. On reflection it will be perceived that the giving of warning bore no direct relation to the foreman's work in preparing and firing the blast. The object of that work was the removal of rock, and such object would be attained as well without the warning as with it, if we leave out of consideration the safety of the workmen. Quite different are the conditions where a

person using a tool or machine is obliged to see that the implement remains fit for use. In such case the duty to examine is auxiliary and incidental to the duty to use; and, when a servant owes the latter duty to his master, he owes the former also. A failure to perform carefully this incidental duty of examination may result in damage to a fellow servant, but the common master is not responsible for such damage, because the duty neglected was not one owed by him outside of that duty. There may have been a similar duty of inspection owed by the master to his servants, but the duties themselves are distinguishable from each other. In the present case, however, as already pointed out, the duty to give warning was not in any such sense subservient to the blasting of rock. On the other hand, when we consider the general duty owed by an employer to his employees to exercise reasonable care that the place where he sets them to work shall be kept safe (*Van Steenburgh v. Thornton*, 58 N. J. L. 160, 33 Atl. 380), the propriety of including therein the duty of giving warning, in such circumstances as those now before us, becomes at once apparent. The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by the workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen, and proper warning given, the quarry became an unsafe place for the workmen, but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place should be kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast. In selecting the person who was to fire the blast as the person to give the warning, the defendant probably chose the man best able to perform that duty; but, as the defendant's responsibility extended beyond the selection of an agent and included the warning itself, it must answer for negligence in the giving of warning, no matter how fit was the chosen agent." We regard this reasoning as sound in itself, and as consistent with the rules on the subject which have gained general recognition by the courts. However, in a note published in 54 L.R.A. 85, at page 120, it is said, referring to this decision: "All the authorities, with the exception of the single New Jersey case cited, . . . seem to be agreed that a master is not liable for the negligence of a servant in failing to notify a coemployee of the approach of a transi-

tory peril which as the work progresses will render the environment unsafe for a brief period, but which may easily be avoided if due warning is given. In some of the cases illustrating this principle the breach of duty was committed by failing to notify the injured servant himself that his safety was imperiled by the particular peril in question." This language is repeated by the author of the note in his work on Master and Servant (2 Labatt, Mast. & S. § 601).

While there is undoubtedly a conflict in the authorities, the New Jersey case does not stand alone. It is cited with approval, with other cases of the same tendency, in *Coffeyville Vitrified Brick & Tile Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856, where the principle it announces was applied. Some of the apparent conflict in the decisions can be eliminated upon considerations which were there thus stated: "In some cases it may be said that, if the conduct of an enterprise involve the giving of monitory signals in passing progressively from detail to detail of the work, and the person set to give the signal be carefully chosen, the company will not be bound if he fail in his duty. An injured workman and the person employed to give the signal may then be said to be engaged in the discharge of duties so intimately related and so combinedly directed to a common end that the one must be on his guard with reference to the conduct of the other; the warning becomes a part of the service itself, which is something entirely distinct and separate from the things the master must do to make the service and the place in which it is performed reasonably safe. But whenever a negligent act violates any duty which the master himself owes to the servant, as, for example, the duty to make the service and the place in which it is performed reasonably safe, that fact controls, irrespective of the rank or grade of service between employees, and notwithstanding the circumstance that they are engaged in a common employment directed to a common end; and if, in the discharge of the master's duty, a warning be necessary, it is not enough for him to say that he has provided a competent person to give it; the warning must be given." The New Jersey case is expressly disapproved in *McLaine v. Head & D. Co.* 71 N. H. 298, 58 L.R.A. 464, 93 Am. St. Rep. 522, 52 Atl. 545, and in *Kelly Island Lime & Transp. Co. v. Pachuta*, 69 Ohio St. 462, 100 Am. St. Rep. 706, 69 N. E. 988. In the former case, however, there is a strong dissenting opinion in which the authorities are carefully reviewed in what seems a successful effort to show that the doctrine repudiated by the majority of the court is in

accordance with precedent as well as with reason. *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764, is cited with approval in a dissenting opinion in *Ward v. Naughton*, 74 App. Div. 68, 77 N. Y. Supp. 344, where the facts are quite similar to those of *Electric Plaster Co. v. Reedy*, 74 Kan. 57, 85 Pac. 824, where a conclusion was reached directly in conflict with that of the New York court. See, also, *Donk Bros. Coal & Coke Co. v. Thil*, 228 Ill. 233, 81 N. E. 857.

In the present case the evidence had some tendency to show that the plans of operation adopted by the defendant company contemplated that at irregular intervals the bank of salt should be undermined and the detached portion permitted to fall down and roll across the floor of the packing room in such manner, in such quantity, and with such force as to expose the plaintiff to injury while in the performance of his duties; that the only way by which he could be adequately protected was by warning him when the avalanche was to take place; that the danger did not arise from the method, negligent or otherwise, in which the workmen performed the duties assigned to them in which they had freedom of action, but inhered in the general mode in which the company carried on its business; and that, in the absence of a due warning, the place was not a safe one in which to work. If these conditions existed, the failure to give the notice was an omission of one of the positive, affirmative obligations of the employer, rendering him liable, irrespective of the relation of the employees to each other. Whether they did exist was a question that should have been submitted to the jury.

The petition described the negligent act complained of as that of White. Under the evidence the plaintiff relied largely upon the failure of Swofford, the foreman, to give the warning. It is urged that on the demurrer the only question was whether the evidence tended to support the exact case presented by the pleading. The trial court, however, in announcing the ruling, placed it upon the ground that the plaintiff's injury was due to the act of a fellow servant. While the assigning of an untenable reason will not warrant reversing a decision if it can be justified upon other considerations, it would be manifestly unfair to nonsuit the plaintiff on account of a variance in proof without giving him an opportunity to amend. Moreover, the variance, especially in view of what has been said already, is of little importance. See, in this connection, *Missouri, K. & T. R. Co. v. Green*, 75 Kan. 504, 89 Pac. 1042.

An argument is also made that the plain-

tiff ought not to recover on the strength of no warning having been given him, inasmuch as his own testimony showed that he understood the salt might fall at any time and thought he was far enough away to be safe, and that he heard the noise of White's pick as he resumed work, and was by that means notified of the probable fall. These and other matters of the same general character discussed in the brief are really considerations to be presented to the jury. It does not conclusively follow from what the plaintiff said that he would have been satisfied with his position if he had known the fall was coming; and it may be that, even where he stood, he could have saved himself, if he had had timely warning, by stepping to one side so as to avoid being caught against the post. Although he testified that he heard a noise which he afterwards concluded was made by White's pick, he did not say that he identified it as such at the time.

The judgment is reversed, and a new trial ordered.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

JOHN N. WEBSTER, Appt.,

v.

CITY OF VANCEBURG.

(— Ky. —, 113 S. W. 140.)

Municipal corporation — adjustment of sidewalk.

1. A municipal corporation is not bound to make the necessary alterations in a sidewalk along a railroad freight depot to permit wagons to be driven from the roadway to the depot.

Same — customary use.

2. The fact that a sidewalk along a freight depot has been driven on and across for many years by teamsters desiring to reach the depot from the roadway does not render the municipality responsible for its safety for such use.

Same — assumption of risk.

3. A teamster who attempts to use a sidewalk along a freight depot as a driveway to reach the depot takes the risk of injury from its being unsafe for that purpose.

(November 12, 1908.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Lewis County in defendant's favor in an action brought to

Note. — An extensive search has disclosed no other cases involving the question of a city's liability for injury to one driving or attempting to drive upon a sidewalk.

recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. A. D. Cole, for appellant:

It cannot be held as a matter of law that under no circumstances can a sidewalk be used as a crossing for vehicles to pass over.

27 Am. & Eng. Enc. Law, 2d ed. p. 166.

Mr. R. D. Wilson for appellee.

O'Rear, J., delivered the opinion of the court:

The Chesapeake & Ohio Railway freight depot in Vanceburg is situated on Main street, alongside of which is a pavement. The lay of the land is such that in getting freight into the depot for shipment, and in getting it out for delivery in town, teamsters have for years crossed the pavement in taking their wagons and drays up to the depot building to load and unload freight. Appellant, who was a drayman, loaded his dray with baled hay from the depot, or a car by it, and for that purpose and his own convenience had driven his dray upon the pavement. In driving off the pavement, the wheels of his dray dropped off at the pavement curbing, one before the other, which was a foot or more lower at that point than the sidewalk. From the jar thus caused appellant was thrown to the ground and sustained a serious injury to his shoulder. He sued the city, because it had neglected to so repair the pavement at that point as to make it reasonably safe for its use by wagons having occasion to go to the freight depot. Upon the evidence showing the foregoing state of facts, the trial court peremptorily instructed the jury to return a verdict for the defendant city, of which appellant complains on this appeal.

The sidewalks of a city are intended solely for the use of pedestrians. While they must be kept in reasonably safe repair for such use, the city is not bound to keep them fit for the use of vehicles also. If drivers of vehicles nevertheless use them for passage of their wagons, they must do so at their peril. Nor does the fact that the pavements have been so used by the acquiescence of the city for many years affect its liability in the matter, so far as vehicle drivers are concerned.

It is argued that the way used by appellant was the only practicable way for wagons to reach the depot. Be that as it may, the city was not legally bound to provide a roadway for wagons to the railroad depot, and is not liable for a failure to do so. If the driver of the wagon saw proper to use ways not provided for such vehicles, he has no legal complaint against the city that

they were not fit for the use to which he was putting them. A city's legal duty is not to furnish streets, even where they may be needed; but it is to keep such as it does furnish in a reasonably safe condition for use for purposes for which they are provided,—sidewalks for pedestrians; roadways for vehicles and horses.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY et al., Appts.,

v.

MINNIE RAINE.

(— Ky. —, 113 S. W. 495.)

Carrier — passenger — acceptance.

1. A passenger who boards a train after telegraphing for a reservation on a certain Pullman car which is not attached to that train, but will be picked up a few miles down the road, and is allowed to remain in a Pullman car pending the arrival of the one on which his reservation is, is not a passenger of the Pullman company, and it is not liable for negligence of its conductor which results in his missing his car.

Same — negligence — liability.

2. Where a sleeping car conductor undertakes, in the presence of the train conductor, to put a lady holding a railroad ticket on the right Pullman car, and tells her to remain in his car until the desired car arrives, the railroad company is liable for his neglect to do so.

Same — connecting carrier — liability.

3. A railroad company receiving a sleeping car from another company upon which is a passenger for a car on its train whom the conductor of the former car has undertaken to put on the right car is not liable for sending that car forward in the first section of the train, so that the passenger does not get it, where it had no notice of her desire until after the train had been separated, and its conductor did all he could to rectify the mistake after learning of it.

Damages — missed train.

4. A railroad company which negligently causes a passenger to miss a train on a connecting road so that she is compelled to stop over at a way station and return home is not liable for injury to her through going into a cold room of a hotel and sitting up all night, or for vexation or personal injury.

Note. — An extensive search has failed to disclose any other case discussing the question of the duty of a sleeping car company toward a train passenger who was permitted, as a matter of courtesy, to ride in a sleeping car.

convenience because of the delay, but may be chargeable for hotel bills and lost time.

(November 18, 1908.)

A PPEAL by defendants from a judgment of the Circuit Court for Boyle County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have resulted to plaintiff because of defendant's breach of contract. Reversed.

The facts are stated in the opinion.

Mr. John Galvin, with **Mr. Charles H. Rodes**, for appellant Cincinnati, N. O. & T. P. R. Co.:

The sleeping car conductor cannot be held the agent of the railway company.

Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 26, 2 Am. St. Rep. 144, 13 N. E. 122, 14 N. E. 352; Hancock v. Louisville & N. R. Co. 27 Ky. L. Rep. 434, 85 S. W. 210; Alabama G. S. R. Co. v. Carmichael, 90 Ala. 19, 9 L.R.A. 388, 8 So. 87; Levins v. New York, N. H. & H. R. Co. 183 Mass. 175, 97 Am. St. Rep. 434, 66 N. E. 803; Illinois C. R. Co. v. Harper, 83 Miss. 560, 64 L.R.A. 283, 102 Am. St. Rep. 469, 35 So. 764; Illinois C. R. Co. v. Head, 119 Ky. 809, 84 S. W. 751.

Messrs. C. R. McDowell and Humphrey & Humphrey for appellant Southern Railway in Kentucky.

Messrs. C. H. Rodes, C. R. McDowell, and Kohn, Baird, Sloss, & Kohn for appellant Pullman Company.

Messrs. Robert Harding, J. F. Vanarsdall, E. M. Hardin, and E. V. Puryear for appellee.

Hobson, J., delivered the opinion of the court:

Mrs. Minnie Raine lived in Atlanta, Georgia. Her father lived at Harrodsburg, Kentucky, and she made trips about three times a year from her home to her father's. In January, 1906, she was at her father's, and desired to go home on Sunday, January 7th. That morning her father called up the station agent of the Southern Railway in Kentucky at Harrodsburg by telephone, and told him that he wanted a reservation for his daughter in the sleeper for Atlanta on the train that night. The agent said he would wire Louisville and get it. That afternoon he called up the station agent, and was told by someone at the station that the reservation had been secured. The train from Louisville reached Harrodsburg about 10:35 P. M. Mrs. Raine bought a through railroad ticket to Atlanta, and with this got on the train at the day coach. She passed back, walking through two sleepers, where she found the sleeping car conductor. She asked him for the Atlanta sleeper, saying

that she had a reservation in there. He told her there was no Atlanta sleeper on the train, but that there would be an Atlanta sleeper which would come from Cincinnati on the train which they would meet at Danville. Danville is 10 miles from Harrodsburg. The Southern train runs from Louisville to Danville, and there connects with the train running from Cincinnati to Atlanta. While she was talking to the Pullman conductor, the passenger conductor also came in. They told her there was a Chattanooga sleeper on that train, and that she could go into it and get a reservation at once, advising her to do so as the other train was frequently late, and she might have to sit up some time if she waited for the Atlanta sleeper. She had her little boy, about six years old, with her, and, when she learned that she would have to get up about 6 o'clock in the morning if she did this, she decided not to take the Chattanooga sleeper. They then advised her to sit in the Chattanooga sleeper until she got to Danville, telling her that, when they reached Danville, that sleeper would be put next to the Atlanta sleeper, and she would only have to walk from one car to the other, while the Knoxville sleeper, in which she was then, would be put at some distance from the Chattanooga sleeper. She said that she would stay in the Knoxville sleeper with some friends, and they agreed for her to do so. When they reached Danville, the train from Cincinnati was forty minutes late. When she saw it come in, she went to the Pullman conductor, and asked him if he would not go and get her reservation for her. He answered that he was not allowed to leave his sleeper while it was standing at the station; that, as soon as they were out of Danville, he would see about it; that there would be plenty of time. When her car was attached to the other train, she again made the same request of him, and he made in effect the same answer. When the train pulled out of Danville, she and the Pullman conductor went forward and learned there was no Atlanta sleeper on that train; that the Cincinnati train had on that night been divided into two sections, the Atlanta sleeper being in the first section, and the Knoxville sleeper, in which she had been sitting, having been put in the second section. The first section was 10 miles ahead of them. She then said to the Pullman conductor: "Now, see what you have done by not attending to my reservation in Danville." He said: "Madam, I am not to blame. My clothes are on that section too." The train had only been running to Danville a month, and this Pullman conductor had never known the Cincinnati train before to run in two

sections, although it happened from time to time when travel was heavy. The Chattanooga sleeper had been put in the first section, and if Mrs. Raine had taken a seat in that sleeper, instead of staying with her friends, there would have been no trouble. The section which she was in went to Knoxville. She talked the matter over with the conductor of the train. He told her that he would wire to Somerset, which was about 50 miles below, and ask that the first section be held there for her. At the next stop, at Junction City, he held his train 10 minutes and did wire to Somerset, but was unable to get an answer. When he was unable to get an answer, he came in and told Mrs. Raine the facts, and they then consulted as to what she had better do. The Pullman conductor had in his pockets the tickets of all the passengers in the Chattanooga sleeper. The Knoxville train would turn off from the main line at Oakdale, a station about half way between Somerset and Chattanooga. Mrs. Raine did not want to sit up all night, and finally concluded that she would get off there and go back to Harrodsburg, and wait there for the next train. The conductor, she says, advised her to do this. The conductor says she proposed it; but, however this may be, she got off voluntarily at the station, and went over to a hotel about 66 feet from the station. It was then about 1 o'clock in the morning. She was assigned to a room by the clerk, but declined at first to have a fire made. Afterwards she had a fire made, but did not go to bed. At 4 o'clock she took the train for Harrodsburg, and went back to her father's, and that evening took the train for Atlanta, and went through without trouble. But she had taken a violent cold, and this cold produced a very bad nervous condition approaching hysteria. The bad nervous condition may have been due also in part to the excitement incident to her leaving the train and sitting up all night. After she got home, she was sick for two months, and at the trial, a year or more later, her health was still infirm. She brought this suit to recover damages against the Pullman Car Company, the Southern Railway in Kentucky, and the Cincinnati, New Orleans, & Texas Pacific Railway Company. On a trial of the case a judgment was rendered in her favor against all the defendants for the sum of \$4,000, and they appeal.

The only questions we deem it necessary to consider on the appeal are, first, Should the jury have been instructed peremptorily to find for the defendants? second, If not, what is the proper measure of damages?

1. When Mrs. Raine came upon the sleeper, she had nothing but a railroad ticket. She had no sleeping car ticket, and she had nothing to show that she had any reserva-

tion in any sleeper. She remained in the Knoxville sleeper entirely by the courtesy of the conductor. She paid nothing for her seat in that sleeper, and it is evident that he allowed her to remain because she had her little boy with her, and she decided to stay there and talk to her friends until she got to Danville. When the servants of a carrier know that a passenger is in the wrong car and that he must go into another car, they may simply tell him what to do, and ordinarily leave him to follow their directions; but, when they tell him to keep his seat, and that they will, at the proper time, transfer him to the other car, and fail to do so, the company which they represent is liable. Mrs. Raine was not a passenger of the Pullman Car Company, for she had not been received as a passenger. She had simply been allowed to sit in the sleeper with her friends, and the Pullman Car Company is not answerable to her because its conductor failed to get her in the right car. for he did not represent the company as to the Atlanta sleeper, and she had made no contract with the Pullman Car Company, and it owed her no duty. But, while this is so, the Pullman conductor in dealing with Mrs. Raine, who had a railroad ticket, was discharging a duty which the railroad company owed her. The train conductor was with him, and assented to what the Pullman conductor said. In undertaking to transfer Mrs. Raine at Danville to the proper sleeper, and in telling her that she might remain in the Knoxville sleeper until he so transferred her, the Pullman conductor was discharging a duty which devolved upon the Southern Railroad Company. While he might have told Mrs. Raine what to do and left her to follow his directions, a very different state of case is presented when he told her that he would transfer her to the other sleeper, and for her to sit where she was, that there was plenty of time, and he would attend to it. The passenger conductor was present when the arrangement was made, and he left her in the care of the Pullman conductor. It was incumbent on these men, under the circumstances, to see that the lady was transferred to the proper train. The servants of a carrier cannot mislead a passenger, to his prejudice. It is proper that a passenger should obey the instructions which he receives from them; and when they tell a passenger to keep his seat, and they will, at the proper time, transfer him, he has the right to trust implicitly their directions. If Mrs. Raine had not been told to keep her seat, that there was plenty of time, she might have protected herself from the consequences that followed.

We therefore conclude that the jury should have been instructed peremptorily to find for the Pullman Car Company, but that the

motion for a peremptory instruction as to the Southern Railway in Kentucky was properly refused. It remains to consider whether any liability was shown on the part of the Cincinnati, New Orleans, & Texas Pacific Railway Company. Mrs. Raine did not see the conductor of this train until after it had pulled out of Danville. He did not take up her ticket, and evidently did all in his power to rectify the mistake that had occurred, for which he was in no wise responsible. She had remained in the Knoxville sleeper with the consent of the conductor of the Southern Railway, and she had come into the custody of the second line when that sleeper was attached to its train. Junction City was a proper place for her to alight, and, as said, she got off there voluntarily. We therefore conclude that there was no liability on the part of the second line; for it had perfect right to run its train in two sections, and to attach the sleepers which came to it from the other line to that section which best suited his convenience. It had no notice of Mrs. Raine's situation until she saw the conductor after the train pulled out from Danville.

2. It remains to consider what is the measure of damages as against the Southern Railway Company. Mrs. Raine, by its negligence, missed her train, and was delayed twenty-four hours in returning home. In *Illinois C. R. Co. v. Head*, 119 Ky. 812, 84 S. W. 752, this court said: "The evidence presents simply a case where the railroad company agreed to furnish transportation, and failed to do so promptly, if Rupert Head was not guilty of contributory negligence in going to the wrong place for his ticket, and of this the jury must judge. But, if the railroad company was negligent in furnishing the transportation, the measure of damages is simply a reasonable compensation for the time lost by Rupert Head and any expenses he incurred by reason thereof." Mrs. Raine testifies that nobody was on the platform when she got off and that she made her way to the hotel alone, but she did not request the conductor to go with her or to furnish anybody to accompany her, or make any objection to his leaving her. The hotel was near by, and it is evident that she went directly to it. The trouble with her was not that she did not go to the hotel without difficulty, but that after she got there she went into a cold room, and stayed there for some time without a fire. Her nervousness was perhaps largely due to the fact that she remained up all night. But neither one of these things was the proximate result of the negligence of the Southern Railway in Kentucky in failing to transfer her to her train. She no doubt acted as she did without realizing the danger; but her remaining in the

cold room was not due to the act of the railroad company, and all of the consequences which followed would seem to be due primarily to the violent cold which she took afterwards settling upon her stomach and impairing her digestion. A passenger who, by the negligence of a railroad company, fails to make a connection, cannot hold the railroad company responsible for consequences which a person of ordinary prudence might not reasonably anticipate as the result. A person of ordinary prudence might reasonably anticipate that one who missed his connection would have to pay a hotel bill and would have to wait until the next train, but, a well-regulated hotel being right at hand, other consequences such as these proved here should not be anticipated. Under all the circumstances, we conclude that the proper measure of damages is such expense as Mrs. Raine incurred and the value of the time which she lost by reason of her not being transferred to the Atlanta sleeper. The rule for the measure of damages in such cases is the same for both men and women; and, if this had been a man, manifestly no other damages would be allowed. There was nothing in Mrs. Raine's condition or appearance to show that she was not capable of taking care of herself, or to apprise a person of ordinary prudence that it was not safe to leave her at Junction City within a few feet of a well-regulated hotel. No recovery can be had for vexation or personal inconvenience by reason of the delay. *Robinson v. Western U. Teleg. Co.* 24 Ky. L. Rep. 452, 57 L.R.A. 611, 68 S. W. 656. Mrs. Raine was treated with courtesy and kindness by all the conductors. The mistake was due to a misapprehension, the Pullman conductor not being allowed to leave his car, and the railroad conductor assuming that the Pullman conductor would get her to the proper sleeper at Danville. The mistake would not have occurred had the Cincinnati train run in one section as it usually did, or if the Pullman conductor had known it was liable to run in two sections. There is nothing in the case to take it out of the general rule as to the measure of damages for delay on a journey.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

KENTUCKY COURT OF APPEALS.

HARRY ANDERSON

v.

PALMER TRANSFER COMPANY.

(— Ky. —, 115 S. W. 182.)

Monopoly — railroad — hack privileges.
A railroad company cannot give to one

hackman the right to occupy such a position on its grounds as necessarily to result in his securing by far the larger share of the business, and a contract by which it attempts to do so is void.

(January 7, 1909.)

CROSS APPEALS from a judgment of the Circuit Court for McCracken County enjoining defendant from interfering with plaintiff's use of certain railroad grounds adjoining a depot driveway; defendant appealing from so much of the decree as granted the injunction; and plaintiff appealing from so much as denied him damages alleged to have been sustained by reason of having been deprived of such use. Affirmed.

The facts are stated in the opinion.

Messrs. Bradshaw & Bradshaw, for plaintiff:

The contract tends to prevent competition, and is void.

McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15; Montana Union R. Co. v. Langlois, 9 Mont. 419, 8 L.R.A. 753, 18 Am. St. Rep. 745, 24 Pac. 209; Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667; Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep. 274, 53 N. E. 937; Old Colony R. Co. v. Tripp, 147 Mass. 43, 9 Am. St. Rep. 661, 17 N. E. 89; State v. Reed, 76 Miss. 211, 43 L.R.A. 134, 71 Am. St. Rep. 528, 24 So. 308; Sandford v. Catawissa, W. & E. R. Co. 24 Pa. 378, 64 Am. Dec. 667; Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106.

Messrs. Crice & Ross, with Messrs. Wheeler, Hughes, & Berry, for defendant:

The contract is valid, and one which the complainant has no right in law to attack, because the only duty owing by the railroad company is to the traveling public, for complainant has no right to use any part of the railroad company's grounds around its depot except by license from the railroad.

Hedding v. Gallagher, 72 N. H. 377, 67 L.R.A. 811, 57 Atl. 225; Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89.

Note.—As to discrimination between hackmen and other solicitors of patronage at depots, wharves, etc., see case note to Oregon Short Line R. Co. v. Davidson, 16 L.R.A.(N.S.) 777. As to remedy by injunction for unlawful discrimination by railroad against hack driver, see case note to Cooper v. Devall, 8 L.R.A.(N.S.) 1027. 19 L.R.A.(N.S.)

Clay, C., delivered the opinion of the court:

Plaintiff, Harry Anderson, the owner of a line of cabs, busses, and baggage wagons in the city of Paducah, instituted this action against the defendant, Palmer Transfer Company, a corporation engaged in a similar business, to enjoin the latter from interfering with him in the use of a certain plot of ground adjoining the approach to the Union Depot in Paducah, and also to recover damages for being deprived of the right to use the plot of ground. Defendant's demurrer to the petition being overruled, it then filed answer, denying the allegations of the petition, and claiming that it had the right to use the plot of ground in question under and by virtue of a contract which it made with the Illinois Central Railroad Company, by the terms of which it agreed to meet all incoming and outgoing trains with its cabs and busses, and serve the traveling public in an orderly manner, and further bound itself to transport passengers and baggage from all parts of the city of Paducah at the rate of 25 cents for each passenger and 25 cents for each piece of baggage, and also to perform certain other covenants mentioned in the contract, all of which defendant alleged it had fully and faithfully performed. By reply plaintiff alleged that the contract between the defendant and the railroad company gave to the defendant the exclusive use of a large part of the approach lying nearest to the depot and best equipped with improved walks, and thereby gave to the defendant a monopoly of the passenger and baggage carrying business to and from the depot; that on this account the contract relied upon by the defendant was against public policy, and therefore null and void. By amended petition, the plaintiff also charged that it was the duty of the railroad company to provide comfortable and convenient accommodations for the traveling public, and that it had failed to perform that duty to the public by granting the contract in controversy, which created a practical monopoly of the passenger and baggage carrying business. Depositions were taken, and the case submitted to the chancellor, who granted the injunction prayed for by plaintiff, but declined to give him any damages. From that judgment, the Palmer Transfer Company prosecutes this appeal.

The facts in this case are as follows: The Illinois Central Railroad Company and the Nashville, Chattanooga, & St. Louis Railway Company have a union station in the city of Paducah. Leading southward from Caldwell street towards the depot building there is a roadway or approach 64 feet wide and 315 feet long. A platform

or walkway extends along the south end of the roadway its entire width,—64 feet. A sidewalk or platform of gravel or crushed stone, 15 feet in width, with concrete or stone curb, extends along the west side of the roadway its entire length of 315 feet. The roadway and the depot are between the main tracks of the two railroad companies. The passengers board or alight from the Illinois Central trains on the west side of the depot and roadway, and from the Nashville, Chattanooga, & St. Louis trains on the east side thereof. The space occupied by the Palmer Transfer Company is on the west side of the roadway. This space is 32 feet wide, and extends from the south end of the roadway towards Caldwell street 150 feet. This space being taken out of the driveway leaves 32 feet on the east side and 115 feet on the west side that is open to public use. Out of the 32 feet, however, about 8 feet is occupied by the street car line, and, taking into consideration the danger of being near the street car line or the railroad tracks, the space left next to the depot building is about 20 feet. This 20 feet is fairly convenient of access and approach to the Nashville, Chattanooga, & St. Louis trains, but by far the larger portion of the traffic to and from the union depot is over the tracks of the Illinois Central. In order for passengers from the Illinois Central to reach the cabs or busses of those transfer men who are not permitted to occupy the space in question, they must proceed down the platform and pass by the cabs or busses of the Palmer Transfer Company for a space of 150 feet.

Plaintiff Anderson testified that he had on an average three cabs to meet trains at the Union Station, and that the Palmer Transfer Company had four; that it was much more convenient for passengers leaving the Union Station to use the carriages of the Palmer Transfer Company because these carriages were closer, and a portion of the approach set aside for that company had a gravel walkway along its entire length, from which passengers could step into its carriages; that this walkway was not constructed by the Palmer Transfer Company for its own convenience, but was a part of the general depot improvements and conveniences provided by the railroad company for the public; that, in order for a passenger to get to the carriages of the appellee or any other cabmen except the Palmer Transfer Company, they would have to walk a distance of 150 feet past a long line of carriages of appellant; and that, under ordinary circumstances, no passenger would do this. He further stated that he had been in the transfer business since May, 1902, during all of which time the Palmer

Transfer Company had excluded him from the use of that portion of the approach in controversy, and that his loss on this account amounted to at least \$2 per day up to the day of filing the suit. The witness further testified to the fact that the Palmer Transfer Company had changed the post dividing the space occupied by it from the rest of the roadway, and he was denied admittance to the space so occupied by it, and upon one occasion when he had entered this space a warrant was issued against him by the officers of the Palmer Transfer Company.

For the defendant, R. L. Palmer testified that his company had transfer agents on the various trains, and that the principal part of his business consisted in carrying passengers and the baggage of passengers who had previously contracted with its train agents. Witness produced the contracts between his company and the railroad companies, and made them a part of his deposition. He stated that there was plenty of room for the busses and wagons of other transfer agents to occupy. Witness further testified that his company might secure more business by having the contracts giving the company the right to occupy the place in dispute.

In the case of *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15, this court had under consideration a question similar to the one involved in the case at bar. In that case the railroad company granted to McConnell, to the exclusion of all other persons engaged in a like business, the right to come upon its depot grounds in Glasgow, Kentucky, with his vehicles for the purpose of receiving and depositing passengers and freight. The contract was being carried out by McConnell when the firm of Pedigo & Hays undertook to transfer passengers to and from the depot, and claimed the right to stand their hacks upon the grounds near and at the depot, when in so doing they did not interfere with the business of the railroad company. McConnell sought an injunction against Pedigo & Hays, and his petition being dismissed, he appealed to this court. It was here held that a regulation of a railroad that discriminates by driving from its depot those who are engaged in a public employment and whose duty it is to provide for their guests and the traveling public, resulting in a monopoly of the particular business, is unauthorized by the charter of a railroad company, and in palpable violation of the rights of others. While it may be admitted that the English rule and the rule of several other states is different from that announced above (*Barker v. Midland R. Co.* 18 C. B. 46; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am.

St. Rep. 661, 17 N. E. 89; Hedding v. Gallagher, 72 N. H. 377, 64 L.R.A. 811, 57 Atl. 225), yet the courts of several states hold to the view adopted by this court (Montana Union R. Co. v. Langlois, 9 Mont. 419, 8 L.R.A. 753, 18 Am. St. Rep. 745, 24 Pac. 209; Kalamazoo Cab & Bus Co. v. Sootsma, 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667, and in the recent case of Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep. 274, 53 N. E. 937, the case of McConnell v. Pedigo, supra, was cited with approval. That being the case, we see no reason for changing the rule announced by this court.

Counsel for appellant, however, insist that the rule laid down in the case of McConnell v. Pedigo has no application to this case, because abundant space is left for Anderson and other hackmen, and that the contracts between appellant and the railroad companies do not create a monopoly. We confess, however, that we are unable to differentiate this case from that cited. While there is some space still left for Anderson and the other hackmen to occupy, it is so inconveniently located with reference to the larger part of the business of carrying passengers and baggage that the giving to appellant of the space occupied by it constitutes such a preference over other transfer men as to afford it a practical monopoly of the business. There is, in effect, no difference between giving a transfer company the exclusive right to occupy the depot grounds and the right to occupy that portion thereof which necessarily results in its securing by far the larger share of the business. We therefore conclude that appellant's contracts, operating as they do to give it a practical monopoly, are null and void, and that appellant has no right to occupy the space in question to the exclusion of appellee and other hackmen.

We are inclined to the opinion that the chancellor did not err in refusing to allow the plaintiff damages.

For the reasons given, the judgment is affirmed.

LOUISIANA SUPREME COURT.

B. F. ESTOPINAL

v.

BERNARD MICHEL, Jr., et al., Appts.

(121 La. 879, 46 So. 907.)

Voters — qualifications — "residence."

1. The term "residence," used by the Constitution in fixing the qualification of voters, does not mean domicil.

Headnotes by PROVOSTY, J.
19 L.R.A. (N.S.)

Same — time qualification — reason for.

2. The object of requiring the voter to have resided for a time at the place where he offers to vote is that he may be afforded an opportunity to acquire the information necessary for an intelligent vote, and become identified with the interests of the locality, and also to prevent the colonization of voters.

Domicil — presumptions — evidence.

3. In the absence of proof that a person otherwise qualified has acquired a residence elsewhere, he must be considered to be a resident of the parish where his work requires him to stay, where he was born, and where he has always lived and voted; and it makes no difference that he has never had in said parish any other home than a boarding house, while he has had in another parish a home, where he has kept his wife and children, whom he has visited as often as he could.

(June 22, 1908.)

Case Note. — Does "residence," as a qualification of voters, mean "domicil."

Whatever may be the distinction between the terms "residence" and "domicil," when used in other connections, it has been very generally held that the term "residence" as used in the various Constitutions or statutes as a qualification of voters, is the equivalent of, and means no less than, the term "domicil." This is clearly supported by the following cases: Sharp v. McIntire, 23 Colo. 99, 46 Pac. 115; French v. Lighty, 9 Ind. 477; State v. Savre, 129 Iowa, 122, 3 L.R.A. (N.S.) 455, 113 Am. St. Rep. 452, 105 N. W. 387; Opinion of Justices, 5 Met. 587; Berry v. Wilcox, 44 Neb. 82, 48 Am. St. Rep. 706, 62 N. W. 249; State ex rel. Hannon v. Grizzard, 89 N. C. 115; People ex rel. Boyer v. Teague, 106 N. C. 576, 19 Am. St. Rep. 547, 11 S. E. 665; Sturgeon v. Korte, 34 Ohio St. 525; Fry's Election Case, 71 Pa. 302, 10 Am. Rep. 698; Allentown Contested Election Case, 8 Phila. 575; State ex rel. Goldsworthy v. Aldrich, 14 R. I. 171.

Cessna v. Myers, Smith, Elec. Cas. 60, is also cited in 10 Am. & Eng. Enc. Law, 2d ed. p. 598, as supporting the above proposition.

To the same effect is Cadwalader v. Howell, 18 N. J. L. 138, the court, however, taking occasion to say that is was not prepared to say whether or not the two terms in all respects were convertible terms.

Justice Woodward in Chase v. Miller, 41 Pa. 420, seems also to have been of the opinion that the term "residence," as used in the constitutional provision relating to suffrage, in its primary meaning is equivalent to "domicil."

In Crawford v. Wilson, 4 Barb. 504, it was said: "From the various definitions of the terms 'residence,' 'inhabitaney,' and 'domicil,' and the decisions in regard to them, I think we can deduce the proposition.

APPEALS by defendants from several judgments of the Civil District Court for the Parish of Plaquemines in plaintiff's favor in actions to have defendants' names stricken from the registration roll of the parish because of alleged nonresidence. Reversed.

The facts are stated in the opinion.

Mr. John Dymond, Jr., for appellants.

Mr. Warren Doyle for appellee.

Provosty, J., delivered the opinion of the court:

Six separate suits against as many defendants have been consolidated in this appeal, and have been submitted without brief. The object of the suits is to have the defendants stricken from the registration roll of the parish of Plaquemines for the alleged reason that they are not residents of that parish.

The defendants are bar pilots; that is to say, they pilot vessels in and out to sea at the mouth of the Mississippi river. For discharging these functions they have to be appointed by the governor of the state, and licensed. Their post is at the head of the passes, and they are forbidden by law to leave their post for longer than seven days without a leave of absence from the governor of the state. The place is called Pilot Town. We gather from the record that is a sort of village. There is a schoolhouse, and chil-

dren go to school. The land there, when not covered by water, is too low and marshy to be trod upon. The communication between the houses is by skiff, or on wharves, or elevated plank walks. The locality is additionally undesirable to inhabit from being exposed to storms. As a consequence, the pilots have homes in New Orleans for their wives and children, to which they themselves go whenever off duty. At Pilot Town they live at a boarding house, or home, which they maintain at common expense. How they divide their time between their New Orleans home and Pilot Town is not shown by the evidence, except as appears from the following: "The pilots sometimes stay one day, sometimes a month, on a station, but more frequently two weeks, and are permitted to be off duty for seven consecutive days."

The Constitution (article 197, fixing the qualification of voters) provides that the voter must be: "An actual bona fide resident of this state for two years, and of the parish one year, and of the precinct in which he offers to vote six months next preceding the election."

The reason of this requirement is stated in 10 Am. & Eng. Enc. Law, 2d ed. p. 596, as follows: "The Constitutions of nearly all the states of the Union and the laws of nearly all of the territories require a residence for a definite period, ranging from

that the terms 'legal residence' or 'inhabitaney,' and 'domicil' mean the same thing. By legal residence, I mean the place of a man's fixed habitation; where his political rights, such as the right of the elective franchise, are to be exercised, and where he is liable to taxation."

In *Huston v. Anderson*, 145 Cal. 320, 78 Pac. 626, it was said that when residence is spoken of in connection with the right of a person to vote, "legal residence" is meant.

In *Esker v. McCoy*, 5 Ohio Dec. Reprint, 573, it was held that "residence," within the meaning of the statute regarding elections, has reference to and means a fixed place of abode.

In *Spragins v. Houghton*, 3 Ill. 416, Justice Lockwood, in a concurring opinion, and in considering the question whether, according to the Constitution, an alien had the right to vote, said: "There is no ambiguity in the word 'resident.' Every man is a resident who has taken up his permanent abode in the state."

In *Lower Oxford Contested Election*, 11 Phila. 641, it was held that by residence is meant the settled place of abode,—where one dwells without definite purpose of removal.

In *Re Lower Merion Election*, 1 Chester Co. Rep. 257, it was held that a "residence," in the sense contemplated by the election laws, is the place where a voter intends to reside, and where he has assumed, or in- 19 L.R.A. (N.S.)

tends to assume, all the duties, rights, and responsibilities of citizenship.

In *Vanderpool v. O'Hanlon*, 53 Iowa, 246, 36 Am. Rep. 216, 5 N. W. 119, the court, in discussing the right of a student to vote in the county where the college was located, under a statute making "residence" a qualification, apparently used the terms "residence" and "domicil" interchangeably.

In Illinois it is expressly provided by statute that a "permanent abode" is necessary to constitute a residence, as used in its election laws, and it is held in *Dale v. Irwin*, 78 Ill. 170, that the term "permanent abode" does not mean an abode which the party does not intend to abandon at any future time, but is nothing more than a "domicil," or a "home," which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it. To the same effect is *Moffett v. Hill*, 131 Ill. 239, 22 N. E. 821.

In *Johnson v. People*, 94 Ill. 505, the constitutionality of the above statute was assailed on the ground that it was repugnant to that part of the Constitution which provided that every person who shall have "resided" in the state, etc., for a certain time, etc., should be entitled to vote, in that the terms "residence" and "permanent abode" were entirely different, and that the latter term required more than the former. The court said, however, following a case in which it was held that every man was a resident who had taken up his permanent

three months to two and one-half years, as a prerequisite to the right of suffrage; and they usually require, in addition, a residence for a certain period within the county and voting precinct.

"The purpose of this requirement is to provide a term of educational probation during which the proposed voter may become acquainted with the wants and identified with the interests of the people among whom he proposes to live, and acquire a knowledge of the character and capacity of those who are candidates for office. It, moreover, prevents the colonization of voters within any particular political division."

In *State ex rel. Egan v. Steele*, 33 La. Ann. 910, this court said: "A residence is one thing, and a domicile is another. A person may have as many residences as he may choose, but can have but one real domicile."

See also *Steer's Succession*, 47 La. Ann. 1551, 18 So. 503.

A separate title of our Civil Code is devoted to the subject "Domicil and the Manner of Changing Same," and the term "domicil" is one of definite meaning in our law, and may be said to be a technical term: whereas the term "residence" is nowhere defined, and conveys only the general meaning which it possesses in the language; and we think that the word "residence" was used advisedly by the framers of the Constitution, instead of the word "domicil."

abode in the state (*Spragins v. Houghton*, supra), that they would presume that the framers of the Constitution used the word in the sense in which it had been defined in that case.

In Wisconsin, also, a statute governing elections provides that the term "residence" means a fixed habitation without any present intention of removing therefrom, and to which, when the person is absent, he has the intention of returning; and that one shall not be deemed to have gained a residence within the meaning of the law by merely coming into an election precinct for temporary purposes only, and thus it was held in *State ex rel. Hallam v. Lally*, 134 Wis. 253, 114 N. W. 447, that a person who moves into a ward a short time before an election, to stay only while engaged on a particular job of work, and has no intention of making it his home, is not a qualified voter in the ward.

The only cases found expressly holding to the contrary, that is, holding that the term "residence," as a qualification of voters, is not the equivalent of, and does not mean, "domicil," are *ESTOPINAL v. MICHEL* and its companion case, *Estopinal v. Vogt*, 121 La. 883, 46 So. 908,—a case arising out of similar facts, and depending upon the former for its decision. It will be noticed, however, as clearly appears in *ESTOPINAL v. MICHEL*, that not only did the defendants have their residence in the parish from the registration roll of which their names were

In like manner the registration law uses the word "residence" and "reside," and not "domicil" or "domiciliated."

In undertaking to determine, therefore, what will constitute a residence, within the meaning of the Constitution, we must go to the dictionary for the meaning of the word "residence." We need not transcribe here the definition of the word. Suffice it to say that it does not imply permanency, or the *animo manendi*, as does the word "domicil."

That these defendants are residents of Pilot Town, and of no other place, there can be no doubt. They certainly are not residents of New Orleans. Their families are, but not they. Such a thing would be possible as their having never set foot in New Orleans and intended never to do so. The record shows they occasionally visit their families in New Orleans, but not that they reside there.

So far as all the defendants, except Nick Trayanovich, are concerned, they were born in the parish of Plaquemines, and have always lived and voted there, and never elsewhere, and are not shown to have a domicile elsewhere; and hence the parish of Plaquemines would have to be held to be, not only their residence, but even their domicile. Where Nick Trayanovich was born, or where he lived prior to becoming a bar pilot, is not shown. He is not, at any rate, shown to

sought to be stricken, but their domicile was there also, and therefore, so far as this note is concerned, these cases can have only the value of *obiter dicta*, since it could make no difference in the final outcome whether the terms were synonymous or not.

Another case seemingly recognizing a distinction between the two terms is *Re Banff Election*, 4 N. W. Terr. 140, where it was held that "residence," as used in the election ordinance, means a person's habitual physical presence in a place or country, which may or may not be his home, and that "habitual" does not mean presence in a place for either a long or short time, but the presence there for the greater part of that period. The court took occasion to say: "As an illustration of the above definition, I may cite the following example: A has resided in Calgary for two years. He goes away on business or a trip of pleasure for four months; his residence is still at Calgary, and, if an election were to take place the day after he came back, he would have a vote in Calgary, according to my reading of the elections ordinance."

It is well to note that there may be many other cases where, from the result of the decision, the court must have recognized either that the terms "residence" and "domicil" were synonymous, or that they were not, whichever the case may be; but, unless the court discussed the question here annotated, those cases have been expressly excluded from this note.

have resided elsewhere than in the parish of Plaquemines.

The place where a man's family lives does not determine his domicile, and still less his residence. The domicile of wife and children follows that of the husband, not that of the husband that of wife and children. In the case of *State ex rel. Egan v. Steele*, supra, the fact that the defendant had sold his home in Tensas parish and purchased another in Natchez, Mississippi, and had removed his family to this new home, was held not to have necessarily had the effect of operating a change of domicile.

Article 208 of the Constitution reads as follows: "For the purpose of voting, no person shall be deemed to have gained a residence, by reason of his presence, or lost it by reason of his absence, while employed in the service, either civil or military, of this state or of the United States, . . . or on the high seas, or while a student of any institution of learning."

Were it not for this article of the Constitution, the fact that the defendants had accepted a life (or during good behavior) term office would of itself have sufficed, under article 45, Rev. Civ. Code, to have established their domicile at Pilot Town. That article reads: "An acceptance of an office conferred for life or during good behavior implies an immediate transfer of the domicile of the officer to the parish in which he is required to exercise his functions. But public officers who perform duties throughout the state, or in a district composed of several parishes, preserve the domicile they have before their appointment, unless they manifest a contrary intention."

Although, under article 208 of the Constitution, the acceptance of an office for life or during good behavior does not of itself operate a change of domicile to the place where the functions of the office are to be exercised, it is nevertheless a circumstance to be taken into consideration in determining the questions of domicile and residence.

The judgments appealed from are set aside, and the plaintiff's suits are dismissed, with costs in both courts.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ALVIN J. GORDON

v.

JOHN WOOD KNOTT et al.

(199 Mass. 173, 85 N. E. 184.)

Sale — good will.

1. The personal knowledge of a sales agent located at a commercial center, ac-

quired in the sale of his line there, his experience in the business, his acquaintance with available salesmen and to probable customers, and his ability to secure a similar agency in a rival house, may be found to constitute what the parties refer to as good will which his principal purchases from him when placing another person in charge of the agency, so as to form a consideration for the amount agreed to be paid therefor.

Same — derogation from grant.

2. A sales agent located in a commercial center, who, upon surrendering the agency, sells to his principal the good will of the business, cannot derogate from his grant by engaging in a competing business and endeavor to sell similar goods to his old customers.

Same — restriction of acts.

3. Even though one selling the good will of a business cannot be restrained from engaging in a competing business, he will not be permitted to solicit orders from his former customers.

Foreign law — presumption — proof.

4. In the absence of proof of the law of a foreign country, where a contract for sale of the good will of a business was entered into, the court of the forum will presume that it is the same as its own law; and this presumption cannot be affected by statements in its own opinions, or those of the courts of the foreign country, which are not put in evidence.

(May 22, 1908.)

Case Note. — Sale of business and good will as a limitation upon right of vendor to engage in competing business.

As to the right of one copartner to the use of the firm name upon purchasing the interest of his copartner in the firm business and good will, see note to *Vonderbank v. Schmitt*, 15 L.R.A. 462.

As to the effect upon the right of an individual partner of the sale by a firm of its business and good will, with or without an agreement by the firm not to engage in a similar business, see case note to *Southworth v. Davison*, post, 769.

This note is confined strictly to the question whether the sale of a business, together with the good will thereof, imposes a restriction upon the right of the vendor to engage in a competing business in the absence of a restrictive covenant pertaining thereto, and excludes cases where such right is restricted by a covenant.

As a general rule, in the absence of an express covenant, the sale of a business, together with the good will thereof, does not import an agreement by the vendor not again to engage in a competing business. *Cottrell v. Babcock Printing Press Mfg. Co.* 54 Conn. 122, 6 Atl. 791; *Porter v. Gorman*, 65 Ga. 11; *Findlay v. Carson*, 97 Iowa, 537, 66 N. W. 759; *Ranft v. Reimers*, 200 Ill. 386, 60 L.R.A. 291, 65 N. E. 720; *Drake v.*

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench after an interlocutory decree in plaintiff's favor in an action brought to compel an accounting under a contract for the transfer of a sales agency. Affirmed.

Plaintiff conducted a business in rubber goods in London, England, from 1884 to 1896, handling the goods of the Boston Rubber Shoe Company. For a time the company sold goods to the plaintiff outright without any special contract or agreement with him, but latterly the company had consigned the goods to him retaining title until they were sold, under contracts in which plaintiff is denominated the agent of the company. Finally, on August 28, 1896, the company executed an agreement with

the plaintiff by which it agreed to give him the exclusive sale of its goods in Great Britain and on the Continent. On October 28, 1896, the plaintiff executed an assignment to John Wood Knott of the business as carried on by him, including lease-hold, and all the good will of the business, and all the plant, materials, stock in trade, book debts, and assets. Possession was taken under this assignment, and the company thereafter conducted the business through Knott as its agent.

Further facts appear in the opinion.

Mr. Charles R. Darling, for plaintiff:

The effect of the assignment of the good will was to preclude the plaintiff from soliciting business from his former customers.

Hutchinson v. Nay, 183 Mass. 355, 67 N.

Dodsworth, 4 Kan. 159; Bergamini v. Bastian, 35 La. Ann. 60, 48 Am. Rep. 216; Bassett v. Percival, 5 Allen, 345; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Smith v. Gibbs, 44 N. H. 335; Snowden v. Noah, Hopk. Ch. 347, 14 Am. Dec. 547; White v. Jones, 1 Robt. 321; Close v. Flesher, 8 Misc. 299, 28 N. Y. Supp. 737; Moody v. Thomas, 1 Disney (Ohio) 294; Rupp v. Over, 3 Brewst. (Pa.) 133; Hall's Appeal, 60 Pa. 458, 100 Am. Dec. 584; White v. Trowbridge, 216 Pa. 11, 64 Atl. 862; Palmer v. Graham, 1 Pars. Sel. Eq. Cas. 476; Morean v. Edwards, 2 Tenn. Ch. 347; Fish Bros. Wagon Co. v. La Belle Wagon Works (Fish Bros. Wagon Co. v. Fish) 82 Wis. 546, 16 L.R.A. 453, 33 Am. St. Rep. 72, 52 N. W. 595; Zanturjian v. Boornazian, 25 R. I. 151, 55 Atl. 199; Churton v. Douglas, Johns V. Ct. (Eng.) 174; Trego v. Hunt, [1896] A. C. 7; Labouchere v. Dawson, L. R. 13 Eq. 322; Jennings v. Jennings [1898] 1 Ch. 378; Gillingham v. Beddow [1900] 2 Ch. 242.

In *Shackle v. Baker*, 14 Ves. Jr. 468, Lord Eldon, said that, in the absence of anything more than a mere "purchase of the good will of a trade, the vendor would be at liberty to set up the same trade in any other situation."

One who sells a printing plant and newspaper, together with the good will and subscription list, is not thereby prohibited from setting up a rival printing plant and establishing another newspaper. *Smith v. Gibbs*, supra.

So, the sale of a school and the good will thereof will not prevent the vendor from opening a rival school, he being under no obligation to use his efforts to obtain pupils for the vendee. *Close v. Flesher*, supra.

The vendor of a business and good will is not prevented from leasing other property owned by him in the immediate vicinity of the business sold, to another, who may engage in a competing business, where the lessor has no interest therein, and there is no collusion between the lessor and the lessee. *Bradford v. Peckham*, 9 R. I. 250.

As above shown, it has been held in Massachusetts that, upon the sale of an ordinary 19 L.R.A. (N.S.)

mercantile business and good will, there is no restriction upon the right of the vendor, in the absence of an express agreement, to re-engage in a competing business. The decision in *Gordon v. Knott* is based upon the distinction between such a sale and the sale of a business in which the vendor of the good will could not engage in a competing business without necessarily derogating from his grant thereof.

The principle upon which this distinction rests is stated in *Foss v. Roby*, 195 Mass. 292, 10 L.R.A. (N.S.) 1200, 81 N. E. 109, 11 A. & E. Ann. Cas. 571, where it was held that a dentist who sells his interest in a partnership carrying on a dental business, together with the good will thereof, thereby impliedly covenants that he will not set up a rival business, and he will be enjoined, when, three years later, he engages in the practice of his profession in the immediate vicinity of the former business, and solicits patronage from patients of the old firm. In this connection, the court said: "By the contract of sale, while the defendant explicitly conveyed his interest in the good will, he did not expressly covenant to refrain from competition, either as to time, or territory. But, the sale being of an established practice . . . it was implied even if not expressed, that thereafter the . . . [vendor] would so practice his profession as not to injure and perhaps destroy the business he had sold. . . . In a mercantile partnership the sale of the good will conveys an interest in a commercial business the trade of which may be largely, if not wholly, dependent upon locality; and the right which the vendee acquires under such a purchase is the chance of being able to retain the trade connected with the business where it has been conducted. . . . But in a partnership for the practice of dentistry, the personal qualities of integrity, professional skill, and ability attach to and follow the person, not the place. . . . The object to be obtained was the protection of the vendee, and the agreement is to be construed as if the . . . [vendor] had expressly covenanted to render the old practice secure by not competing himself under conditions

E. 601, 187 Mass. 262, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974; United Shoe Machinery Co. v. Kimball, 193 Mass. 351, 79 N. E. 790; Munsey v. Butterfield, 133 Mass. 492; Dwight v. Hamilton, 113 Mass. 175; Thompson v. Winnebago County, 48 Iowa, 155.

Messrs. Moorfield Storey and Ezra R. Thayer, for defendants:

The good will referred to in the transferred property was not plaintiff's, but the defendant's.

Webster v. Webster, 180 Mass. 310, 62 N. E. 383; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Bassett v. Percival, 5 Allen, 345.

Sheldon, J., delivered the opinion of the court:

The principal question argued in this case is whether the finding made by the single

by which it might either be impaired or destroyed."

It was said in Moore v. Rawson, 199 Mass. 493, 85 N. E. 586, although *dictum*, that "usually in this commonwealth there is an implied agreement not to set up a competing business that will directly interfere with the business to be carried on by the purchaser of the good will."

This distinction is also recognized and applied in Old Corner Book Store v. Upham, 194 Mass. 101, 120 Am. St. Rep. 532, 80 N. E. 228, where one copartner, who had sold his interest in the business and good will to his copartner in a firm which for thirty-six years had conducted a book store and had dealt largely in books used in or in connection with the Episcopal Church, three years later, organized a corporation bearing his name, to deal in the same line of books,—it was held that the corporation would be perpetually enjoined from directly or indirectly employing the vendor in its business, or recognizing him as a stockholder, except to permit him to sell his shares of stock and receive what was due thereon; although the court did not dispose of the question of the right of the corporation to carry on such a business. The court, in this case, said: "It is settled in this commonwealth that, when a man voluntarily sells the good will of his business, he thereby precludes himself from setting up a competing business which will derogate from the good will which he has sold. . . . In each case where the good will of a business is sold and the vendor sets up a competing business, it is a question of fact whether, having regard to the character of the business sold and that set up, the new business does or does not derogate from the grant made by that sale." And it was further held in this case that the vendor will be enjoined from working for, or holding stock in, or otherwise being connected with, directly or indirectly, such corporation.

So, a physician who sells his practice and good will will be enjoined from re-engaging 19 L.R.A. (N.S.)

justice, "that the plaintiff was the owner of something which the parties called a good will," and that the Boston Rubber Shoe Company, hereinafter called the defendant, agreed to pay the plaintiff for this quasi good will, should be reversed. Under the recognized rule, it is to be sustained unless upon the evidence reported it was clearly wrong. Elliott v. Baker, 194 Mass. 518, 80 N. E. 450; Lindsey v. Bird, 193 Mass. 200, 79 N. E. 263.

There is great force in the defendant's contention that, as the business which the plaintiff was carrying on in London in October, 1896, was and for two years had been carried on by him merely as the agent of the defendant, and as the rubber boots and shoes which constituted the stock in trade had been merely consigned to him by the defendant for sale, and it was his duty only to sell them for the defendant, so the busi-

ness in practice in the same locality as that of the business sold, as such a sale carries with it an implied covenant that the vendor will do nothing to disturb or interfere with the vendee in the enjoyment of that which he has purchased. Dwight v. Hamilton, 113 Mass. 175.

And it was said in Yeakley v. Gaston (Tex. Civ. App.) 111 S. W. 768, although *dictum*, that the sale of the good will of the business of a professional man carries with it an obligation to refrain from practising in the future in the territory from which he thereby binds himself to withdraw.

It was held in Townsend v. Hurst, 37 Miss. 679, that the good will of a physician's business passed by a sale of his dwelling and drug stock where he expressly represented to the purchaser, a physician, that he was going to remove from the state, and recommended the purchaser to his former patients, and soon after, upon returning to the same neighborhood, engaged in practising his profession among his former patients; and that, under such circumstances, the vendee would be entitled to a rescission of his contract.

Where one agrees to sell the good will and personal property used upon a milk route, it will be a good defense, when the prospective purchaser is sued for a failure to complete the sale, to show that the prospective vendor had already bargained with another person to purchase another competing milk route. Munsey v. Butterfield, 133 Mass. 492.

It may be said in passing that the case of Angier v. Webber, 14 Allen, 211, 92 Am. Dec. 748, which is cited by the court in GORDON v. KNOTT, was one in which there was an express stipulation upon the part of the vendor against engaging in a competing business.

The sale of all right, title, and good will of a paper route is violated by the vendor by calling upon the patrons thereof and inducing them not to take papers from the

ness was the defendant's business, and the good will of that business was the defendant's own property and did not belong to the plaintiff at all. So far as the good will of the business depended upon the reputation of the goods which had been sold, that belonged to the defendant. So far as it depended upon the possession of a valuable list of customers in various countries who would buy rubber boots and shoes, and the consequent ability to communicate readily with probable purchasers of such goods, and thus to effect larger sales at a less expense and with less trouble than otherwise would be the case, full knowledge of all these particulars was already secured to the defendant by the agreements made between itself and the plaintiff on April 2, 1894, and August 1, 1895, respectively. So far as the good will depended upon the effect of the plaintiff's personality in the business, the

defendant rightly says that this was not included in what the plaintiff turned over to Knott for its benefit.

But it could be found that these considerations do not cover the whole of the existent good will of this business. The plaintiff had built up a very large trade in England and other foreign countries, and, although this does not appear to have been profitable, yet so extensive a connection as he had formed might, under a wiser management or more fortunate circumstances, be capable of returning large gains. At any rate, the defendant regarded it as worth while to take a transfer not only of all the assets of the business and of the plaintiff's leasehold estate in the premises in which it was carried on, but also of the good will, of which the plaintiff was called in the assignment the beneficial owner. The plaintiff himself, according to one part of the

vendee, but from the former, as such conduct differs from establishing a rival business it takes away the very thing sold. *Wentzel v. Barbin*, 189 Pa. 502, 42 Atl. 44.

Right to use similar name.

The sale of a business and good will conducted under the vendor's name, to one who adopts another name for the same, will not prevent the vendor setting up a competing business under his own name, and receiving mail directed in such name to the old address. *Ranft v. Reimers*, 200 Ill. 386, 60 L.R.A. 291, 65 N. E. 720.

And the sale of a business and good will will not prevent the vendor from using his own name in a competing business, although his surname is a portion of a trademark sold. *White v. Trowbridge*, 216 Pa. 11, 64 Atl. 862. To the same effect, see *Fish Bros. Wagon Co. v. La Belle Wagon Works* (Fish Bros. Wagon Co. v. Fish) 82 Wis. 546, 16 L.R.A. 453, 33 Am. St. Rep. 72, 52 N. W. 595.

Upon the sale by a partner to his co-partner of his interest in a partnership business, conducted under the name of "John Douglas & Company," together with the good will thereof, John Douglas, the vendor, was enjoined from using the name "John Douglas & Company" for a competing business established next door to the old establishment, by himself and three others, who, for a long period, had been in the employ of the old firm, notwithstanding the vendee adopted a new firm name after the sale, as such conduct upon the part of the vendor amounted to a violation of the contract of sale of the good will. *Churton v. Douglas*, 5 Jur. N. S. 837.

Upon the sale of a business and good will to a corporation, which adopts as a corporate name the name the vendor had been using, the vendor, after being employed for four years as an officer of the corporation, may, upon severing his connection therewith, establish a rival business under his own name, and advertise himself as formerly 19 L.R.A. (N.S.)

with such corporation. *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932. *Emery, V. C.*, however, said, if the only question was whether the vendor, after having sold the good will of his business, was entitled to carry on a rival business, stating his former connection with that sold, that he would be inclined to grant an injunction; but that, under the circumstances of the present case, after the vendor had been employed by the corporation for that length of time he was under no obligation, upon severing his connection with the corporation, not to state his former connection therewith.

While the vendor may use his own name upon setting up a rival business, he cannot adopt the name, not his own, formerly used by him to designate the business and good will sold. *Drake v. Dodsworth*, 4 Kan. 159.

So, upon the sale of a partnership business and good will carried on under the name of the Kalamazoo Wagon Company, under which the purchasers continue the business, the vendors will be restrained, upon engaging in a rival business, from using the corporate name of the Kalamazoo Buggy Company, or one so similar to that acquired by the vendee as to mislead customers as to the identity of the two companies. *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545.

As to the right of a vendor to use a trade-name or the name of a business establishment sold with the good will upon setting up a rival business, see note to *Vonderbank v. Schmitt*, 15 L.R.A. 462.

Sale under mortgage or bankruptcy proceeding.

Upon the sale of a business and good will under a commission in bankruptcy, the purchaser cannot enjoin the bankrupt, after his discharge, from setting up a rival business. *Walker v. Mottram*, L. R. 19 Ch. Div. 355; *Hudson v. Osborne*, 21 L. T. N. S. 386; *Crutwell v. Lye*, 17 Ves. Jr. 335.

So, where the property and good will sold

competing business. He relies upon the language of Loring, J., in *Hutchinson v. Nay*, 187 Mass. 263, 264, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974, in which it is shown that the rule of *Labouchere v. Dawson*, L. R. 13 Eq. 322, to the effect already stated, although since doubted or denied in other cases, has been finally confirmed by the House of Lords in *Trego v. Hunt* [1896] A. C. 7. But to this contention there are two answers.

In the first place, even if this rule were applied to the contract before us, the plaintiff, under the agreement which he has made, would not be allowed to solicit orders from his former customers, even though he might set up a competing business. Accordingly, the extent and value of the good will which he had transferred to Knott, though much diminished, would not be wholly destroyed. But, in the second place, the real answer to this contention is that when, in a contest in our own courts, the rights of the parties depend upon any foreign law, what that law is is purely a question of fact, to be determined by such evidence as may be offered thereon. *Rev. Laws*, chap. 175, §§ 71, 75, 76; *Demelman v. Brazier*, 193 Mass. 588, 79 N. E. 812. We do not find that there was any evidence of the law of England as to this matter before the single justice; and we cannot ourselves consider evidence which was not introduced before him. But, in the absence of evidence, it cannot be pre-

sumed that the common or commercial law of England differs from ours. *Callender, McA. & T. Co. v. Flint*, 187 Mass. 104, 72 N. E. 345; *Cherry v. Sprague*, 187 Mass. 113, 67 L.R.A. 33, 105 Am. St. Rep. 381, 72 N. E. 456; *Mittenthal v. Mascagni*, 183 Mass. 19, 23, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; *Chase v. Alliance Ins. Co.* 9 Allen, 311. Upon this question of fact, we can no more consider statements made in the reasoning adopted in the opinions of our own court than decisions in the English courts not put in evidence at the hearing. Accordingly this contention of the defendant must fail.

It may be added that the words of the agreement in question in which the plaintiff is called the beneficial owner of the property assigned are not without weight upon the question, though their probative value is, of course, much lessened, both by the fact that he was in no sense the beneficial owner of much of the property assigned, and by the further fact that Leland, who represented the defendant in the negotiations that preceded the making of the assignment, had refused in those negotiations to admit that the plaintiff owned any good will in the business. On the whole, we are satisfied that the findings of the single justice upon this question was warranted by the evidence and cannot be set aside; and it is conceded that in that event the further finding that the defend-

pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world that he is carrying on such a business; but he is not entitled, either by private letter or by a visit, or by his traveler or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the good will. Customers, it is true, may be affected by public advertisements and public circulars, but that does not, in the slightest degree, militate against the principle I have laid down."

But, upon such a sale by one copartner upon engaging in a competing business, he will not be restrained from dealing with those old customers of the firm who may choose to deal with him. *Leggott v. Barrett*, L. R. 15 Ch. Div. 306.

However, it was held in *Curl Bros. v. Webster* [1904] 1 Ch. 685, that the vendor of a business and good will, upon organizing a corporation to carry on a rival business, would be enjoined from personally soliciting trade even from such customers of the old business as had before solicitation voluntarily become patrons of the corporation; and, although the injunction would not issue against the corporation, the vendor would be restrained from suggesting solicitation by

travelers or other agents of the corporation.

Where one copartner, upon selling his interest in a partnership business and good will to his copartners, together with the right to use the firm name, expressly reserved the right to engage in a competing business, he may, under his own or any other name than that of the old firm, advertise such business in newspapers and by posters, and publish circulars, and may trade with all who choose to deal with him; but he may not apply either personally or otherwise to customers of the old firm, and request them to deal with him and not with the old firm. *Burkhardt v. Burkhardt*, 5 Ohio Dec. Reprint, 185.

So, a retiring partner who sells his interest in the firm business and good will to his copartner, but expressly stipulates that he may set up a similar business in the same neighborhood, upon so doing will be enjoined from soliciting patronage from customers of the old firm. *Gillingham v. Beddow* [1900] 2 Ch. 242.

After the sale of a business and good will in bankruptcy proceedings, the bankrupt, after discharge, upon setting up a competing business, may solicit patronage from the customers of the old business. *Walker v. Mottram*, L. R. 19 Ch. Div. 355. And also see *supra*, "Sale under mortgage or bankruptcy proceedings."

ant had agreed to pay for this something in the nature of a good will was also warranted.

It is very difficult, to be sure, to see how such a qualified and limited good will could have any considerable pecuniary value; but that question is not before us. After the decree that the plaintiff is entitled to an accounting shall have been entered, the value of this good will, as well as of the leasehold premises and his office furniture, and of any commissions to which the plaintiff may have become entitled, and of any part of the deposit in the Bank of England that may be found to have been his private property, as well as the amount of the Albert L. Gordon note, and the amount of the plaintiff's indebtedness to the defendant, will all be open for investigation either before a single justice or before a master.

As to the testimony the admission of which was excepted to, we are of opinion that, so far as it has not turned out to be immaterial, it was admissible to prove the promise of the defendant to pay the plaintiff for his good will and to show the meaning put by the parties upon that term, and the conditions which existed while the contract was under consideration. *Smith v. Vose & Sons Piano Co.* 194 Mass. 193, 9 L.R.A. (N.S.) 966, 120 Am. St. Rep. 539, 80 N. E. 527, and cases there cited.

Accordingly, a decree will be entered declaring that the plaintiff is entitled to an accounting with the defendant as already stated.

So ordered.

MINNESOTA SUPREME COURT.

GEORGE A. SOUTHWORTH et al., Reapts.,
v.

JAY DAVISON et al., Appts.

(— Minn. —, 118 N. W. 363.)

Contracts — sale of good will — validity.

1. A sale of the good will of an established business in connection with a sale of the business is not, if reasonable in other respects, void because unlimited as to time.

Partnership — sale of good will — effect.

2. Such a sale by a copartnership binds the members thereof individually as well as copartners.

(November 20, 1908.)

A PPEAL by defendants from an order of the District Court for Rice County

Headnotes by BROWN, J.
19 L.R.A. (N.S.)

overruling a demurrer to the complaint in an action brought to enjoin them from engaging in the laundry business within a certain radius of Northfield in violation of their contract not to do so. Affirmed.

The facts are stated in the opinion.

Messrs. William W. Pye and Charles R. Pye, for appellants:

The provision requiring grantors not to engage in the laundry business within 5 miles of the city of Northfield, being unlimited as to duration, is void.

National Ben. Co. v. Union Hospital Co. 45 Minn. 272, 11 L.R.A. 437, 47 N. W. 806; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; Espenson v. Koepke, 93 Minn. 278, 101 N. W. 168; 9 Cyc. Law & Proc. p. 529; 24 Am. & Eng. Enc. Law, pp. 848, 850; Wright v. Ryder, 36 Cal. 357, 95 Am. Dec. 186; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Alger v. Thacher, 19 Pick. 51, 31 Am. Dec. 119; Chappel v. Brockway, 21 Wend. 158; Long v. Towl, 42 Mo. 545, 97 Am. Dec. 355; Beard v. Dennis, 6 Ind. 200, 63 Am. Dec. 380.

It had reference to the copartnership, and did not bind defendants as individuals.

22 Am. & Eng. Enc. Law, p. 93; Hendren v. Wing, 60 Ark. 561, 46 Am. St. Rep. 218, 31 S. W. 149.

Messrs. Childress & Barrett and Thomas H. Quinn, for respondents:

The individuals as well as the partnership were bound by the agreement.

Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153.

The contract is not obnoxious because unlimited in time.

Carll v. Snyder (N. J. Ch.) 26 Atl. 977; French v. Parker, 16 R. I. 219, 27 Am. St.

Case Note. — *Effect on right of individual partners of sale by firm of good will of business with or without an agreement not to re-engage in the same business.*

Cases involving express and explicit covenants on the part of the individuals not to engage in the same business are excluded.

Where a firm sells a certain branch of its business to another, and agrees not again to engage in that line of business, the individual partners are bound by such covenant even after a dissolution of the partnership. Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153.

So, a stipulation, upon the sale of a partnership business and good will, not to engage for a period of ten years, "either directly or indirectly, or concern ourselves in carrying on or conducting," a similar business, either as principals, agents, servants, or otherwise, binds the copartners individually. American Ice Co. v. Meckel, 109 App. Div. 93, 95 N. Y. Supp. 1060,

Rep. 733, 14 Atl. 870; *Hauser v. Harding*, 126 N. C. 299, 35 S. E. 586; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64, 9 Cyc. Law & Proc. p. 527 (4); *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Grow v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737, 11 N. W. 404; *Hubbard v. Miller*, 27 Mich. 17, 15 Am. Rep. 153; *Cottingham v. Swan*, 128 Wis. 321, 107 N. W. 336; *Emery v. Bradley*, 88 Me. 357, 34 Atl. 167; *Vandiver v. Robertson*, 125 Mo. App. 307, 102 S. W. 659; *Angelica Jacket Co. v. Angelica*, 121 Mo. App. 226, 98 S. W. 805.

Brown, J., delivered the opinion of the court:

This action was brought to restrain and

And a subsequent purchaser acquiring the business and good will from the vendee may enjoin a breach of such covenant upon the part of the remote vendor. *Ibid*.

It was said in *Moreau v. Edwards*, 2 Tenn. Ch. 347, that while one copartner might, upon the sale of the partnership business and good will, bind the copartnership by an agreement not to re-engage in the same business, yet he could not thereby bind the partners individually.

It was held in *Hutchinson v. Nay*, 187 Mass. 262, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974, that the sale of the good will of a partnership, as part of the firm assets, upon a dissolution proceeding, will not preclude the surviving partner from entering into a competing business and soliciting trade from the customers of the old firm. The court said: "Where a sale of partnership assets is forced upon the survivor by the administrator of a deceased partner, the surviving partner is not in the position of a sole trader who voluntarily has parted with the good will of his business. He is not bound to retire from business, as a sole trader impliedly elects to do by voluntarily selling his good will. A sale of good will forced upon the surviving partner is like the sale of the good will of a sole trader by his trustee or assignee in bankruptcy. . . . No injustice is done to the estate of a deceased partner by this rule. If the estate gets all that the creditors of a sole trader can get, full justice is done to it, while to put the surviving partner in the position assumed by a sole trader, who voluntarily has elected to sell the good will, would be an act of great injustice."

In *Moore v. Rawson*, 199 Mass. 493, 85 N. E. 586, in speaking of the right of copartners to engage in a competing business after the sale of the business and good will of the partnership by a receiver in dissolution proceedings, *Knowlton, Ch. J.*, said (*obiter*) that, under such a sale, either of the partners would have a right to re-establish a new business of the same kind, and solicit trade from customers of the old firm.

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enjoin defendants from engaging in the laundry business within a radius of 5 miles from the city of Northfield. Defendants interposed a general demurrer to the complaint, and appealed from an order overruling it.

The complaint alleges that, prior to December 21, 1906, defendants had established, and for several years theretofore had conducted, in the city of Northfield, a steam laundry under the copartnership name of *Davison & Lyman*, and were enjoying a large and profitable trade; that, on the date stated, plaintiffs and defendants entered into a contract under and by which plaintiffs purchased from defendants said business and all property used in the operation and conduct of the same for the consideration of \$5,000. The contract was in writing, and contained, among other things, the

In *Hall v. Barrows*, 4 DeG. J. & S. 150, it was said that the sale of a partnership business and good will in a dissolution proceeding would not prevent the copartners from again engaging in a similar business.

But the purchaser of a business and good will of a partnership at a receiver's sale in a dissolution proceeding—wherein the court enjoined the copartners from in any wise derogating from the good will of such business—may restrain one of the copartners, who sets up a rival business directly across the street from the old stand, from soliciting customers of the old firm, enticing away the purchaser's employees, and from using a business sign and advertising devices similar to those upon the old place of business. *Richardson v. Westjohn*, 6 Ohio Dec. Reprint, 1043.

It was held in *Iowa Seed Co. v. Dorr*, 70 Iowa, 481, 59 Am. Rep. 446, 30 N. W. 866, that, conceding that one purchasing at a sale for benefit of creditors, under a deed of assignment, acquired the good will of a copartnership, he could not restrain one partner from again engaging in the same line of business under the old firm name.

It was held in *Marcus Ward & Co. v. Ward*, 40 N. Y. S. R. 792, 15 N. Y. Supp. 913, that the sale of a partnership business and good will by a firm to a corporation, without a restrictive covenant as to re-engaging therein, will not prevent an individual partner, after ceasing to be a stockholder of the corporation, from setting up a rival business and soliciting custom from the vendee's patrons.

So, he may also describe himself as late of the old partnership, the name of which had been adopted by the vendee as a corporate name. *Ibid*. The court relied upon *Pearson v. Pearson*, L. R. 27 Ch. Div. 145, which, however, was overruled in *Trego v. Hunt* [1896] A. C. 7.

As to the right of one, including a retiring partner, who sells the good will of his business without any restrictive covenants as to re-engaging therein to engage in a competing business, see case note to *Gordon v. Knott*, ante, 762.

following stipulation: "It is further stipulated that vendors hereby sell and transfer the good will of the Davison & Lyman Steam Laundry to the vendees herein, and agree not to engage in the laundry business within a radius of 5 miles from the city of Northfield, Minnesota." The complaint further alleges that thereafter, and notwithstanding the sale of said business and the good will thereof, as above stated, defendants, in violation of the above agreement, organized and equipped a corporation for the purpose of conducting and carrying on a laundry business in said Northfield, and that they are now operating the same with others associated with them. The prayer for relief is that plaintiffs recover of defendants \$5,000 damages for the violation of the contract, and that defendants be restrained and enjoined from continuing in said business either as members, stockholders, or agents of the corporation, or as individuals.

The sufficiency of the complaint is challenged in three respects: (1) That the contract by which the good will of the steam laundry was sold to plaintiffs is void for the reason that it is unlimited as to time; (2) that the contract bound defendants only as copartners, and not as individuals; and (3) that the contract is void for want of a sufficient consideration to support it. The objections are not well taken.

1. The rules of law applicable to the sale of the good will of business establishments have in recent years undergone material change. Formerly it was generally regarded as essential to the validity of such contracts that they be limited both as to time and place. *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; 28 Am. & Eng. Enc. Law, p. 848, and cases cited. And numerous expressions in the adjudicated cases still give out the impression that contracts not so limited are void and unenforceable. *Kronschabel-Smith Co. v. Kronschabel*, 87 Minn. 230, 91 N. W. 892; *Espenson v. Koepke*, 93 Minn. 278, 101 N. W. 168; *National Ben. Co. v. Union Hospital Co.* 45 Minn. 272, 11 L.R.A. 437, 47 N. W. 806. The settled modern law, however, is, both in England and in this country, that limitation as to both time and place is unnecessary, if the agreement in other respects be reasonable, and not in conflict with public policy or the general welfare. 9 Cyc. Law & Proc. p. 927. The validity of such contracts often depends upon the nature and character of the business, and whether the restraints afforded the grantee reasonable protection, or impose restrictions either as to time or place which are unreasonable. 19 L.R.A. (N.S.)

Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt, 62 L. J. Ch. N. S. 273; *Leather Cloth Co. v. Lonsont*, 39 L. J. Ch. N. S. 86; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 80 Am. Rep. 464, 13 N. E. 419. But in cases involving ordinary business establishments or occupations the failure to prescribe a time limitation does not invalidate the contract. The rule, broadly stated, seems to be that no contract of this kind is void as being in restraint of trade where it operates simply to prevent a party from engaging or competing in the same business. *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363. Though there are authorities which hold that no limitation of time renders the contract invalid (*Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Carroll v. Giles*, 30 S. C. 412, 4 L.R.A. 154, 9 S. E. 422), the great preponderance of authority sustains the converse of the proposition where there is a proper limitation as to place (*Pemberton v. Vaughan*, 10 Q. B. 87; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64; *Swanson v. Kirby*, 98 Ga. 586, 26 S. E. 71; *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946; *Smith v. Brown*, 164 Mass. 584, 42 N. E. 101; *Up River Ice Co. v. Denler*, 114 Mich. 296, 68 Am. St. Rep. 480, 72 N. W. 157; *Webster v. Buss*, 61 N. H. 40, 60 Am. Rep. 317; *French v. Parker*, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870; *Kramer v. Old*, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813; *Cottingham v. Swan*, 128 Wis. 321, 107 N. W. 336).

2. There is no special force in defendants' second contention, that the contract bound them only as copartners. It is thoroughly settled that the good will of business concerns is, though intangible, a species of property transferable from hand to hand as other property. *Bradford v. Montgomery Furniture Co.* 115 Tenn. 610, 9 L.R.A. (N.S.) 979, 92 S. W. 1104; *Williams v. Wilson*, 4 Sandf. Ch. 379; *Hitchcock v. Coker*, 6 Ad. & El. 438. And, if sold by a copartnership, the transfer necessarily vests the entire beneficial interest in the purchaser, to the exclusion of any right of the individual members of the selling firm. It stands, so far as bargain and sale is concerned, as other partnership property; and, as an ordinary sale of an article owned by the firm binds all the members thereof, the sale of the good will has the same effect. It would be a far-fetched doctrine that would enable one of the partners to set up his individual claim to property sold by the firm in the usual course of business on the theory that the sale only affected his rights as a copartner. *Hubbard v. Miller*, 27

Mich. 15, 15 Am. Rep. 153. And to construe the contract in harmony with defendants' contention would expressly destroy the purpose intended by the transaction, viz., the prevention of defendants, either as partners or individuals, from competing in the laundry business in Northfield. And, though contracts of this kind are generally strictly construed, the rule is not so severe as to justify a conclusion at variance with the plain purpose and intention of the parties. Any other conclusion would not only enable the individual partner to reclaim partnership property sold for value during the existence of the firm, but justify the commission by him of a palpable fraud by doing indirectly that which he could not do as a member of the firm. Eisel v. Hayes, 141 Ind. 41, 40 N. E. 119.

3. The contract is shown to have the support of a valuable consideration in the purchase price of the property with the good will as an incident. Eisel v. Hayes, supra. The complaint also sufficiently alleges a violation of the contract. It charges that defendants have been instrumental in the organization of a corporation for the purpose of conducting a laundry business in Northfield, and that they are managing its affairs. This is a clear violation of the contract. Ibid.

Order affirmed.

MICHIGAN SUPREME COURT.

WILLIAM BLAKELEY, Plff. in Err.,
v.
WHITE STAR LINE.

(— Mich. —, 118 N. W. 482.)

Pleasure resort — protection of patrons.

1. The owner of a pleasure resort, who permits the playing of ball away from the portion of the grounds devoted to such sport and near to that devoted to dancing, without notifying those interested in the dancing or taking precautions to protect them from injury, may be liable for an injury inflicted by a ball thrown upon a spectator of the dancing.

Same — absence of admission fee.

2. That a transportation company maintaining a pleasure resort at the termination of its line as an inducement to persons to patronize the line charges no fee for admission to it, depending for its profit on the passengers carried, does not exempt it from the rule requiring the owners of pleasure resorts to protect invited guests from unusual occurrences which may result in serious danger to them.

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. **Reversed.**

Statement by Grant, Ch. J.:

The defendant owns and operates a line of boats running from Detroit to various places on the St. Clair river. It owns and controls a pleasure resort known as "Tashmoo park." It makes no entrance charge to visitors, but makes its profit by carrying passengers to and from the park. It has furnished various means of amusement, including a baseball ground known as "The Diamond," a dancing pavilion, and places for other forms of amusement. On June 18, 1905, the retail clerks of Detroit gave a special excursion to the park, and were given by the defendant the right to the possession of the diamond for the purposes of playing baseball. Plaintiff went to the park with this excursion. When the excursion arrived, the diamond was in possession of a club of players known as the "Mohawk club." They surrendered, evidently under the instruction of the defendant, the diamond to players of the retail clerks. Some members of the Mohawk club on leaving the diamond went outside, between it and the pavilion, where a dance was in progress, and commenced pitching and catching balls. Plaintiff stood near the pavilion,

Case Note. — Liability of one maintaining place of amusement to which the public is invited, for safety of persons visiting the premises.

This subject is treated in a case note to Higgins v. Franklin County Agri. Soc. 3 L.R.A.(N.S.) 1132. A few decisions in point have been rendered since that note.

In Scott v. University of Michigan Athletic Asso. 152 Mich. 684, 17 L.R.A.(N.S.) 234, 116 N. W. 624, it was held that the mere employment, by persons about to give an athletic exhibition to which the public was invited upon payment of an admission fee, of competent persons to build and inspect a stand for the accommodation of patrons, did not absolve them from liability for injuries to a patron from the collapse of the stand through a patent defect discoverable by the exercise of proper care, since, by inviting the public and charging an admission fee, they impliedly contracted that, except for defects not discoverable by reasonable means, the stand was safe.

In Stair v. Kane, 84 C. C. A. 126, 156 Fed. 100, it was held that the petition and evidence made a case of negligence which was properly submitted to the jury, where it was alleged, and the evidence tended to support the allegations, that among the appliances of a theater of which the defend-

with his back to the players, watching the dance. A ball was thrown towards the pavilion. The catcher failed to catch it, and it struck the plaintiff's ankle with such force that it broke the bones. Plaintiff brought this suit, alleging negligence on the part of the defendant, its agents, and servants "to keep and maintain its park and recreation grounds in an orderly manner, . . . and to see that all dangerous games, diversions, and recreations, in which there was an element of danger to patrons and the public, should not be played upon any portion of its park except that set aside for such diversions and amusements, and not in places in said park in close proximity to the paths and spots where passengers and patrons were accustomed to be and to gather, and at places not intended for the exercise and carrying on of such pastimes and diversions." The declaration further avers the duty of the defendant to employ and maintain in its park agents and servants for the purpose of seeing to the care, safety, and security of its patrons, and a violation of this duty. At the close of the plaintiff's case the court directed a verdict for the defendant. In so directing he stated that "the game of throw and catch would not be a dangerous game where it is conducted in a way that is not wild and erratic, and there is nothing in the testimony to indicate that it was extremely wild and careless, or that the conduct of the little game that was being conducted would be such that people must take notice of those people who are supposed to look out for the comfort and safety of the people in the park. It

ant had control was a fire extinguisher, which was kept on the sill of an open window at the side of the stairway leading to the gallery of the theater, that it was unsecured, and was in a place where men and boys in crowding down the stairway as was usual at the close of a performance, were likely to knock it out of the window, as they in fact did, and that it fell and injured the plaintiff as he was leaving the theater after attending a night performance.

In *Brown v. Batchellor* (R. I.) 69 Atl. 295, it was held that a count in a declaration which set up that it was the duty of the defendant, the proprietor of a theater, to have provided some protection for spectators occupying seats at or near the stage from injury by reason of bicycles and the performers thereon riding or falling off the stage into the audience, was not demurrable on the ground that defendant was under no such duty.

In *Nephler v. Woodward*, 200 Mo. 179, 98 S. W. 488, it was held that whether a hole in a carpet covering the aisle of a theater was of such a character that the proprietors of the theater ought to have recognized it as being dangerous to their

is just such a game as people visiting a park of this kind might naturally expect to be conducted there, and which they must look out for. They must look out for the dangers incident to such a game."

Mr. Clarence P. Milligan, for plaintiff in error:

It was the duty of defendant to render the public park a reasonably safe place for all persons who might be in attendance there.

Cousineau v. Muskegon Traction & Lighting Co. 145 Mich. 314, 108 N. W. 720; *Brezee v. Powers*, 80 Mich. 172, 45 N. W. 130; *McGearty v. Manhattan R. Co.* 15 App. Div. 2, 43 N. Y. Supp. 1086; *Selinas v. Vermont State Agri. Soc.* 60 Vt. 249, 6 Am. St. Rep. 114, 15 Atl. 117; *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 37 L.R.A. 258, 27 S. E. 70; *Cooley, Torts*, 2d ed. 718; *Clarke v. Palmer*, 129 Mass. 373; *Brother-ton v. Manhattan Beach Improv. Co.* 50 Neb. 214, 69 N. W. 757; *Dinnihan v. Lake Ontario Beach Improv. Co.* 8 App. Div. 509, 40 N. Y. Supp. 764.

Messrs. Gray & Gray for defendant in error.

Grant, Ch. J., delivered the opinion of the court:

Counsel for each party cite with approval, as the law applicable to this case, the statement of Justice Cooley, in his work on *Torts* (page 605): "One is under no obligation to keep his premises in a safe condition for the visits of trespassers. On the other hand, when he expressly or by implica-

patrons, and have guarded against it, was a question of fact for the jury.

In the preceding case it was held that the owners of a theater were not liable for an injury to a patron, caused by catching her foot in a round hole, 3 inches in diameter, in a carpet on the floor, unless before the accident the condition was such that, by the exercise of ordinary care, they could have foreseen probable danger.

In *Lumsden v. L. A. Thompson Scenic R. Co.* 114 N. Y. Supp. 421, it was held that a corporation, operating a scenic railway by the use of cars which, after being drawn up a steep incline, were allowed by the force of gravity to descend steep and abrupt inclines along a devious track, was not guilty of negligence in failing to notify a passenger, who knew the general nature of the ride which she was about to take, that she must hold on to the car, and not fall off.

In *Nephler v. Woodward*, supra, it was held that a patron of a theater, being shown to her seat by an usher, had the right, in the absence of any warning to the contrary, to presume that it was safe to follow where the usher led the way, and was not bound to be on the lookout for holes in the carpet.

tion invites others to come upon his premises, whether for business, or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." This rule has been cited with approval by this and many of the courts of other states. The difficulty lies only in applying the rule to the facts of a given case. We find, however, no difficulty in applying the rule to the facts here. Plaintiff was invited to the defendant's park or pleasure ground to spend the day. In so far as various sports were allowed to be carried on in places allotted for them, visitors who went to the vicinity of these places to witness the sports undoubtedly assumed the risk of danger. In this case the defendant had marked off the grounds for the game of baseball. It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk. They can watch the ball, and may usually avoid being struck. Plaintiff had no reason to anticipate a game of throw and catch of the diamond, and in close proximity to the dancing pavilion. The defendant should not have permitted such a game in close proximity to a crowd of visitors, without giving notice, or making proper arrangement for the protection of its visitors. There is testimony from which a jury might infer that this game, in this unusual place, had been going on for a sufficient length of time to give notice to the defendant's agents or superintendents that it was in progress, and that a woman had been struck nearly a half hour before, and seriously injured by a ball thus thrown. The owners of pleasure resorts may not permit dangerous sports to be played in places other than those set apart for them. This plaintiff was standing where he had been invited. He was not in any danger from a ball game played at the customary place. The defendant owed him a duty, and that was either to prevent the game at that unusual place, or to notify him and other visitors that it was to be played. It was likewise its duty to keep a reasonable number of watchmen or servants to see that its grounds were protected from the playing of games as dangerous as this was. It may safely be inferred that this ball was thrown with all the force and swiftness with which the thrower was capable. The result justifies the inference. This may not be 19 L.R.A. (N.S.)

"extremely wild and careless" ball throwing, as between players who were on their guard, or as to visitors who were warned that the game was in progress. But as to those who were not warned, and who have no knowledge of it, I do not agree with the circuit judge that it was not "wild and careless throwing."

We held in *Cousineau v. Muskegon Traction & Lighting Co.* 145 Mich. 314, 108 N. W. 720, that a common carrier of passengers owning a park owed a duty to the plaintiff, a girl, to protect her from the crowd as she was attempting to enter one of its cars. For the same reason there given, the owner of the park is bound to protect its invited guests from unusual occurrences which may result in serious danger to its patrons, if he has the requisite notice or knowledge. The rule we have thus enunciated as applicable to this case is sustained by the following authorities: *Selinas v. Vermont Agri. Soc.* 60 Vt. 249, 6 Am. St. Rep. 114, 15 Atl. 117; *Richmond & M. Co. v. Moore*, 94 Va. 493, 37 L.R.A. 258, 27 S. E. 70; *Lane v. Minnesota State Agri. Soc.* 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382; 1 *Thomp. Neg.* § 998; *Brotherton v. Manhattan Beach Improv. Co.* 48 Neb. 563, 33 L.R.A. 598, 58 Am. St. Rep. 709, 67 N. W. 479; *Id.* 50 Neb. 214, 69 N. W. 767; *Indianapolis Street R. Co. v. Dawson*, 31 Ind. App. 605, 68 N. E. 909; *Williams v. Mineral City Park Asso.* 5 A. & E. Ann. Cas. 924, and note, (128 Iowa, 32, 1 L.R.A. (N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783). See also *Larkin v. Saltair Beach Co.* 30 Utah, 86, 3 L.R.A. (N.S.) 982, 116 Am. St. Rep. 818, 83 Pac. 686, 8 A. & E. Ann. Cas. 977. Invitation is sufficient. Pecuniary profit to the owner is not essential. 1 *Thomp. Neg.* § 968; *Clarke v. Palmer*, 129 Mass. 373. The learned counsel for the defendant cite and rely upon *Steele v. Boston*, 128 Mass. 583, and other similar cases. In that case the public park was "traversed by divers footpaths, leading in different directions," with openings in the fence, to give access to and from the adjoining streets. One of these paths had been fitted up by the public authorities for boys to coast upon with sleds. They had built a bridge over an intersecting path, and had stationed a policeman at the foot of the path to keep people from walking on it. It had turned water on it so that it might freeze and render the path slippery. The plaintiff deliberately walked along this path and was injured by a coaster. The court used the following language: "If a private person owned a similar park to which he had given the public free access, we are at a loss to see how he could be held liable for an accident like that of

the plaintiff. Such person might, if he saw fit, set apart and fit for use one of the paths for the recreation of youth in coasting, and if anyone should, as was the case with the plaintiff, choose to enter upon the path, seeing that it was set apart for this purpose, he would do so at his own risk, and could not hold the owner responsible if he was injured by a passing sled." The court further held that, if the path were in a public highway, the plaintiff could not maintain his suit because the statute gave no right of action. That case does not apply to this.

So the defendant in its private park may establish places for a sport dangerous to those visitors who choose to come within the radius of danger, without incurring liability for an injury. Visitors, however, may properly assume that they may visit other places without being exposed to the dangers of the same sport elsewhere.

Judgment reversed, and a new trial ordered.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. DON
BALES, Appt.,

v.

THOMAS BAILEY, Sheriff of Beltrami
County.

(— Minn. —, 118 N. W. 676.)

Officer — de facto — courts.

1. There may be a *de facto* officer, though no *de jure* office exists, as in *de facto* municipal corporations or *de facto* courts.

Habeas corpus — legal existence of court — attack.

2. The legal existence of a court organized and created under color of law cannot be questioned in habeas corpus sued out by a person convicted and sentenced to imprisonment in proceedings had before it.

Courts de facto — collateral attack.

3. Even though defectively organized, the organization being authorized by law, the municipal court of Bemidji is at least a *de facto* court and the judge and clerk thereof *de facto* officers, and the right of the court to exercise judicial functions can be inquired into only at the instance of the state in direct proceedings brought for that purpose.

(November 20, 1908.)

A PPEAL by relator from an order of the District Court for Beltrami County

Headnotes by BROWN, J.

Note. — The question whether a *de jure* office is a condition of a *de facto* officer, is treated in a case note to Lang v. Bayonne, 15 L.R.A. (N.S.) 93.
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discharging a writ of habeas corpus sued out to secure the release of relator from the custody of Sheriff Thomas Bailey to which he had been committed upon conviction of petit larceny by an alleged illegally established court. Affirmed.

The facts are stated in the opinion.

Mr. Frank A. Jackson for appellant.

Mr. Henry Funkley for respondent.

Brown, J., delivered the opinion of the court:

Relator was convicted in the municipal court of Bemidji of petit larceny, and sentenced to imprisonment in the county jail for the term of ninety days. He thereafter sued out a writ of habeas corpus, alleging that his imprisonment was illegal and without authority of law, in that the said municipal court was never legally created or established. The writ was discharged by the court below, and relator appealed.

We are confronted at the outset with the question whether the legal existence of the court in which relator was convicted and sentenced may be inquired into in a proceeding of this kind. If not, then the other questions presented require no attention. The office of the writ of habeas corpus is to afford the citizen a speedy and effective method of securing his release when illegally restrained of his liberty. Its scope, when directed to an inquiry into the cause of imprisonment in judicial proceedings, extends to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner is restrained. It cannot be employed as a writ of quo warranto to inquire into the title of the person to the office of judge of the court whose judgment or commitment is assailed. 15 Am. & Eng. Enc. Law, 2d ed. p. 151. Nor as a writ of error to review alleged errors committed on the trial. Nor as an appeal or writ of certiorari. State ex rel. Rea v. Kinmore, 54 Minn. 135, 40 Am. St. Rep. 305, 55 N. W. 830. At common law courts of superior jurisdiction would review on this writ commitments by inferior magistrates, and in doing so sometimes go back of the commitment, and inquire into the grounds thereof and their sufficiency. This wide scope of inquiry, however, came from the superiority of the higher court, and not from statutory authority. But the rule in many of the states has been modified or changed, and, where so modified, the writ extends as a general rule to defects appearing upon the face of the record only. Church, Habeas Corpus, 234. The rule in this state by statute is that, if the judg-

ment be rendered or the commitment issued by a competent court, and be fair upon its face, nothing further than the jurisdiction of the court will be inquired into. State ex rel. Noonan v. Hennepin County, 24 Minn. 87; State ex rel. Blaisdell v. Billings, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794; State ex rel. Kelly v. Kilbourne, 68 Minn. 320, 71 N. W. 396; State ex rel. Lacy v. Norby, 69 Minn. 451, 72 N. W. 703. Our statutes provide (§ 4586, Rev. Laws 1905) that where, upon the return of the writ, it shall appear that the person alleged to be restrained of his liberty is held and detained by virtue of a final judgment of a competent court of civil or criminal jurisdiction, he shall be remanded to the custody of the officer. Section 4587 provides that, if it shall appear on the return of the writ that the prisoner is in custody by virtue of a process of a court "legally constituted," he can be discharged only when it shall be made to appear (1) that the court under which the prisoner is committed was originally without jurisdiction to render the judgment; or (2) by some act or omission subsequently occurring the prisoner is entitled to his discharge; or (3) when the process under which he is held is in matter of substance defective; or (4) when issued without authority; or (5) when the person detaining the prisoner is not the person authorized by law to detain him; or (6) where the process was wholly unauthorized by judgment or provision of law. These statutory provisions abrogate the common-law rule, and preclude the right of the court to go behind the judgment or commitment and determine the validity thereof from matters *dehors* the record, except in those cases where the evidence is brought up on certiorari as ancillary to the writ of habeas corpus as in the case of *Re Snell*, 31 Minn. 110, 16 N. W. 692.

It is not contended by relator that any of the grounds for release specified in the statute are present in this case, except that the municipal court of Bemidji was not legally constituted, was not a "competent court" within the meaning of the statute, and had therefore no jurisdiction to hear, try, or determine the prosecution against relator. We are of opinion that this question cannot be determined in this proceeding.

The Constitution of the state expressly authorizes the legislature to create and establish such courts inferior to the supreme and district courts as public interests may from time to time require. Under this authority, the legislature, by § 125, Rev. Laws 1905, provided for the organization of municipal courts in certain villages and cities 19 L.R.A. (N.S.)

of the state upon a compliance with the conditions therein prescribed. In April, 1905, the city council of Bemidji, a city coming within the terms of the statute, acting under and pursuant to its provisions, duly resolved that a municipal court be established in and for that city, the resolution to take effect and be of force on August 1st following. The proceedings of the council were in all things in conformity with the law, and the resolution was duly submitted to the city mayor for his approval or rejection. The mayor vetoed the resolution, whereupon, in the due course of events, it was again brought before the council for consideration in connection with the mayor's disapproval. It was then passed by unanimous vote of the council over the veto. Thereafter the court was duly constituted by the appointment of a judge and clerk, as provided for by the statute under which the council acted, who qualified and entered upon the discharge of their duties. It was before this court as thus established that relator was convicted. It is his contention that the approval of the resolution by the mayor was an essential prerequisite to the organization of the court, and, he having disapproved or vetoed the same, that was an end of the matter; that the council had no power or authority to pass the resolution over his veto, hence that the court was not legally created or established. We do not pass upon the question whether the court was legally created or intimate any opinion to the effect that it was not. The question is not reached.

The question whether the legal existence of a court may be inquired into on habeas corpus proceedings has been answered by different courts both in the affirmative and the negative (21 Cyc. Law & Proc. p. 301); the weight of authority, however, as we view the matter, being with those courts which hold under statutes like those of this state that the writ cannot reach that question. That the right of a person to exercise the functions of a public office, who has qualified and entered upon the discharge thereof under color of authority, though his title be not good in point of law, cannot be called in question collaterally upon habeas corpus or other indirect method, is sustained by all the courts. Note to 87 Am. St. Rep. 177; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *Re Manning*, 76 Wis. 365, 45 N. W. 26; *Re Brainerd*, 56 Vt. 495; *Ex parte Ward*, 173 U. S. 452, 43 L. ed. 765, 19 Sup. Ct. Rep. 459; *Patterson v. State*, 49 N. J. L. 326, 8 Atl. 305. No reason occurs to us why the same rule should not apply to *de facto* municipal corporations and *de facto* courts. The authorities maintaining that the legal

existence of the court may thus be inquired into proceed on the theory that there can be no such thing as a *de facto* court. *Re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639. But that doctrine is not fully supported either on principle or authority, at least it is not without exceptions. A municipal corporation, although not legally organized, is still a *de facto* corporation. *State ex rel. Hagan v. District Ct.* 90 Minn. 118, 95 N. W. 591; *St. Paul Gaslight Co. v. Sandstone*, 73 Minn. 225, 75 N. W. 1050; 1 Dill. Mun. Corp. 4th ed. 43; *Cooley*, Const. Lim. 309, 310; 20 Am. & Eng. Enc. Law, p. 1135; *Speer v. Kearney County*, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 749; *Omaha v. South Omaha*, 31 Neb. 378, 47 N. W. 1113; *Miller v. Perris Irrig. Dist. (C. C.)* 85 Fed. 693. And the authorities hold that in such case the acts of the municipality and its officers are as to third persons lawful and binding, and the legal existence or right of a municipality to continue to exercise its functions can be questioned only by the state in direct proceedings brought for that purpose. Logically, if a corporation has only a *de facto* existence, the offices created by the act or proceeding creating it can have no superior legal quality. They necessarily must be *de facto*, for there can be no *de jure* office of a municipal corporation existing only in theory, and the incumbents thereof manifestly are *de facto* officers of a *de facto* corporation. Courts, in attempting to adhere to the abstract rule that there must in all cases be a *de jure* office, have in cases where a *de facto* corporation has been held to exist invented a theory of potential existence to take the place of the lawfully created office. *Carleton v. People*, 10 Mich. 250; *Yorty v. Paine*, 62 Wis. 154, 22 N. W. 137; *Fowler v. Beebe*, 9 Mass. 231, 6 Am. Dec. 62; *Smith v. Lynch*, 29 Ohio St. 261; *Buck v. Eureka*, 109 Cal. 504, 30 L.R.A. 409, 42 Pac. 243. There can, however, be no difference in point of substance between an office having a potential existence—i. e., one that might lawfully be created—and one existing in fact though not legally created. In neither case is it a *de jure* office. This precise question was discussed by the Missouri court of appeals in *Adams v. Lindell*, 5 Mo. App. 197, where the court reached the conclusion, as we think correctly, that the existence of a *de jure* office is not in all cases indispensable to the existence of a *de facto* officer. If this is not sound, then there can be no such thing as a *de facto* corporation or a *de facto* court. *Burt v. Winona & St. P. R. Co.* 31 Minn. 472, 18 N. W. 285, 289.

This court has held, and we are supported by courts of high standing, that there may not only be *de facto* municipal

corporations but *de facto* courts, and that the validity of their acts cannot be questioned in collateral proceedings. *St. Paul Gaslight Co. v. Sandstone*, supra; *State ex rel. Childs v. Crow Wing County*, 66 Minn. 519, 35 L.R.A. 745, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631; *State ex rel. Young v. Harris*, 102 Minn. 340, 13 L.R.A. (N.S.) 533, 113 N. W. 887; *Burt v. Winona & St. P. R. Co.* supra. In the last case cited, which is analogous to the one at bar, it was held that the municipal court of Mankato, created by an unconstitutional statute, was a *de facto* court, and that its legal existence could not be questioned in a collateral proceeding. A similar conclusion was reached in *Trumbo v. People*, 75 Ill. 561, and in *Leach v. People*, 122 Ill. 420, 12 N. E. 726, where the status of a school district and its officers which had been illegally established was involved. It was held that the regularity of the proceedings in the formation of the school district could not be inquired into collaterally. A *de facto* county organization was sustained, and the acts of its officers held immune from collateral attack in *Merchants' Nat. Bank v. McKinney*, 2 S. D. 106, 48 N. W. 841. See also *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89; *Campbell v. Com.* 96 Pa. 344; *Walcott v. Wells*, 21 Nev. 47, 9 L.R.A. 59, 37 Am. St. Rep. 478, 24 Pac. 367. In the *Burt* case this court, speaking through Chief Justice Gilfillan, said: "It would be a matter of almost intolerable inconvenience, and be productive of many instances of individual hardship and injustice, if third persons, whose interests or necessities require them to rely upon the acts of the occupants of public offices, should be required to ascertain at their peril the legal right to the offices which such occupants are permitted by the state to occupy. Taking even the narrowest definition of an officer *de facto*, viz., that he is one who is exercising the duties of an office under color of legal right to the office, the reasons that justify the doctrine apply with equal force to a court or office where the same may be said to exist under color of right; that is, under color of law. That there may be a *de facto* municipal corporation, and consequently *de facto* offices of the same, follows from the rule laid down in *Cooley*, Const. Lim. *254. If a municipal corporation appears 'to be acting under color of law and recognized by the state as such, such a question (that is of the legal existence of the corporation) should be raised by the state itself by quo warranto, or other direct proceeding'—and it is sustained by many authorities holding that the question cannot be raised collaterally. *State v. Carr*, 5 N. H. 367.

People v. Maynard, 15 Mich. 463; *Stuart v. School Dist. No. 1*, 30 Mich. 69; *Bird v. Perkins*, 33 Mich. 28; *Mendota v. Thompson*, 20 Ill. 197; *Kettering v. Jacksonville*, 50 Ill. 39; *Geneva v. Cole*, 61 Ill. 397; *Kayser v. Bremen*, 16 Mo. 88; *State ex rel. Read v. Weatherby*, 45 Mo. 17; *St. Louis v. Shields*, 62 Mo. 247; 1 Dill. Mun. Corp. § 43 (22)."

The municipal court of Bemidji was organized under color of law, proceedings for that purpose were at most irregular, and, within the Burt Case, it was a *de facto* court, and its judge and clerk *de facto* officers. Applying the general rule referred to, namely, that the title of a *de facto* officer cannot be attacked collaterally, to the *de facto* court, it follows that relator cannot be heard to complain of the manner in which the municipal court of Bemidji was established. *Ex parte Strang*, 21 Ohio St. 610; *Re Ah Lee* (D. C.) 6 Sawy. 410, 5 Fed. 899; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. See note to *King v. Philadelphia Co.* 21 L.R.A. 141; *State v. Harris*, 47 La. Ann. 386, 17 So. 129. A *de facto* court is therefore a "competent court," or a "legally constituted court," within the meaning of our habeas corpus statute, for its judgments and proceedings are not open to collateral attack. This rule, of course, does not apply to a court created without color of authority, or to a mere usurper. *Ex parte Strahl*, 16 Iowa, 369.

The learned trial court therefore properly discharged the writ, and its order in the premises is affirmed.

NEW YORK COURT OF APPEALS.

HARCOURT BULL, Appt.,

v.

NEW YORK CITY RAILWAY COMPANY,
Resp't.

(192 N. Y. 361, 85 N. E. 385.)

Street railway — transfer — refusal — right.

1. An attorney traveling over a street railway simply for the purpose of ascertaining whether or not a transfer will be given him at a certain point as required by statute, which information he desires for the

Note. — See case note to *Southern P. Co. v. Robinson*, 12 L.R.A. (N.S.) 497, as to motive of plaintiff as affecting right to recover statutory penalty from carrier. Upon the somewhat analogous question as to the damages recoverable by passenger who submits to ejection to lay foundation for an action, see case note to *Brenner v. Jonesboro, L. C. & E. R. Co.* 9 L.R.A. (N.S.) 1060.
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benefit of suits already commenced on behalf of clients for the statutory penalty for refusal to give them transfers, is not entitled to bring an action for the statutory penalty because of the refusal to give him one, where the statute requires the carrying of passengers desiring to make a continuous trip between certain points for one fare, and imposes a forfeiture to the person aggrieved by refusal to issue the necessary transfer.

Same — single line.

2. Entirely distinct lines of street railway originally constructed and operated by different companies and brought into physical relation to each other by a third line connecting them do not, although the three lines have by leases and contracts come into possession of one company, which is operating them as a single system, constitute a road and connecting branches thereof, or a main line of road and any branch or extension thereof, within the meaning of a statute requiring a street railway company to charge only one fare for transporting a passenger over such road and branch within a city.

(June 12, 1908.)

APPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of the Municipal Court of the City of New York, Borough of Richmond, in plaintiff's favor in an action brought to recover the statutory penalty for refusal to give a street-railway transfer. Affirmed.

Statement by Hiscock, J.:

Appeal, by permission, from an order of the appellate division of the supreme court in the second judicial department, entered October 23, 1907, which reversed a judgment in favor of plaintiff entered upon a decision rendered at a trial term of the municipal court of the city of New York.

The action was brought to recover a penalty on the theory that defendant had violated both the statute regulating the fare to be charged by a surface street railroad (railroad law, Laws 1892, chap. 676, § 101, p. 1405) and the statute requiring such road to give transfers (railroad law, § 104). The appellant is an attorney at law, and, prior to the date of the alleged violations, had very largely been engaged in bringing similar suits against this respondent and other corporations in the city of New York. On this occasion theoretically he set out with his companion, also an attorney, to make a trip from the corner of the Bowery and Delancey streets to Fifth street by a course over three different lines of road operated by respondent, and which especially involved the right of a transfer from the so-called Eighth street line to the Avenue

C line. He took a car at the starting point first mentioned, and paid the fare of himself and his companion, and obtained transfers to the Eighth street line, but was then informed by the conductor that he would not be given a transfer from the latter line to Avenue C as above stated. Notwithstanding this, he alighted at the corner of Clinton street, and, taking an Eighth street car, again asked for a transfer to Avenue C, which was refused. Again, notwithstanding this, he alighted at the corner of Stanton street and Avenue A, and boarded a car on the Avenue C line, and in substance asserted the right to have had a transfer to that line and therefore to be carried thereon without payment of fare. His assertion having been disregarded, and demand having been made for payment of another fare, he paid the same, and then alighted and returned to his office. As he knew by previous experience at Clinton street, he could have taken a car which would have given him a transfer to the line on Avenue C.

Appellant's purpose in setting out on this trip was that "of simply traveling over the line to see what would be done." He had been bringing suits for penalties for refusals of transfers similar to that here complained of, and he "rode for the purpose of gaining information." He "had no destination whatever on Fifth street . . . ; was traveling over the line to see what information would be given to passengers desiring transfers." The learned appellate division, by a divided court, held that, under these circumstances, he was not such a passenger as was entitled to the benefits of § 104, above referred to, and then certified to this court for answer the following questions:

"(1) Is plaintiff entitled to a judgment under the provision of §§ 39 and 101 of the railroad law?

"(2) Is plaintiff entitled to a judgment under the provisions of § 104 of the railroad law?"

. Mr. Harcourt Bull, *in propria persona*:

The object or motive which actuated the plaintiff at the time he made the trip is immaterial, and, if the defendant refused the transfer that the law required, every such refusal or overcharge was a legal wrong to the plaintiff who was thereby aggrieved, and who, within the meaning of the act and by its express terms, is thereupon entitled to sue for the penalty.

Fisher v. New York C. & H. R. R. Co. 46 N. Y. 644; St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18; Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752; Adams v. Union R. Co. 21 R. I. 134, 44 L.R.A. 273, 42 Atl. 515; Parks v. Nashville, C. & St. L. 19 L.R.A. (N.S.)

R. Co. 13 Lea, 1, 49 Am. Rep. 655; Fitzmartin v. New York City R. Co. 51 Misc. 36, 99 N. Y. Supp. 902; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543.

Messrs. Henry J. Smith and Henry F. Gannon, with Mr. James L. Quackenbush, for respondent:

Plaintiff was not a passenger desiring to make one continuous trip between any two points on the railroads, and was not aggrieved by the refusal to transfer.

Myers v. Brooklyn Heights R. Co. 10 App. Div. 335, 41 N. Y. Supp. 798; Southern P. Co. v. Robinson, 132 Cal. 408, 12 L.R.A. (N.S.) 497, 64 Pac. 572; Parks v. Nashville, C. & St. L. R. Co. 13 Lea, 1, 49 Am. Rep. 655; Jolley v. Chicago, M. & St. P. R. Co. 119 Iowa, 492, 93 N. W. 555; Norfolk & W. R. Co. v. Irvine, 85 Va. 217, 1 L.R.A. 110, 7 S. E. 233; Griffin v. Interurban Street R. Co. 179 N. Y. 438, 72 N. E. 513; Nicholson v. New York City R. Co. 118 App. Div. 858, 103 N. Y. Supp. 695; Re Syracuse, C. & N. Y. R. Co. 91 N. Y. 1.

Hiscock, J., delivered the opinion of the court:

We shall answer the questions above certified to us in the inverse order of their statement.

The respondent was operating the lines of road on which appellant sought to ride, and many other lines under leases and contracts authorized by statutory provisions now incorporated in railroad law, Laws 1892, chap. 676, p. 1382, and therefore the following provisions of § 104 of said statute were applicable: "Every such corporation . . . shall . . . carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare. . . . Every such corporation shall, upon demand, and without extra charge, give to each passenger paying one single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section the corporation so refusing shall forfeit \$50 to the aggrieved party." In the cases of Myers v. Brooklyn Heights R. Co. 10 App. Div. 335, 41 N. Y. Supp. 798, and Nicholson v. New York City R. Co. 118 App. Div. 858, 103 N. Y. Supp. 695, decided, respectively, by the second and first appellate divisions, it was held in effect that a person traveling over a street railroad simply for

the purpose of being denied a transfer in order that he might bring a suit for a penalty under the statute quoted does not come within the protection and benefits thereof, and cannot recover such penalty.

We agree with the results reached in those cases, and, reinforced as they are by what was written in the cases of *Southern P. Co. v. Robinson*, 132 Cal. 408, 12 L.R.A. (N.S.) 497, 64 Pac. 572, and *Jolley v. Chicago, M. & St. P. R. Co.* 119 Iowa, 491, 93 N. W. 555, we might very well content ourselves with basing the affirmance of the judgment now appealed from upon the authority of those cases so far as this question is concerned, were it not for the fact that the appellant claims that his case may and should be distinguished from those of *Myers* and *Nicholson*. The tangible and practical result of the refusal to appellant of the transfer complained of seems to be, as in those former cases, a suit for a penalty. But he doubtless is entitled to have his purposes and mental operations on the occasion in question measured by the evidence by which he has chosen to define them. According to this, he desired to ride over certain lines of respondent's road for the purpose of ascertaining whether at a given point a transfer would be issued to him enabling him to ride over a certain route in the direction of the point which he had proposed to himself as the termination of his journey, and this information he was seeking in order that, as attorney, he might conduct various suits for penalties for refusals to issue transfers at the point he was investigating. It is at once apparent that the margin between this case and the former ones cited is at best very narrow. There the plaintiff had ridden for the purpose of laying the foundation for a suit to be commenced in his behalf for the penalty. In this case the appellant has ridden for the purpose of acquiring information as attorney, and which was to be utilized for the benefit of suits already commenced in behalf of his clients for penalties. If we assume, however, that there is a narrow margin, the question is whether it is sufficient to place this case within the provisions and benefits of the statute when the other ones lay outside thereof. The statute which we have quoted was passed for the benefit of a "passenger desiring to make one continuous trip between" certain points for one single fare; and it requires that the corporation shall "give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point," etc. It was passed "to the end that the public convenience may be promoted by the operation of the railroads . . . substantially as a single railroad with a

single rate of fare," and it gives a right of action to one who has been "aggrieved."

Whether we contemplate this statute from the standpoint of a passenger as a remedial one or from the standpoint of the railroad as one for penalties, a reasonable construction of it seems to make some things manifest. It was passed in the interest of public convenience, which we suppose to mean in the interest of the general traveling public. It was passed in the interest of a passenger "desiring to make a continuous trip" between certain points, and we believe that this means a person who enters on or continues a trip with the real and actual desire of getting to some place and whose controlling purpose is interfered with or defeated if the railroad company unjustly refuses to give him a transfer which would enable him to reach the point for which he has set out, and who, therefore, by such refusal, is disappointed and defeated of his aim and an "aggrieved party." We do not believe that the appellant comes within the contemplation of the statutory purposes thus outlined. His controlling thought and aim when he started out was to acquire information in regard to the custom of respondent to issue or not issue transfers at a certain point over a certain route, and which information he desired for use in litigation. If he fixed in his mind a definite point of destination, it was simply because he conceived it might be necessary for him to travel to that point in order to acquire the information. As a matter of fact, he acquired the information which he desired at every separate stage of his journey from beginning to end, and he as well might have stopped at the end of the first stage as to have continued to the last one, except that he apparently desired to accumulate evidence as well as information, and also to lay the foundation for a claim for illegal conduct against the respondent on the second theory involved in this case. As soon as he had completed this purpose, he alighted from the car and returned to his office. By the failure to issue the transfer he was not defeated in any purpose which led him to take the respondent's cars for he had accomplished all that he had desired or intended to. He was not aggrieved because the respondent by a refusal to issue the transfer had prevented him from consummating some plan which it was bound to assist him in consummating by issuing the transfer.

It is, however, urged by the appellant, and was written in the dissenting opinion below, that we ought not to construe the statute before us as we have done because this court, in the case of *Fisher v. New York C. & H. R. R. Co.* 46 N. Y. 644, has decided that which forbids such construction. We

do not regard such decision as so holding. In that case, as is well known, the court had before it for consideration chapter 185, p. 432, Laws 1857, providing, "any railroad company which shall ask and receive a greater rate of fare than that allowed by law shall forfeit \$50, which sum may be recovered, together with the excess so received, by the party paying the same;" and it was held by a bare majority of the court that a recovery could be had by a party who rode and paid the excessive fare simply for the purpose of obtaining the penalty, the court saying: "The forfeiture is imposed upon the company for its act, and this entirely irrespective of the object or motive of the passenger in traveling." We accept this decision and the reasoning which led to it. The penalty or "forfeiture," as it was called, was regarded as a punishment inflicted on the railroad for its wrongful act, and any "party" was made a proper agent for inflicting the punishment. As we have already indicated, we do not regard the language used in the statute now before us in meaning, purpose, or effect as at all similar to or the equivalent of the language which was used in the statute of 1857, and thus interpreted. It is stated, in substance, in the dissenting opinion below, that no distinction is to be drawn between the two statutes narrowing the right to sue under the later one simply because the earlier one, in conferring a right of action, uses the word "party" while the other one employs the word "passenger;" that the "party" authorized by the earlier statute to bring an action would necessarily be a "passenger;" and that, therefore, such word "passenger" employed in the later statute is not any more restrictive or limited in its meaning than the word "party." Neither statute is well construed by reference to a single word. We may concede that the "party" mentioned in the statute involved in the Fisher Case was in a certain sense a passenger, but, as we have pointed out, § 104 requires that the successful plaintiff shall be more than a passenger simply in the sense of paying a fare and traveling over a railroad. If we have read the language aright, it contemplates and requires a passenger or traveler of a certain character, one who actually desires to reach some point of destination for a purpose only accomplished by reaching that point, or who desires to be carried for some recognized purpose even though nothing more than recreation, and whose desire is defeated rather than consummated by the refusal to give him the necessary transfer. Neither do we agree, as stated in the dissenting opinion below, that "in the present case 'the forfeiture is imposed upon the company for its act' of refusing a transfer, and 19 L.R.A. (N.S.)

charging another fare, 'and this entirely irrespective of the object or motive of the passenger in traveling.'" In the Fisher Case, as we have pointed out, it was stated that "the forfeiture is imposed upon the company for its act, and it is entirely irrespective of the object or motive of the passenger in traveling." Under the present statute, whatever may be said of the intent to punish the corporation, that punishment can only be inflicted at the instance of a passenger who has been "aggrieved" through being prevented from accomplishing that which the statute attempted to make secure.

We pass to the consideration of the other question submitted to us, whether appellant is entitled to a judgment under the provisions of §§ 39 and 101 of the railroad law. Section 101, so far as it is material, provides as follows: "No corporation constructing and operating a railroad under the provisions of this article, or of chapter 252 of the laws of 1884, shall charge any passenger more than 5 cents for one continuous ride from any point on its road, or on any road, line, or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city. . . . Not more than one fare shall be charged within the limits of any such city. . . . for passage over the main line of road and any branch or extension thereof if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article." This section, by its own terms, provides no penalty for violation thereof, and for the right to recover a penalty resort must be had to the provisions of § 39. We shall assume for the purposes of this case, without deciding it, that § 39 does apply to and supplement § 101. The line on Avenue C, on which appellant claimed the right to ride without payment of additional fare, does not directly and of itself connect with the line in Delancey street on which he first took passage and paid his original fare, but one must reach the former line from the latter one by passage over a third line. It also sufficiently appears that these lines originally were owned or controlled respectively by different companies and were independent of and distinct from one another, and finally, under various leases and contracts, were assembled with very many other lines into a general railroad system controlled and operated by the respondent which was originally incorporated and organized for the purpose of operating an entirely distinct and insignificant line of road. We shall assume, without discussion, that, under the provisions of the statute quoted, appellant would have been entitled to ride for a single fare

over the entire length of any one of the three lines. That, however, does not meet his needs in this litigation. He is compelled to claim and ask us to hold that the Delancey street line and the Avenue C line were respectively a road owned, operated, or controlled by the respondent and a "connecting branch thereof," or a "main line of road and a (any) branch or extension thereof." That is, the narrow question is whether the Avenue C line can be regarded as a connecting branch or extension of the Delancey street line or *vice versa*. We do not think that it can be. We agree with the learned counsel for the appellant that his right to recover in this litigation is not to be decided by the sole fact that he did or did not attempt to take his ride in a single car, and whatever was said or intimated in *O'Connor v. Brooklyn Heights R. Co.* 123 App. Div. 784, 108 N. Y. Supp. 471, appearing to limit on that ground the right of the litigant to recover, is, we think, too narrow. But it does seem to us that it would be extravagant and unreasonable to hold that the two lines of road mentioned, originally constructed and owned by separate companies and operating different lines of cars and brought into physical relation on the route selected by appellant only by means of a third intervening line of road, constituted a road and "connecting branch thereof" or "main line of road and any branch or extension thereof." These terms suggest an original or main line which by an off-shoot and secondary and tributary line has been extended or continued, the two constituting a single continuous and connected line of road. They do not naturally suggest two originally distinct and separate lines of road not constructed with reference to one another or coming into connection with each other, and which have become related to each other simply because they have been taken into a general railroad system. A practical test of appellant's theory would be presented by the question whether the road which he took on Delancey street and another road in the extreme upper part of New York, originally entirely distinct in construction and operation and separated by many miles, could be regarded as road and connecting branch simply because at some time by separate leases they were incorporated into a single system, and one could be reached from the other by traveling over many different intervening lines. The construction which we adopt as in accordance with what we regard as the ordinary meaning of terms is, we think, fortified by § 90 of the railroad law, which deals with and gives a pretty definite idea of what the legislature intended when it spoke of roads and branches and extensions thereof.

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Our construction of this statute adverse to the appellant's contention is, we think, also supported and sanctioned by another consideration of much importance. In construing a statute, we have a right to consider conditions existing when it was adopted, and which it must be assumed the legislature intended to meet, and also other statutes relating to the same subject. Section 101 is, in effect, a re-enactment of statutory provisions originally found in § 13, chap. 252, p. 314, Laws 1884. Under the provisions of that act, surface street railroad companies enjoyed what, in practical effect, was only a limited right to make contracts to run upon and use the railroad tracks of one another, and it is doubtful whether any right would have existed enabling the Delancey street and Avenue C lines to make a contract or lease one with another because parallel lines. We think it cannot be claimed that the legislature then could have contemplated the existence of any such extensive and complicated street surface-railroad system as was afterwards created in the city of New York, or that it then intended to deal in the matter of fares with all of the constituent lines incorporated into such a system, but that it had in mind, as the statute expressed, the ordinary case of a road and direct and actually connecting branches and extensions. Subsequently chapter 305, p. 525, Laws 1885, was passed, which, in effect, re-enacted some of the provisions of earlier statutes and added others, and which expressly secured to different surface railroad companies the right to make leases and contracts of and with one another; and under which provisions, continued and amended from time to time, it became possible and practical to gather together an extensive system of former independent railroad lines like that now operated by the defendant. When this condition presented itself, the legislature recognized the necessity for broader safeguards securing to the traveling public the right of travel over various lines in a single system for a single fare, and therefore, by the same statute last referred to, adopted provisions requiring the company operating the different roads, for a single fare to give a transfer entitling the person receiving it to a continuous trip over the different roads gathered together under a contract and lease as therein provided, and which provisions have now been carried into § 104.

The question at once arises, and we think cannot be satisfactorily answered in accordance with appellant's theory: What was the object in adopting these provisions of 1885, requiring transfers over different roads of a system, if the prior provisions of 1884, providing for a single fare over a road and its

extension or connecting branch, already covered roads which did not actually connect, but were parts of a general system? We do not think that any of the cases especially relied on by the appellant to sustain a conclusion different from that reached by us fairly do so. *Muckle v. Rochester R. Co.* 79 Hun, 32, 29 N. Y. Supp. 732, was an action of assault for unlawfully ejecting the plaintiff from one of defendant's cars, and all of the questions therein arose in connection with a transfer which the defendant had issued. The court did say: "The payment by the plaintiff of a single fare of 5 cents entitled him to one continuous passage from any one to any other point of the railroad operated by the defendant. Laws 1890, chap. 565, § 101, p. 1113." We are not able to determine just what this statement under any circumstances might mean as applied to the railroad operated by the defendant, but the question of the right of the plaintiff to ride for a single fare where he was going does not appear to have been at all disputed or considered. The defendant assumed this and based its defense entirely on other considerations. In the case of *Senior v. New York City R. Co.* 111 App. Div. 39, 97 N. Y. Supp. 645, subsequently affirmed by this court in 187 N. Y. 559, 80 N. E. 1120, the controversy and discussion proceeded on quite different lines from those involved here. In *Baron v. New York City R. Co.* 120 App. Div. 134, 105 N. Y. Supp. 258, no three of the learned judges, as we read the different opinions, united in passing upon the question here involved in the manner desired by the appellant. The actual question involved in that case grew out of facts quite different from those presented here.

In conclusion, we think that each of the questions certified to us should be answered in the negative, and that the order appealed from should be affirmed and judgment absolute entered against the appellant, on his stipulation, with costs in all courts.

Gray, Vann, Werner, Haight, and Chase, JJ., concur.

Cullen, Ch. J., not sitting.

NEW YORK COURT OF APPEALS.

CHARLES W. KOESTER, by Guardian *ad Litem*, Resp't.,

v.

ROCHESTER CANDY WORKS, Appt.

(— N. Y. —, 87 N. E. 77.)

Master — minor — negligence.

1. A master cannot be charged with negligence in employing a minor to work on 19 L.R.A. (N.S.)

dangerous machinery in violation of the terms of a statute making it a misdemeanor to do so, if, in the exercise of proper vigilance and due caution, he was led to believe that the employee was above the statutory age.

Same — care — representations.

2. One about to employ a minor cannot rely alone on his own representation or that of his parents as to his age in order to absolve himself from liability for negligence in case the employee is injured in his service and is actually of such an age that the statute makes it a misdemeanor to employ him.

Evidence — admissions — age.

3. The declarations of a minor as to his age are admissible in evidence in an action by him to hold his employer liable for personal injuries because he was employed contrary to the provision of a statute making it a misdemeanor to employ minors of less than a specified age.

Witness — impeachment — admissions.

4. That one makes the adverse party his witness, does not prevent his proving admissions which had been made by him in conflict with his testimony.

(January 5, 1909.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Satterlee, Blissell, Taylor & French, for appellant:

An employer honestly believing a minor's statements as to his age, and being induced thereby to hire him, cannot be charged by that minor with negligence in hiring him.

Marino v. Lehmaier, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572; *Danaher v. American Mfg. Co.* 126 App. Div. 385, 110 N. Y. Supp. 617; *Lee v. Sterling Silk Mfg. Co.* 115 App. Div. 589, 101 N. Y. Supp. 78; *Bergman v. Neidhardt*, 37 Misc. 804, 76 N. Y. Supp. 900; *Wheeler & W. Mfg. Co. v. Jacobs*, 2 Misc. 236, 21 N. Y. Supp. 1006; *Larocque v. Conheim*, 42 Misc. 613, 87 N. Y. Supp. 625; *Cooley, Torts*, 149; *Bishop, Non-Contract Law*, § 54; *Noonan v. Obermeyer & L. Brewing Co.* 50 App. Div. 377, 63 N. Y. Supp. 1066; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; *Stone v. Dry*

Note. — As to liability of master for injury to minor servant who secures employment by misrepresenting his age, see *Norfolk & W. R. Co. v. Bondurant*, 15 L.R.A. (N.S.) 443, and case note appended thereto.

Dock, E. B. & B. R. Co. 115 N. Y. 104, 21 N. E. 712.

In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made.

Reed v. McCord, 160 N. Y. 340, 54 N. E. 737; Gould v. John Hancock Mut. L. Ins. Co. 114 App. Div. 312, 99 N. Y. Supp. 833; Ankersmit v. Tuch, 114 N. Y. 51, 20 N. E. 819; Converse v. Sickles, 16 App. Div. 52, 44 N. Y. Supp. 1080, affirmed in 161 N. Y. 666, 57 N. E. 1107; Hall v. Naylor, 18 N. Y. 588, 75 Am. Dec. 269.

Mr. George H. Harris, with Messrs. McInerney & Bechtold, for respondent:

The employment of a child in a factory in violation of the statute is the wrongful act that imposes the liability.

Gallenkamp v. Garvin Mach. Co. 91 App. Div. 147, 86 N. Y. Supp. 378, reversed on dissenting opinion in 179 N. Y. 588, 72 N. E. 1142; Marino v. Lehmaier, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572; Bergman v. Neidhardt, 37 Misc. 804, 76 N. Y. Supp. 900; Wheeler & W. Mfg. Co. v. Jacobs, 2 Misc. 236, 21 N. Y. Supp. 1006; Eckstein v. Frank, 1 Daly, 334.

Plaintiff's declarations in respect to his age, made long after the accident, are not competent evidence of his age.

2 Wigmore, Ev. §§ 1481, 1841, subsec. 3; Craufurd v. Blackburn, 17 Md. 54, 77 Am. Dec. 323; 1 Phillips, Ev. Cowen, Hill, & Edwards, notes, p. 202, § 4, p. 204; 1 Rice, Ev. pp. 414, 415; Haines v. Guthrie L. R. 13 Q. B. Div. 828; Eisenlord v. Clum, 126 N. Y. 566, 12 L.R.A. 836, 27 N. E. 1024; Braintree v. Hingham, 1 Pick. 247.

Cullen, Ch. J., delivered the opinion of the court:

The action is brought, servant against master, to recover damages for personal injuries caused by the defendant's negligence. The complaint charged the defendant, which conducted a candy factory, with employing the plaintiff, who at the time was an infant under the age of fourteen years, in the operation of dangerous machinery, in violation of § 70 of the labor law (Laws 1897, chap. 415, p. 477), and that the machinery was not protected by proper safeguards, as required by § 81 of that law. The answer put in issue the extent of the plaintiff's injuries, and the other allegations of the complaint, except plaintiff's employment and the character of the business carried on by the defendant. The plaintiff recovered a verdict at the trial term, which has been affirmed by the appellate division by a divided court. On the trial evidence was given by the plaintiff's

parents as to the date of his birth, which established that at the time of the accident he was a few months less than fourteen years of age. The defendant gave evidence to the effect that, when the plaintiff sought employment, he represented that he was more than sixteen years old. In submitting the case to the jury the learned trial judge charged: "If you find that plaintiff did in fact make this statement as to his age, then you are further to inquire and determine whether defendant's agent, Colebrook, was justified in relying, as he says he did, upon that statement, or whether, in the exercise of reasonable prudence and caution before actually hiring the plaintiff, he should have made further inquiry and received further assurance and proof of the fact. If he was not justified in relying solely upon plaintiff's representation as to his age, aided by his observation of the personal appearance of the boy, if you find he made such representation, if there was in his appearance, or in any other fact coming then to the attention of this agent of defendant, which has been disclosed by the evidence, which would naturally have led him to suspect that plaintiff was not telling the truth about his age, and would have led an ordinarily prudent person to make further inquiry on that subject before actually hiring the plaintiff, then those facts are to be considered by you, and given their due weight in determining whether or not this agent actually believed, and was justified in believing, the statement plaintiff made as to his age." This was the whole of the court's instructions on the question. The defendant requested the court to charge, "If the plaintiff falsely stated his age to the officers of the defendant, and led them to believe that he was actually over fourteen years of age at the time he was hired, and if they were justified in that belief, then they are not guilty of negligence in hiring him, and the jury must dismiss that provision of the labor law from further consideration." This the court refused. The defendant thereupon excepted, and that exception presents the first question for our consideration.

The labor law makes a violation of its provisions a misdemeanor, but does not give a civil remedy therefor to the party injured. Nevertheless it was held by this court, in Marino v. Lehmaier, 173 N. Y. 530, 534, 61 L.R.A. 811, 66 N. E. 572, 573, that a violation of the statute was, *per se*, evidence of negligence for which a jury might find the defendant liable. It was there said by Judge Haight: "We think it is very evident that these reasons induced the legislature to establish definitely, an age limit under which children shall not be employed

in factories; and, to our minds, the statute, in effect, declares that a child under the age specified presumably does not possess the judgment, discretion, care, and caution necessary for the engagement in such a dangerous avocation, and is therefore not, as a matter of law, chargeable with contributory negligence or with having assumed the risks of the employment in such occupation." Under this doctrine, the gist of civil liability is the negligence of the master in employing a person of such tender years that the legislature has forbidden his employment. Therefore, if the employer, in the exercise of proper vigilance and due caution, is led to believe that the employee is above the statutory age, he cannot well be charged with negligence in employing an infant, whether such belief would be available in a criminal prosecution or not. The representation of the employee as to his age, even if accompanied by a similar statement by his parents, is not conclusive on the question. No principle of estoppel is applicable to the case. The question always is whether the employer is justified in believing that the employee is of sufficient age to authorize his employment. For this purpose he may not rest alone on the representation of the plaintiff, but is required to exercise proper vigilance to discover the fact. What such vigilance would dictate differs in different cases. There can readily be imagined a case where the employee is of such mature appearance that the employer may naturally and properly accept his statement as to age. In other cases the appearance of the employee might be the exact reverse. No definite rule can be laid down to relieve the employer from liability in violating the statute. The jury must be satisfied that, under the circumstances of the particular case, the employer believed, and was justified in the belief, that the employee was of the prescribed age for work. In this respect the charge of the learned trial judge as to the circumstances under which the defendant would be liable, despite any statement by the plaintiff as to his age, was entirely correct, but the difficulty is that as to this question he submitted only one side of the case to the jury; that is to say, what facts would render the defendant liable. The converse of the proposition, what would relieve the defendant from liability, he omitted to state, and it was simply this omission which the defendant asked to have supplied in its request to charge. The refusal was therefore error.

On the trial the plaintiff did not testify in his own behalf as to his age. The question, however, was asked him by the defendant on cross-examination. His testimony was in accord with that given by his par-

ents. For the defense it was sought to prove various declarations made by the plaintiff as to his age. That made to the defendant at the time of his employment was admitted, but those made to third parties at other times were excluded. The ruling is sought to be justified by the learned counsel for the respondent on several grounds. It is first claimed that a person is not a competent witness as to his own age, and therefore his declarations to that effect are also incompetent. While I can find no express decision in this state that a witness may testify to his age, as far as my experience goes the practice has been universal to permit such testimony, and I have never heard its competency challenged. The question has been, however, the subject of determination in many other states, and the authorities seem to be uniform that the witness is competent. *Hill v. Eldridge*, 126 Mass. 234; *Com. v. Stevenson*, 142 Mass. 466, 8 N. E. 341; *Hancock v. Supreme Council C. B. L. 69 N. J. L. 308*, 55 Atl. 246; *Cheever v. Congdon*, 34 Mich. 296. To the same effect is the doctrine of text-books. 1 Wigmore, Ev. § 667. See cases there cited. But even were the witness incompetent to testify to that fact from lack of personal recollection as to his birth, it would not justify the exclusion of his admission on the subject when offered in behalf of the opposite party. In *Reed v. McCord*, 160 N. Y. 330, 54 N. E. 737, the plaintiff introduced in evidence a statement made by the defendant as to the details of an accident at which he was not present. It was contended that, as the defendant's admissions related to facts not of his personal knowledge, they should have been excluded. It was held that the admissions were properly received.

It is sought to justify the ruling of the trial court on the further ground that the defendant, by examining the plaintiff as to his age, made him its own witness, and could not impeach him. The limitations of the rule which forbids a party to impeach his own witness (assuming the plaintiff to have been such, which we do not decide) are well settled. He may not thereafter introduce witnesses to prove that his general reputation is bad, and that he is unworthy of credit; nor can he prove statements made out of court in contradiction of his testimony on the stand, and he cannot contradict him as to collateral facts. But he may prove by competent testimony that the facts material to the issue are the exact reverse of those testified to by his witness, and may ask the jury to disbelieve his statement, and credit that of the later witnesses. When, however, it is said that one cannot impeach his own witness by con-

tradictory statements made out of court, this statement must be limited to the case of a witness who is not the adverse party. The effect of such contradictory statements in the case of other witnesses is merely to impeach the witness because they are mere hearsay, and are not proof of the fact stated. The case of an adverse party is the exact reverse. "In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made" (Reed v. McCord, 160 N. Y. 341, 54 N. E. 740), excepting, of course, confidential communications, the disclosure of which is prohibited by statute, such as from client to counsel, from patient to physician, from penitent to clergyman or priest, and the like. The cases relied upon by the learned counsel for the plaintiff as asserting a contrary doctrine are not in point. In Thompson v. Blanchard, 4 N. Y. 303, 311, the plaintiff called one of the defendants, who had made default in the action, as a witness against his codefendant, and, having been disappointed in his testimony, gave evidence of contradictory statements made out of court. This was held error, but of course the declarations of the witness were not competent evidence against his codefendant. The opinion in that case states the true rule: "But the party calling a witness is not precluded from proving the truth of a particular fact by any other competent testimony, in direct contradiction to what such witness may have testified." And, as already stated, the admissions of a party are always original competent evidence. In Coulter v. American Merchants' Union Exp. Co. 56 N. Y. 585, the witness whom it was sought to contradict was not the adverse party. The situation was the same in Fall Brook Coal Co. v. Hewson, 158 N. Y. 150, 43 L.R.A. 676, 70 Am. St. Rep. 466, 52 N. E. 1095. The misconception as to the rule arises from the failure to distinguish between declarations and the admissions of a party, which latter, though undoubtedly declarations, are also very much more. Declarations, as a general rule, are mere hearsay, and therefore incompetent, while admissions of a party are original evidence against the party making them, and are as a rule sufficient to establish a cause of action or defense without further evidence of the fact.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Edward T. Bartlett, Haight, Vann, Hilscock, and Chase, JJ., concur. Werner, J., not sitting.
19 L.R.A. (N.S.)

NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA, Appt.,

v.

JOSIE WESIE, Respnt.

('— N. D. —, 118 N. W. 20.)

Adultery — prosecution.

Section 8903 of the Revised Codes of 1905 reads: "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife; and when the intercourse is between a married woman and a man that is unmarried the man is also guilty of adultery. No prosecution . . . shall be commenced except on the complaint of the husband or wife, and no prosecution shall be commenced after one year from the time of the committing of the offense." Held, that, by the provisions of this section, the spouse of either of the guilty parties is empowered to make complaint against either or both of them.

(October 29, 1908.)

Headnote by SPALDING, J.

Case Note. — Adultery; construction and effect of provisions requiring prosecution to be upon complaint of husband or wife.

Such provisions are said to be grounded in the regard which the law has for the marital relation and the right of the husband and wife to condone the wrongs of either towards the other. State v. Corliss, 85 Iowa, 18, 51 N. W. 1154; State v. Andrews, 95 Iowa, 451, 64 N. W. 404; State v. Oden, 100 Iowa, 22, 69 N. W. 270.

No new element of the crime is added by such provisions. State v. Donovan, 61 Iowa, 278, 16 N. W. 130; State v. Maas, 83 Iowa, 469, 49 N. W. 1037; People v. Isham, 109 Mich. 72, 67 N. W. 819; State v. Brecht, 41 Minn. 50, 42 N. W. 602.

There appears to be a conflict of authority upon the substantive question as to whether the innocent spouse can commence a prosecution against the invading guilty party where such guilty party is also married, or whether, in such case, the prosecution must be by the latter's spouse. The weight of authority favors the view taken by the court in STATE v. WESIE.

Thus, in Serra v. Mortiga, 204 U. S. 470, 51 L. ed. 571, 27 Sup. Ct. Rep. 343, it appears, and was conceded, that, under the Philippine law, adultery is a private offense, and can be prosecuted only upon the complaint of the aggrieved husband, who can enter such complaint against his wife, or her paramour, or both.

And in People v. Davis, 52 Mich. 569, 18 N. W. 362, Willson v. Daboll, 104 Mich. 155, 62 N. W. 293, and State v. Brecht, supra, it was held that, where the guilty parties were both married, the husband of the one or the wife of the other could make the

PPEAL by the State from a judgment of the District Court for Cass County sustaining a demurrer to an information charging defendant with having committed the crime of adultery. Reversed.

The facts are stated in the opinion.

Messrs. William H. Barnett and Seth W. Richardson, for appellant:

The innocent husband of the guilty wife, or the innocent wife of the guilty husband, or *vice versa*, may institute the prosecution against both guilty parties.

State v. Brecht, 41 Minn. 50, 42 N. W. 602; State v. Maas, 83 Iowa, 469, 49 N. W. 1037; Bayliss v. People, 46 Mich. 221, 9 N. W. 257; People v. Davis, 52 Mich. 569, 18 N. W. 362; Willson v. Daboll, 104 Mich. 155, 62 N. W. 293.

Mr. V. R. Lovell for respondent.

Spalding, J., delivered the opinion of the court:

This is an appeal from a judgment of the

district court for Cass county, sustaining a demurrer to an information charging the respondent, a married woman, with having committed the crime of adultery with one Pratt, a married man, and not the husband of said respondent. The information further alleges that the prosecution against the respondent was begun upon the complaint of the wife of said Pratt. The only question for determination is whether the wife of a man charged with adultery is, under the statute, competent to make complaint, as a basis for the institution of a criminal prosecution, against the other party to the crime, namely, the guilty woman. Section 8903 of the Revised Codes of 1905 provides, among other things, that "no prosecution for adultery shall be commenced, except on complaint of the husband or wife." The construction of this clause will determine this appeal. The same section defines adultery as "voluntary sexual intercourse of a married person with a person other than

complaint against either of the guilty parties; and that it was not necessary that the complaint should be made by the wife of the defendant.

But in Bush v. Workman, 64 Iowa, 205, 19 N. W. 910, a contrary view was taken, and it was held that, where the defendant was married, only the spouse of such defendant could commence the prosecution.

The authorities agree, however, that, where such invader is unmarried, and by statute both participants are made guilty of adultery if either is married (as to "adultery" where but one of the parties is married, see note to Bashford v. Wells, 18 L.R.A. (N.S.) 580), it is competent for the aggrieved spouse of the paramour to make complaint against the guilty invader. State v. Wilson, 22 Iowa, 364; Bayliss v. People, 46 Mich. 221, 9 N. W. 257.

In State v. Oden, supra, it was held that the requirement that the prosecution must be upon the complaint of the husband or wife did not apply where the defendant was unmarried when the crime was committed, though he was married before complaint was made and before indictment found.

In State v. Mahan, 81 Iowa, 121, 46 N. W. 855, it was held that, where the indictment disclosed no fact from which the marriage of defendant could be inferred, it was not necessary to aver that the prosecution was commenced on the complaint of defendant's spouse; and that, if defendant was in fact married, the failure of his wife to make complaint was a matter of defense.

It is not necessary to allege in the indictment that the prosecution was begun by the husband or wife of defendant. State v. Harmann, 135 Iowa, 167, 112 N. W. 632; State v. Brecht, supra.

And it need not be alleged in the complaint that the complainant is the wife of defendant. People v. Ishman, 109 Mich. 72, 67 N. W. 819, 19 L.R.A. (N.S.)

The fact that the prosecution was commenced by the unoffending spouse of defendant may be proved, though there is no allegation to that effect in the indictment. State v. Maas, 83 Iowa, 469, 49 N. W. 1037; State v. Andrews, 95 Iowa, 451, 64 N. W. 404; State v. Harmann, supra.

In State v. Henke, 58 Iowa, 457, 12 N. W. 477, it was held that the averment in the indictment that the prosecution was commenced by the defendant's wife raised no presumption that it was so commenced; and it devolved upon the state to establish that fact.

And the fact is not sufficiently established to sustain the averment that the prosecution was commenced by the wife, by merely showing that she went before the grand jury as a witness in obedience to a subpoena, and there testified as a witness. State v. Stout, 71 Iowa, 343, 32 N. W. 372.

But it is not incumbent upon the state to establish this fact beyond a reasonable doubt. State v. Donovan, 61 Iowa, 278, 16 N. W. 130; State v. Athey, 133 Iowa, 382, 108 N. W. 224.

In State v. Donovan, supra, it was held that the mere appearing of a wife before the grand jury in response to a subpoena, and testifying before them in the case, supposing that she was required to do so, but not intending to prefer the charge of adultery against her husband, was not a complaint by her against her husband, within the meaning of the law.

In State v. Roth, 17 Iowa, 336, it was held that neither an averment in the indictment, nor an indorsement on its back, that the prosecution was commenced by the defendant's wife, was conclusive against him; but that he could show the fact to be otherwise, and have the benefit of it.

Such provision does not require that the husband or wife shall continue to prosecute to conviction; but it is sufficient if the

the offender's husband or wife," and provides that, when the intercourse is between a married woman and a man that is unmarried, the man is also guilty of adultery. The state contends that the prosecution can be instituted against either of the guilty parties, by the spouse of either one of them, while the respondent insists that the statute, correctly construed, admits only of a prosecution upon the complaint of the spouse of the party who is being proceeded against; hence that the prosecution cannot proceed or be maintained, or a conviction had, based upon the complaint of Mrs. Pratt against Mrs. Wesie. Laws of this character are evidently enacted for the purpose of protecting the sanctity of the home, and in recognition of the principle that the crime of adultery is a crime peculiarly infringing upon the rights of the innocent parties to the marriage relation, and that, if such innocent parties see fit to condone the offense, and, from a desire to avoid scandal and humiliation, and to preserve the integrity of the home, and prevent the disgrace of children and relatives, refuse to prosecute, the public is not sufficiently interested or injured to justify the institution of criminal proceedings, as in other cases, by any member of the community.

It may be assumed at the outset that the meaning of this statute in respect to who is competent to make the complaint within the limits mentioned is not clear, and that in such case the court is justified in seeking aid from the apparent intention of the legislature, and the construction which other courts have placed upon similar or identical language in statutes of other states. When the crime of adultery is committed between parties who are married, it is an injury to two innocent parties. The act cannot be committed by one person

alone, but requires the participation of two, and the husband and wife of the guilty parties are each injured, as the guilty party not only injures his own spouse, but in the same measure injures the spouse of the other party to the crime, and we are of the opinion that the intent of the legislature was to provide for the commencement of the prosecution for this crime by either of the injured parties against either or both of the guilty ones. We are supported in this conclusion by what we consider the better reason, by authority, and by certain facts of history connected with this legislation, as well as by consideration of the whole of § 8903, supra. This provision is found in the statutes of Michigan, Minnesota, and Iowa, and has been passed upon by the courts of each of these states. It is held in *Bayliss v. People*, 46 Mich. 221, 9 N. W. 257, that the complaint may be made by the spouse of the party who is not being prosecuted; and in *People v. Davis*, 52 Mich. 569, 18 N. W. 362, the court states that it sees no reason to doubt the correctness of the decision in *Bayliss v. People*. It has been referred to and passed upon in other Michigan cases, which it is unnecessary to refer to. In *State v. Brecht*, 41 Minn. 50, 42 N. W. 602, the supreme court of Minnesota, in passing upon this provision, uses the following language: "It must be entirely apparent, the policy of the statute as to this offense being that, if the parties injured choose to acquiesce in the wrong done, no one else ought to be allowed to move in the matter; that, where there are two persons injured, either may complain, as, where the guilty parties are both married, the husband of the one or the wife of the other may make the complaint."

In Iowa the opposite conclusion has been reached; but the court of that state has

prosecution is commenced on his or her complaint. After it is thus commenced, it may be continued without further co-operation on his or her part. *State v. Baldy*, 17 Iowa, 39; *State v. Dingee*, 17 Iowa, 232.

When the prosecution is commenced by the husband or wife, it is not necessary that he or she appear further in the case to prosecute it. *State v. Briggs*, 68 Iowa, 416, 27 N. W. 358.

Upon the request of the complaining spouse the prosecution should be discontinued. *People v. Dalrymple*, 55 Mich. 519, 22 N. W. 20; *Hosford v. Gratiot Circuit Judge*, 129 Mich. 302, 88 N. W. 627.

After the husband and wife have been divorced, the one cannot institute a prosecution against the other for adultery committed prior to the divorce and during the existence of the marriage relation. *State v. Loftus*, 128 Iowa, 529, 104 N. W. 906; *Re Smith*, 2 Okla. 153, 37 Pac. 1099, 19 L.R.A. (N.S.)

It was held, however, in *State v. Smith*, 108 Iowa, 440, 79 N. W. 115, that, on the remarriage of husband and wife after a divorce, the husband could commence a prosecution against a third person for adultery committed with the wife during their former marriage.

The fact that the prosecution must be commenced on the complaint of the unoffending spouse of one of the guilty parties does not make the complainant a party so as to render him incompetent to testify in the case. *Parsons v. People*, 21 Mich. 509.

The statute which allows to the injured wife or husband the exclusive privilege of prosecuting the guilty parties contemplates that the injured wife will proceed irrespective of her husband's consent and in spite of him. *People v. Knapp*, 42 Mich. 267, 36 Am. Rep. 438, 3 N. W. 927.

held that an exception exists to the rule which they have established, when one of the guilty parties is unmarried. In such case it holds that the complaint may be made by the spouse of the guilty married party, against the guilty unmarried party. It is unnecessary to discuss at length the reasoning of the court, but we see no reason for excluding the guilty married party, and at the same time including the guilty unmarried party, in the construction of the language in question, when it is clearly as applicable to one as to the other. This detracts very largely in our estimation from the weight which should be given the Iowa authorities upon this question. One of the authorities cited from that state is *State v. Roth*, 17 Iowa, 336. The decision was by a divided court; and, while a strong argument is made in the majority opinion in support of its theory, we deem the reasoning of Chief Justice Wright, in his dissenting opinion, far more convincing than that of the majority. Some of his reasoning is worthy of quotation. Among other things, he says: "At best the clause of the statute under consideration may and does permit, in too many instances, a crime which shocks the moral sense of the community to go unpunished; but, under the construction given to it by the majority, it becomes even more obnoxious and objectionable. It is certainly a monstrous anomaly that the feelings of society should be outraged, and a whole community injured, by the undisputed commission of this offense continued for months and years, and that, under the law, there is no remedy so long as the husband or wife, either from fear of his own or her own degradation, declines or refuses to apply the remedy. But, when we go one step further and say that the wife of a guilty husband cannot complain against the wife of another husband, but can only complain of her husband, and that such other wife must escape punishment if her husband does not complain against her, the outrage, to my mind, is still greater, and we ought to hesitate long, and be justified by the most cogent considerations, before giving to the statute a construction involving such consequences. . . . And so I say in this case, when the wife complained against Mary Slarett, she could not do so without, in the language of the court below, 'making the same against the husband as well.' The law will not allow her to make a half complaint, to make a partial prosecution, to commence, and not to commence, to halve the adultery, to say to the grand jury, 'Do your duty, and have regard to the oaths you have sworn as to one party, but disregard all as to the other.' But I am told that the language 'the husband or wife' means the husband or wife of the party against whom the prose-

cution is commenced. And stress is placed upon the definite article 'the' as favoring the construction. I answer that the legislature, in expressing their intention, had to use language, either definite or indefinite, and suppose they had 'a' husband or wife, instead of 'the' husband or wife. Then anyone who was so fortunate as to have a husband or wife could set the wheels of the law in motion, the unmarried portion of society only being insulted, and wronged without the power of redress. This, however, was not the purpose of the legislature, and hence they used the language more definite and limited in its scope and purpose. The meaning, I think, is that the husband or wife whose domestic peace and quiet has been disturbed, whose rights have been violated, who is unwilling to submit to the disgrace and ignominy, may commence the prosecution against either or both of the parties to the crime; and that, while they alone can commence the prosecution, when once they do commence, it must go through, and the law take its course with all connected with the crime, or who are legitimately involved in the prosecution,—not against them by name and in terms, but in the crime of which complaint is made." Again, it is self-evident, in view of the provisions of the section quoted, that where an unmarried man is guilty of the crime of adultery, if the contention of the respondent in this case is to be sustained, the legislature has branded him as a criminal, but has provided no possible means whereby he can be prosecuted. Such an absurdity goes a long way toward sustaining the contention of the state.

There is, however, one additional reason supporting our construction of this language. When the Code was revised and re-enacted in 1895, as shown by the records, it included the words "of the accused," making the provision read, "No prosecution for adultery shall be commenced except on the complaint of the husband or wife of the accused." The added words were omitted from the Code as printed, and in 1897 the legislature amended the section in question by striking out the limitation. Undoubtedly the legislature had two objects in doing this, one of which was to make the law stand as printed in the Code, and the other to open the door to prosecution being commenced by either innocent party against either guilty party. We are not justified in presuming that the only purpose of the legislature was to harmonize the law with the printed Code, because, had this been its only intent, it could have re-enacted the provision, and included the words omitted in the printed law.

The judgment is reversed, and the cause remanded.

NEW YORK COURT OF APPEALS.

EVA HENSON, Admr., etc., of William
S. Henson, Deceased, Resp't.,
v.

LEHIGH VALLEY RAILROAD COM-
PANY, Appt.

(— N. Y. —, 87 N. E. 85.)

Master — negligence — evidence.

1. Evidence that a bolt was missing from a car which had been in a wreck, after it had been removed to the railroad yards, is not sufficient to charge the railroad company with negligence which would render it liable for injuries growing out of the wreck, although the absence of such a bolt might be found to increase the chance of the accident which occurred.

Same — sufficiency.

2. A cause of action against a railroad company for injuries to a brakeman by the derailment of a train is not established by evidence that one of the trucks under the car was defective, without showing which one, and that a defective forward truck might have caused the accident without showing that it was so caused.

Same — overturning car — presumption.

3. The derailment and overturning of a freight car in a train is not such evidence of negligence on the part of the railroad company towards its brakeman as to cast upon it the burden of exonerating itself from the charge of negligence to absolve itself from liability for injury to him thereby.

(Edward T. Bartlett and Vann, JJ., dis-
sent.)

(January 29, 1909.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a trial term for Ontario County granting a nonsuit in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

Statement by Hiscock, J.:

The action was brought to recover damages sustained by the death of the plaintiff's intestate alleged to have been caused by the

negligence of the defendant in the maintenance and operation of its road and cars. Although quite unsatisfactory at some points, we shall assume that there was evidence tending to establish the following facts: The intestate was a freight brakeman in the employ of defendant. One evening as he was riding in the line of his duty on top of a train of freight cars, one of the latter became derailed and tipped over on him and killed him. This happened as the train was going around a curve of about 6 degrees at a speed of from 4 to 6 miles an hour. The car which tipped over was a loaded one. After the accident it was found lying on its side diagonally across the track detached from the car both in front and in the rear of it with its top turned towards the engine and its trucks derailed. Car-wheel marks were found on the ties for a distance of about 170 feet back from where the car lay, and at that distance a mark or cut was found on the right-hand rail (looking towards the engine) indicating that a car wheel had run across the rail at this point. This mark and the marks on the ties showed that the wheels left the track towards the right, increasing their divergence as they moved along. Near this point of the commencement of the wheel marks there was a space at the joint of two rails $\frac{5}{8}$ of an inch in width which was from $\frac{1}{8}$ to $\frac{1}{4}$ of an inch more than the ordinary space. Within this distance of 170 feet there were two or three ties of which the ends on one side of the track were not close up against the rails, and a few ties which showed signs of superficial wear and decay; also, some appearance of quicksand in the track ballast. The end of the car next in the rear of the one mentioned also was derailed by the accident. The wreckage was taken to defendant's yard at Sayre, and subsequently two trucks, somewhat identified as those belonging to the overturned car, were examined. In the case of one of them it was found that a column bolt was missing, and also that the nut at one end of one of the trusses designed to support the bolster was wanting, and that the truss had receded from its proper position by several inches;

Note. — As shown in the note to Fitzgerald v. Southern R. Co. 6 L.R.A. (N.S.) 337, there is a conflict of authority upon the question whether the rule of *res ipsa loquitur* is ever applicable as between master and servant. New York, however, is one of the jurisdictions which recognizes such rule as between master and servant when the circumstances are such as to make it applicable. The opinion and decision in HENSON v. LEHIGH VALLEY R. Co. illustrate the point, elaborated in that note, that the doctrine has a much narrower application between master and servant than between

carrier and passenger, for the reason that—according to the common phraseology, at least—the carrier owes a higher degree of duty to a passenger than a master to a servant. The necessity of reasonably repelling the application of the doctrine of assumed risk and the fellow-servant rule, which are distinctive of the relation of master and servant and entirely inapplicable between carrier and passenger, frequently affords another reason for the narrower application of the rule *res ipsa loquitur* as between master and servant.

the thread where the nut was missing being worn and rusted. The column bolt and this truss rod were each part of the construction designed to support and distribute the weight of the superstructure of the car, and the absence of the column bolt and the defective condition of the truss rod tended to weaken this construction and allow the weight of the car to break down the bolster and settle down on the side gearing of the truck, and thus prevent the latter from turning readily on a curve, and, on the other hand, make the wheels of the truck liable to "jump" the rails. The bolster was found broken after the accident. There was nothing to indicate how long the column bolt had been missing.

Mr. Lyman M. Bass, with Messrs. Kenefick, Cooke, & Mitchell, for appellant;

The presumption is that the master has exercised due care in providing for servants safe appliances and a safe place to work.

Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339; Wood, Mast. & S. §§ 345, 346; 4 Thomp. Neg. § 3864, p. 127; Painton v. Northern C. R. Co. 83 N. Y. 7; Powers v. New York C. & H. R. R. Co. 60 Hun, 19, 14 N. Y. Supp. 408.

Negligence of the defendant cannot be presumed from the happening of the accident.

DeGraff v. New York C. & H. R. R. Co. 76 N. Y. 125; Grant v. Pennsylvania & N. Y. Canal & R. Co. 133 N. Y. 657, 31 N. E. 220; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; Rende v. New York & T. S. S. Co. 187 N. Y. 382, 80 N. E. 206; Starer v. Stern, 100 App. Div. 398, 91 N. Y. Supp. 821; Moran v. Mulligan, 110 App. Div. 208, 97 N. Y. Supp. 7; Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689; Stackpole v. Wray, 99 App. Div. 262, 90 N. Y. Supp. 1045; Fink v. Slade, 66 App. Div. 105, 72 N. Y. Supp. 821; Lane v. New York Contracting Co. 125 App. Div. 808, 110 N. Y. Supp. 91; Burns v. Old Sterling Iron & Min. Co. 188 N. Y. 175, 80 N. E. 927; Warner v. Erie R. Co. 39 N. Y. 468; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Northern P. R. Co. v. Dixon, 71 C. C. A. 555, 139 Fed. 737.

Mr. W. Smith O'Brien, for respondent:

The death of plaintiff's intestate having been caused by the derailment of a car, the ownership, management, and control of which, as well as of the roadbed, was vested exclusively in the defendant, proof of the accident and the attendant circumstances cast upon the defendant the burden of ex- 19 L.R.A. (N.S.)

plaining its cause; and it was error to grant defendant's motion for a nonsuit.

Edgerton v. New York & H. R. Co. 39 N. Y. 227; Adams v. Union R. Co. 80 App. Div. 136, 80 N. Y. Supp. 264; Areson v. Long Island R. Co. 10 N. Y. S. R. 331; Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 563, 47 Am. Rep. 75; Breen v. New York C. & H. R. R. Co. 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60; Caldwell v. New Jersey S. B. Co. 47 N. Y. 293; Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925; Eaton v. New York C. & H. R. R. Co. 163 N. Y. 391, 79 Am. St. Rep. 600, 57 N. E. 609; McGuire v. Bell Teleph. Co. 167 N. Y. 208, 52 L.R.A. 437, 60 N. E. 433; Byrne v. Eastmans Co. 163 N. Y. 461, 57 N. E. 738; Bushby v. New York, L. E. & W. R. Co. 107 N. Y. 374, 1 Am. St. Rep. 844, 14 N. E. 407.

It is not to be expected that the proof furnished in case of a derailment will be of such certain character as to amount to a demonstration, and leave no question of fact to be considered by a jury.

Hart v. Hudson River Bridge Co. 80 N. Y. 622; Durkin v. Sharp, 88 N. Y. 225; France v. New York C. & H. R. R. Co. 118 App. Div. 550, 102 N. Y. Supp. 991.

It is the duty of the master to furnish his employees with suitable tools and appliances with which to work, and exercise a proper inspection for the purpose of keeping the same in repair.

Painton v. Northern C. R. Co. 83 N. Y. 7; Eaton v. New York C. & H. R. R. Co. and Byrne v. Eastmans Co. supra; Bailey v. Rome, W. & O. R. Co. 139 N. Y. 302, 34 N. E. 918; McGuire v. Bell Teleph. Co. 167 N. Y. 208, 52 L.R.A. 437, 60 N. E. 433; Gustafson v. Young, 91 App. Div. 433, 86 N. Y. Supp. 851.

Hiscock, J., delivered the opinion of the court:

A decision in this case is not free from difficulties whichever way it goes. The appellate division, in reversing the judgment of nonsuit, held that the plaintiff had failed to establish her allegations of negligence with one exception. We think that this decision was clearly right in so far as it held that no sufficient connection had been shown between the accident and various alleged defects in defendant's track and car. It would not only be speculation, but speculation in the face of opposing evidence, to hold that the space between two of the rails or the alleged defects in the ties or ballast caused the car which killed intestate to leave the track. While a jury probably might be permitted to say that the absence of a column bolt tended to impair the construction of a loaded freight car so as to in-

sustaining a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Crew, J.:

On January 31, 1907, the plaintiff in error, David B. McGill, commenced an action in the court of common pleas of Lorain county, Ohio, against the defendant in error, the Cleveland & Southwestern Traction Company, to recover damages for personal injuries received by him on October 23, 1906, while in the employ of said defendant company. The petition filed by him, omitting caption and verification, was in the words and figures following: "Now comes the plaintiff, David B. McGill, and says that the defendant, the Cleveland & Southwestern Traction Company, is now, and was, on the 23d day of October, 1906, a corporation duly organized under the laws of the state of Ohio, and, as such corporation, owned, operated, and controlled a line of electric railway extending from the city of Cleveland, in the county of Cuyahoga, to the village of Wellington, county of Lorain, and elsewhere; that in said village of Wellington at said time, near the public square, defendant maintained a certain side track and other equipment used by the defendant in the operation and maintenance of its said line of railway; avers that on and prior to the 23d day of October, 1906, plaintiff was in the employ of the defendant company, in the capacity of helper to one Mike Gibbons, who was then in the employ of the defendant company in Wellington, Ohio, as car inspector. Plaintiff avers that he controlled no person, and was subject to the orders, direction, and control of his said foreman or boss, Mike Gibbons; avers that, at said time, defendant maintained, as aforesaid, a certain side track along the main street in said village of Wellington, where the defendant placed certain of its cars, from time to time, to be inspected, repaired, and cleaned; avers that it was plaintiff's duty, among other things, at said time, to assist, under the direction of said boss or foreman, in cleaning, washing, and repairing the cars of defendant company; that it became and was necessary in cleaning and washing said cars of defendant company, and particularly the windows and window frames on the outside of said cars, for this plaintiff to use a certain stepladder about 7 feet high; said ladder being furnished by defendant company for that purpose in the performance of his work; avers that some days prior to the 23d day of October, 1906, plaintiff discovered that said ladder, which defendant had furnished him to be used while performing his duties, as aforesaid, had become old,

worn, and defective to such an extent that the same was unfit for plaintiff to use in connection with his said work, in that the steps of said ladder were loose and worn, and the iron braces holding said steps to the side pieces of said ladder were loose, broken, and defective; avers that a few days prior to the 23d day of October, 1906, this plaintiff complained to his said foreman, Mike Gibbons, of the defective and dangerous condition of said ladder, and plaintiff avers that said defendant through its foreman assured and promised plaintiff that he would have said ladder repaired with a new, proper, and sufficient one, so that plaintiff could safely perform his work. Plaintiff avers that about a week or 10 days prior to the 23d day of October, 1906, he further complained to the master mechanic of defendant company, Fred Strail, of the defective and dangerous condition of said ladder, and that said master mechanic then and there promised and assured plaintiff that he would be furnished with a new, sufficient, and proper ladder with which to perform his work as soon as the same could be made, and that he should use said ladder until a new ladder was furnished; that plaintiff relied upon defendant's fulfilling its said promises and assurance, and he continued to perform his labor as directed by said foreman, Mike Gibbons, until the 23d day of October, 1906, when plaintiff was injured in the direct line of his duty and without fault or negligence upon his part, as hereinafter set forth. Plaintiff avers that on said 23d day of October, 1906, he was ordered by defendant's foreman, Mike Gibbons, to clean the windows on the outside of the vestibule on the west end of one of defendant's cars placed on said side track in said village, and, in order to properly perform his work, it became and was necessary for plaintiff to use said ladder furnished by the defendant company, and that, while attempting so to do, the steps of said ladder and braces thereof gave way, by reason of its old, defective, and dangerous condition, and plaintiff was thrown upon and across the bumper on the west end of said car, and was precipitated to the fender of said car, bruising plaintiff and inflicting serious and permanent injuries, as hereinafter set forth. Plaintiff avers that the defendant was guilty of negligence and carelessness in permitting and allowing said ladder to be and remain in said defective, worn-out, and dangerous condition, and in ordering said plaintiff to work with the same at said time. That the defendant was guilty of carelessness and negligence in not furnishing plaintiff with a new, proper, and sufficient ladder, in accordance with the promises and assurance of defendant. Plaintiff avers that his in-

juries were caused solely by reason of the fault and negligence of the defendant, as aforesaid, and without any fault or negligence upon his part; that, by reason of the negligence of the defendant aforesaid, plaintiff was thrown upon the iron bumper of said car, thereby suffering a fracture of two ribs on his right side; that his right arm and shoulder were severely sprained and bruised; that he is unable to use said right arm and shoulder as he formerly did, and he believes he never will have the proper use of said arm and shoulder; avers that the same gives him constant pain; that he sustained a severe injury to his head and neck; that his head causes him constant pain, and that he suffers from dizziness; that he received a severe bruise to his right hip; that he further received a severe injury and shock to his entire nervous system; that he suffers from sleeplessness as a result of the injury to his head; avers that by reason of the fracture of the ribs on his right side his right lung has become affected, the exact nature and extent of which plaintiff is unable at this time to determine; that he was confined to his bed for a period of about two weeks; that prior to said injury he was able to perform, and did perform, manual labor; that since said injury, he has not been able to perform any manual labor, and believes he will be incapacitated from performing the same as he formerly did; avers that his injuries are permanent, all to his damage in the sum of \$10,000. Wherefore plaintiff prays judgment against said defendant for his damages so sustained, as aforesaid, in the sum of \$10,000." A general demurrer to this petition was sustained by the court of common pleas, and, the plaintiff not desiring to amend or to further plead, his petition was dismissed, and judgment rendered against him for costs. On error this judgment was affirmed by the circuit court. A reversal of both of said judgments is here asked by the plaintiff in error.

Messrs. Skiles, Green, & Skiles, and Stroup & Fanver, for plaintiff in error:

The servant has a right to rely upon the promise and assurance of the master to remedy a defect, and meantime to continue his employment without assuming the risk of injury from such defect.

Union Mfg. Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Williams v. Kimberly & C. Co. 131 Wis. 303, 10 L.R.A.(N.S.) 1043, 120 Am. St. Rep. 1049, 111 N. W. 481, 11 A. & E. Ann. Cas. 622. 19 L.R.A.(N.S.)

Messrs. E. G. Johnson, H. C. Johnson, and T. C. Johnson, for defendant in error:

A stepladder does not come within the rule that a servant may complain of a defect therein, and, upon promise of the master to repair, may remain in the service without accepting the risk.

Marsh v. Chickering, 101 N. Y. 400, 5 N. E. 56; Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339; Corcoran v. Milwaukee Gaslight Co. 81 Wis. 193, 51 N. W. 328; Gowen v. Harley, 6 C. C. 190, 12 U. S. App. 574, 56 Fed. 974; State v. The Nine Justices, 90 Tenn. 722, 18 S. W. 393; Meador v. Lake Shore & M. S. R. Co. 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721; Gunning System v. La Pointe, 212 Ill. 274, 72 N. E. 393; Conley v. American Exp. Co. 87 Me. 352, 32 Atl. 965; McCormick Harvesting Mach. Co. v. Wojciechowski, 111 Ill. App. 641; Bowen v. Chicago & N. W. R. Co. 117 Ill. App. 9; International Packing Co. v. Kretowicz, 119 Ill. App. 488; Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936; Jenney Electric Light & P. Co. v. Murphy, 115 Ind. 566, 18 N. E. 30; Indianapolis & St. L. R. Co. v. Watson, 114 Ind. 20, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824; Bailey, Personal Injuries Relating to Master & Servant, p. 209; Erdman v. Illinois Steel Co. 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993; Vanderpool v. Partridge, 79 Neb. 165, 13 L.R.A.(N.S.) 668, 112 N. W. 318.

The defects in the ladder, as disclosed in the petition, were so patent and of such a character that plaintiff was guilty of negligence contributing to his injury even though promise to repair is shown.

Cutler v. Babcock, 81 Wis. 193, 29 Am. St. Rep. 882, 51 N. W. 420; Indianapolis & St. L. R. Co. v. Watson and Erdman v. Illinois Steel Co. supra; Anderson v. Fielding, 92 Minn. 42, 104 Am. St. Rep. 665, 99 N. W. 357; Crum v. North Vernon Pump & Lumber Co. 34 Ind. App. 253, 72 N. E. 193; Louisville Hotel Co. v. Kaltenbrun, 26 Ky. L. Rep. 208, 80 S. W. 1163, 26 Ky. L. Rep. 669, 82 S. W. 378; Baumwald v. Trenkman, 88 N. Y. Supp. 182.

The rule that a servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair does not apply in those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple construction, with which the servant is as familiar and understands as fully as the master.

Webster Mfg. Co. v. Nisbett, supra; Illinois Steel Co. v. Mann, 170 Ill. 200, 40 L.R.A. 781, 62 Am. St. Rep. 370, 48 N. E. 417; Meador v. Lake Shore & M. S. R. Co. supra; Marsh v. Chickering, 101 N. Y. 396,

5 N. E. 56; Jenney Electric Light & P. Co. v. Murphy, 115 Ind. 570, 18 N. E. 30; St. Louis, A. & T. R. Co. v. Kelton, 55 Ark. 483, 18 S. W. 933; Bailey, Personal Injuries Relating to Master & Servant, § 3103, pp. 209, 210; Burrows, Neg. pp. 121, 122; Gunning System v. Lapointe, *supra*.

Crew, J., delivered the opinion of the court:

In support of the claim that the averments of the petition in this case sufficiently allege and show a liability on the part of the traction company to plaintiff for the injuries alleged to have been sustained by him through the negligence of said traction company, reliance is had upon the general rule that, where the servant notifies the master of a defect in machinery or in his place of work, and the master promises to repair the same or to obviate and remove the danger, and the servant, reasonably relying upon such promise, remains in the service, the master thereby assumes the risk of injury to the servant, and is liable to him in damages for an injury resulting to him from such defect pending the making of the repair promised. While such doubtless is the general rule applied in cases where the servant is engaged in working with machinery or appliances of which he has but a limited and imperfect knowledge, and in cases where some measure of skill and experience is necessary to enable the servant to know and appreciate the particular defect and the danger incident thereto, yet that this rule was never designed or intended to apply to cases of common and ordinary labor, such as requires in its performance the use only of some simple implement, instrumentality, or tool with which the employee is himself entirely familiar, is, we think, clearly and abundantly established by the overwhelming weight of authorities.

Judge Bailey in his work on Personal Injuries Relating to Master & Servant (vol. 2, at § 3103), in speaking of this rule and its limitations, says: "A master is not liable to a servant of mature years and ordinary mental capacity who is injured in his employ by reason of a defect in a ladder of which he was aware, though the servant had notified the master of such defect, and was told to use the ladder until another was furnished. The rule exempting an employee from an assumption of the risk in case of a promise to remedy the defect is designed for the benefit of employees engaged in work where machinery and materials are used of which they can have little knowledge, and not for those engaged in ordinary labor which only requires the use of im-

plements with which they are entirely familiar."

In the case of Meador v. Lake Shore & M. S. R. Co. 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721, which was an action to recover for a personal injury occasioned by a defective ladder used by a watchman in lighting and extinguishing lamps at street crossings, the court, in discussing this rule said: "In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials are furnished the use of which requires the exercise of great care and skill, it can be scarcely claimed that a defective instrument or tool furnished by the master, of which the employee has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has complete knowledge, cannot be said to have a claim against his employer for negligence, if, in using an utensil which he knows to be defective, he is accidentally injured. . . . The fact that he notified the master of the defect, and asked for another implement, and the master promised to furnish it, in such a case does not render the master responsible if an accident occurs. A rule imposing a liability under such circumstances would be far-reaching in its consequences, and would extend the rule of *respondet superior* to many of the vocations in life for which it was never intended. It is a just and salutary rule, designed for the benefit of employees engaged in work where machinery and materials are used of which they can have little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar. The plaintiff, in the case at bar, was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to, as applied to the use of complicated machinery."

In Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56, in the opinion of the court by Miller, J., it is said: "As a general rule, it is to be supposed that the master who employs a servant has a better and more comprehensive knowledge as to the machinery and materials to be used than the employee, who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the

performance of the service required of him. The rule stated, however, is not applicable in all cases, and, where the servant has equal knowledge with the master as to the machinery used, or the means employed in the performance of the work devolving upon him, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof. In considering the application of the rule just stated, due regard must be had to the limited knowledge of the employee as to the machinery and structure on which he is employed and to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise. *Powers v. New York, L. E. & W. R. Co.* 98 N. Y. 274, 280. In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employee has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. . . . It does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and if he is thereby injured, it is by reason of his own fault and negligence. The fact that he notified the master of the defect, and asked for another instrument, and the master promised to furnish the same, in such a case does not render the master responsible if an accident occurs."

In *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393, a comparatively recent case, it is said: "It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended, and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and the danger incident thereto, or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master."

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In *Vanderpool v. Partridge*, 79 Neb. 165, 13 L.R.A. (N.S.) 668, 112 N. W. 318, the first two paragraphs of the syllabus are as follows: "(1) The law requires masters to exercise ordinary care to provide reasonably safe tools and appliances for their servants. (2) But the foregoing rule has no application where the servant possesses ordinary intelligence and knowledge, and the tools and appliances furnished are of a simple nature, easily understood, and in which defects can be readily observed by such servant." The rule as announced by the foregoing authorities has found recognition and has been declared in many other cases, among which are *Bowen v. Chicago & N. W. R. Co.* 117 Ill. App. 9; *Corcoran v. Milwaukee Gaslight Co.* 81 Wis. 191, 51 N. W. 328; *Jenney Electric Light & P. Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Webster Mfg. Co. v. Nisbett*, 205 Ill. 273, 68 N. E. 936; *Conley v. American Exp. Co.* 87 Me. 352, 32 Atl. 965; *St. Louis, A. & T. R. Co. v. Kelton*, 55 Ark. 483, 18 S. W. 933; *Gowen v. Harley*, 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973; *International Packing Co. v. Kretowicz*, 119 Ill. App. 488; *Erdman v. Illinois Steel Co.* 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993; *Gulf, C. & S. F. R. Co. v. Brentford*, 79 Tex. 619, 23 Am. St. Rep. 377, 15 S. W. 561.

Tested, then, by this apparently now well-settled rule, we are of opinion that the allegations of plaintiff's petition in the present case do not state a cause of action. In his petition plaintiff avers: "That some days prior to the 23d day of October, 1906, plaintiff discovered that said ladder which defendant had furnished him to be used while performing his duties, as aforesaid, had become old, worn, and defective to such an extent that the same was unfit for plaintiff to use in connection with his said work, in that the steps of said ladder were loose and worn and the iron braces holding said steps to the side pieces of said ladder were loose, broken, and defective; avers that a few days prior to the 23d day of October, 1906, this plaintiff complained to his said foreman, Mike Gibbons, of the defective and dangerous condition of said ladder, and plaintiff avers that said defendant through its foreman assured and promised plaintiff that he would have said ladder repaired with a new, proper, and sufficient one, so that plaintiff could safely perform his work. Plaintiff avers that about a week or 10 days prior to the 23d day of October, 1906, he further complained to the master mechanic of defendant company, Fred Strail, of the defective and dangerous condition of said ladder, and that said master mechanic then and there promised and assured plaintiff that he would be furnished with a new,

sufficient, and proper ladder with which to perform his work as soon as the same could be made, and that he should use said ladder until a new ladder was furnished." It sufficiently and affirmatively appears from the foregoing allegations that the unfit and unsafe condition of this stepladder, on and prior to October 23, 1906, was fully known to and understood by the plaintiff. He knew, as he alleges, "that the same was unfit for plaintiff to use in connection with his said work." He was familiar with and appreciated its condition and defects, all of which were alike open to his observation and within his comprehension, and it would seem from the averments of his petition that he was so impressed by this defective and unsafe condition that he not only complained of the same to his foreman, but to the master mechanic as well. Plaintiff knew as well as the foreman, master mechanic, or master that said stepladder, in its then condition, could not be used with any assurance of safety, and, having such knowledge, he must be held to have assumed the risk of its use. To hold the master liable to an employee, under such circumstances, for injuries resulting to the latter from the use of so simple an implement or tool as an ordinary stepladder, would be to extend the rule of *respondet superior* beyond its reasonable limit, and to apply it as never intended. The case of *Union Mfg. Co. v. Morrissey*, 40 Ohio St. 148, 48 Am. Rep. 669, cited by counsel for plaintiff in error as supporting their contention in the present case, is not in point; that being a case where the injury to the employee was caused by a complicated machine, and not by a simple instrumentality or appliance such as the stepladder in the case at bar.

Judgment affirmed.

Price, Ch. J., and Shauck, Summers, Spear, and Davis, JJ., concur.

OREGON SUPREME COURT.

FRANK M. BEARD, Resp.,
v.
ROYAL NEIGHBORS OF AMERICA, Appt.

(— Or. —, 99 Pac. 83.)

Insurance — false answer — materiality.

1. A negative answer to a question in an application for insurance the answers in which are made warranties, as to having had la grippe, will avoid the policy where it appears that the applicant had had such disease, although it was a very light at-

tack and may have had nothing to do with his death.

Evidence — insurance — proofs of loss.

2. The proofs of death are admissible in evidence in an action upon a mutual-benefit certificate.

Insurance — consulting physician.

3. Consultation by an applicant for insurance with a physician, within the meaning of a question in the application, is shown by the fact that her husband notified the physician that she was indisposed and asked him to attend her, and that, upon his arrival at the house, she advised him of her symptoms and received aid from him.

Trial — question for court — truth of answers.

4. The truth or falsity of warranties by an applicant for insurance may be determined by the court when the beneficiary has confessed upon the witness stand that they were not true.

(January 19, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Douglas County in plaintiff's favor in an action brought to recover upon a benefit-insurance certificate. Reversed.

Statement by Slater, C.:

This is an action to recover the amount of a benefit certificate issued by the defendant association to Nancy C. Beard, wife of plaintiff. Application for issuance of the certificate was made August 22, 1903, and the certificate was issued to, and received and accepted by, the insured, on November 13, 1903. By its terms it was issued and accepted upon certain warranties, conditions, and agreements therein expressed, to the general effect: (1) That the application and medical examination are a part of the contract, and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty, and to form the only basis of the liability of the society to the member applying for the benefit, and to the beneficiary, the same as if fully set forth in the certificate; (2) that, should said application, and each and every part thereof, not be literally true, then the certificate as to the member or beneficiary shall be null and void; (3) that the certificate was issued in consideration of the warranties and agreements made in the application; and (4) that, if the application shall be found in any respect untrue, then the cer-

Note. — See case note to *Metropolitan L. Ins. Co. v. Brubaker*, 18 L.R.A. (N.S.) 362, as to what constitutes a consultation with, or attendance by, a physician, within the meaning of an application for life insurance.

tificate shall be void and all rights under it forfeited. Nancy C. Beard died June 8, 1905, and proof thereof was made to the defendant on June 9, 1905, by Frank M. Beard, the beneficiary named in the certificate, who demanded payment of the amount therein specified, and, the company failing to pay, he brought this action to recover the same. The answer denies generally all of the material averments of the complaint, except that it expressly admits the issuance of the certificate and the terms thereof, as stated in the complaint: that plaintiff is named therein as the beneficiary; that due and timely proofs of the death of Mrs. Beard were made and furnished to the defendant; but the defendant denied any and all liability to plaintiff by reason of the certificate. As an affirmative defense there are set forth the terms of the application, which are in part to the general effect that the applicant agreed that the application should be the sole basis of her admission to the order, and of the benefit certificate to be issued, and that any untrue statement or answer made in the application or to the examining physician, or any concealment of facts, intentional or otherwise, should forfeit her rights, and that of her beneficiary, to any and all benefits therein. It also contains this provision: "That I have verified each of the foregoing answers and statements, numbered from 1 to 33, both inclusive, and adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true; and I agree that the exact truth of each shall be a condition precedent to any binding contract." There are then set forth a number of interrogatories contained in the application and the answers made thereto by Mrs. Beard, among which are these: "(18) Have you within the last seven years consulted any person, physician, or physicians in regard to personal ailment? No. If so, give dates, ailment, length of illness, and person, physician, or physician's name and address"—and "(25) Have you ever had any . . . of the following diseases: . . . La grippe? No." It is then averred that each of these answers are untrue, in that she had had la grippe, and that, within seven years preceding the date of her application, she had consulted a physician in regard to a personal ailment. The affirmative matter of the answer was denied by the reply. The cause being at issue, a trial was had before a jury. At the close of the taking of testimony defendant moved for a directed verdict in its favor, which was denied by the court. A verdict for plaintiff having been returned, judgment thereon was according- 19 L.R.A. (N.S.)

ly entered, from which defendant has appealed.

Messrs. Benjamin D. Smith and Fullerton & Orcutt, for appellant:

A breach of warranty voids the certificate.

Buford v. New York L. Ins. Co. 5 Or. 334; Chrisman v. State Ins. Co. 16 Or. 283, 18 Pac. 466; Bacon, Ben. Soc. § 197; 3 Cooley, Briefs on Insurance, p. 1950.

If there was a breach of warranty the policy is voided though the statement on which the proof is predicated is in no way material to the risk.

Buford v. New York L. Ins. Co. and Chrisman v. State Ins. Co. supra; McDermott v. Modern Woodmen, 97 Mo. App. 636, 71 S. W. 833; Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595; Bayley v. Employers' Liability Assur. Corp. (Cal.) 56 Pac. 638; Bacon, Ben. Soc. § 197.

Proofs of death are admissible in evidence, and are prima facie proof of the facts stated therein, against the beneficiaries and on behalf of the society.

Mutual Ben. L. Ins. Co. v. Newton, 22 Wall. 32, 22 L. ed. 793; Home Ben. Assn. v. Sargent, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332; Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; Walther v. Mutual L. Ins. Co. 65 Cal. 417, 4 Pac. 413; Modern Woodmen v. Von Wald, 6 Kan. App. 231, 49 Pac. 782; Elliott, Ev. § 2367; Bliss, Life Ins. 2d ed. § 265.

The statement by the applicant that she had not consulted a physician regarding any personal ailment, which answer was untrue, constituted a breach of warranty, relieving the defendant from liability, without regarding the character of the ailment for which such physician was consulted.

Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766; Cobb v. Covenant Mut. Ben. Assn. 153 Mass. 176, 10 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230; Mutual L. Ins. Co. v. Arhelger, 4 Ariz. 271, 36 Pac. 895; Modern Woodmen v. Von Wald and Hoover v. Royal Neighbors, supra; Providence Life Assur. Soc. v. Reutlinger, 58 Ark. 528, 25 S. W. 835; McDermott v. Modern Woodmen, supra; Hubbard v. Mutual Reserve Fund Life Assn. 40 C. C. A. 665, 100 Fed. 719; Caruthers v. Kansas Mut. L. Ins. Co. 108 Fed. 487.

Messrs. John T. Long and Caldwell & Watson for respondent.

Slater, C., delivered the opinion of the court:

The motion for a directed verdict is based upon the averment that the answer

given by Mrs. Beard to the eighteenth interrogatory, contained in her application, was not true, and that the evidence conclusively shows that she had consulted a physician regarding a personal ailment within seven years prior to making such answer. The proof on the part of the defendant consisted, first, of an offer of the application, which showed a negative answer to that inquiry, the genuineness of the signature of Mrs. Beard thereto being admitted by plaintiff when called upon by defendant to testify in regard to that matter; and, second, of an offer of the proofs of death, which it is claimed contain an admission against plaintiff's interest to the effect that the answer given by Mrs. Beard to the eighteenth interrogatory was not in fact true. The proof consisted in part of an affidavit, made on June 26, 1905, by Dr. K. L. Miller, who, it appears therefrom, attended Mrs. Beard in her last illness, in which he stated that she died of tuberculosis, the predisposing cause of which he did not know. But he stated that, following an attack of la grippe, she had a hacking cough; that he had been the medical attendant or adviser of the deceased for three years, and had treated her two or three years prior thereto, for four or five days, for the disease called "la grippe." Further, to explain his attendance upon deceased as her physician, Dr. Miller testified in person, at the instance of defendant, that he was by profession a physician and surgeon, and had practised his profession at Roseburg since 1882, and was acquainted with the deceased during her lifetime. In answer to the question whether or not he was ever consulted by Nancy C. Beard in her lifetime as a physician and surgeon, he stated that he was called to see Mrs. Beard early in the fall of 1902; that from the symptoms he discovered at the time he considered it a mild case of la grippe; that he gave her one prescription, and never saw her any more during that sickness. On cross-examination he stated that at that time (1902) he was requested to attend upon deceased by her husband, the plaintiff, and in response to the following cross-interrogatory: "She never consulted you at all; you were sent there by her husband?"—he replied, "Of course she consulted me after I got there, so far as she had anything to do with it." In response to further interrogation, he stated that he informed the patient that her trouble was "just la grippe in a mild form;" the symptoms being a cold in the head, accompanied with pain in the limbs and head.

An attempt was made by counsel to have the witness declare that the ailment of Mrs. Beard, for which she was then treated, was 19 L.R.A. (N.S.)

"what ordinarily would be called a bad cold," but the witness replied, "Well, of late years we term it 'la grippe.' We used to call it 'influenza.'" On being urged to fix more definitely the date of his attendance upon the deceased, the witness stated that he could not fix the exact date, but that it was in August or September, 1902, and that he fixed this date from the written prescription on file with the druggist. In rebuttal plaintiff testified in part, in his own behalf, as follows: "I went home one day at noon, and Mrs. Beard was laying down, feeling bad. She seemed to have quite a cold in her head and headache and kind of fever, and I came back uptown and met Dr. Miller on the street, and I told him that Mrs. Beard was feeling bad, and I wished he would go down and see what was the matter. So he went down, and when he came back he gave me a prescription, and I asked him, I think, at the time, what was the matter with her. He says, 'Oh, a severe cold, or la grippe, or something of that kind,' and he says, 'She will be all right in a short time,' or something to that effect, and I says, 'If there is anything serious in any way, go ahead and straighten her out.' And I guess he never considered it that way, for he never went back any more,—never asked me any more about it;" that the doctor "gave one little prescription, and that was the end of it." He gave further testimony to the effect that his wife never had any symptoms of consumption prior to the time she made application for insurance in the order, but that the first he ever knew that she was afflicted with such disease was on the 10th day of December, 1904, which followed a severe cold contracted by her about that time; that when she made application she was strong and healthy. Other testimony was offered by plaintiff through Dr. Hoover, who was the examining physician of the defendant association at the time of Mrs. Beard's application, tending to show that his examination of the applicant was thorough, and that, relying upon his report made in this case, he testified that there were no symptoms or evidence of any trouble of the lungs at that time.

No evidence, however, was offered by plaintiff tending in any degree to controvert the truth of the statements made by Dr. Miller in the death proofs, or in his evidence in person to the effect that the deceased, early in the fall of 1902, had consulted him as a physician regarding a personal ailment, and that at that time he had treated her for the disease called "la grippe." Under such state of the record, there is no conflict in the evidence or dispute as to the essential facts above stated;

and, as we view the law, it was the duty of the court to direct a verdict in favor of the defendant when so requested by it. *Coffin v. Hutchinson*, 22 Or. 554, 30 Pac. 424; *Crawford v. Hutchinson*, 38 Or. 578, 65 Pac. 84. By an express agreement of the parties, the statements contained in the application of Nancy C. Beard for a benefit certificate were made material to the consideration thereof, and warranties on her part, and the literal truth of each of them is a necessary prerequisite to a recovery. *Bacon, Ben. Soc.* § 197; *Buford v. New York L. Ins. Co.* 5 Or. 334; *Chrisman v. State Ins. Co.* 16 Or. 283, 18 Pac. 466. Objection was made by plaintiffs to the reception in evidence of the proofs of death, when offered by the defendant, as being irrelevant and immaterial; but it has been generally held that, being an admission by the beneficiary, they are admissible, and that the effect thereof is to make a *prima facie* case of the truth of the facts stated therein, as against the beneficiary and in favor of the society. 3 *Elliot, Ev.* § 2387; *Bliss, Life Ins.* § 265; *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Home Ben. Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332; *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59. And by some authorities it is even held that, in the absence of evidence to contradict the statements in the proofs of loss, the *prima facie* case thus made becomes conclusive. 3 *Elliot, Ev.* § 2387.

The interrogatory "Have you, within the last seven years, consulted any person, physician, or physicians in regard to personal ailment?" was answered by the applicant in the negative, while the next inquiry "If so, give dates, ailment, length of illness, and person, physician, or physician's name and address" remained unanswered. The truth of the answer given is directly impeached by the affidavit of Dr. Miller in the proofs of death. The application was made August 22, 1903, while Miller's affidavit was made June 26, 1905. He there says that he had been the medical attendant or adviser of the deceased for three years, and that two or three years prior to that time he had treated the deceased four or five days for the disease known as "la grippe." When called to testify in person, he evidently attempts to minimize the gravity of the case by saying that early in the fall—August or September of 1902—he was called once to see Mrs. Beard; that he found her suffering with a mild case of la grippe, and gave her one prescription. This much is expressly admitted by the plaintiff when testifying in his own behalf, although he attempts further to palliate the admission by saying

that he sent Dr. Miller to the house to see Mrs. Beard, and that the latter did not seek the advice of the doctor. But it is testified by Dr. Miller that when he arrived at the house she consulted with him regarding her trouble, and that he prescribed for her ailment. It is not material to the issue to be tried in this case whether Mrs. Beard's ailment was a serious or mild form of the disease known as "la grippe." So long as it is admitted that she had such a disease and was treated for it by Dr. Miller, it cannot be gainsaid that she consulted a physician in regard to a personal ailment.

In *Cobb v. Covenant Mut. Ben. Asso.* 163 Mass. 176, 10 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230, the presiding judge at the circuit had instructed the jury that, if the insured, being, as he supposed, in need of a physician, went to one for the purpose of consulting him as to what was his ailment, and had an interview answering such inquiries as the physician deemed pertinent, receiving aid, advice, or assistance from him, the insured consulted a physician within the meaning of the interrogatory. On appeal the supreme court approved this ruling. The mere fact that Dr. Miller was not sought out by Mrs. Beard, with a view of consulting him as a physician, but, instead, was met on the street by Mr. Beard, who advised him of his wife's illness, and directed him to go to the house and attend her, does not prevent it from being considered a consultation by her with a physician. She approved and adopted the act of her husband as her own by accepting the services of the physician, advising him of her symptoms, and receiving aid from him, thereby making the act of her husband in summoning the physician her own act, if that were necessary—which we think was not—to constitute a consultation of a physician. The material part of the facts constituting consultation, within the meaning of this contract is having an interview with him, acquainting him with the nature of the ailment, and accepting and receiving aid, advice, or assistance from him. Some effort was made by counsel to parry the effect of these admissions by attempting to show that the statements on which the breach is predicated are in no way material to the risk, and that the admitted personal ailment, in relation to which Mrs. Beard consulted Dr. Miller in August or September, 1902, could not have been the predisposing cause of her last illness. But from the general principle that the materiality of the fact warranted to be true is wholly essential in a defense based upon a breach thereof, it necessarily follows that when it is shown that there is a breach of warranty

upon which a policy is based, the policy is avoided, though the statement is in no way material to the risk. *Bacon, Ben. Soc. § 197; Buford v. New York L. Ins. Co. and Chrisman v. State Ins. Co. supra; McDermott v. Modern Woodmen, 97 Mo. App. 636, 71 S. W. 833; Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595.*

Again, it is urged by plaintiff that the truth or falsity of answers in the application are questions of fact for the jury to decide, and not for the court. That this is so in the first instance cannot be questioned; but, when the issue joined as to the falsity of such answers has been sustained by the defendant by competent and relevant testimony, which has not only been uncontroverted by plaintiff as to its material elements, but is confessed by him in person upon the witness stand, there is no dispute as to the facts; and, under the rule stated by Mr. Chief Justice Strahan in *Coffin v. Hutchinson, supra*, the question becomes one of law for the court.

The court erred in refusing to direct a verdict for the defendant, and the judgment should be reversed, and a new trial ordered.

OREGON SUPREME COURT.

STATE OF OREGON, Resp't.,
v.

E. W. BARTLETT, Appt.

(50 Or. 440, 93 Pac. 243.)

Witness — accused — instructions.

An instruction to the jury in a criminal case in which accused has testified in his own behalf: You are not bound to consider the testimony of defendant as absolutely true . . . you are to bear in mind that he speaks in his own behalf, to discharge himself from a criminal accusation, and you are to consider the great temptation which one so situated is under so to speak as to procure an acquittal,—is calculated to leave with the jury the impression that they are to consider defendant's testimony false, and therefore reject it, and is erroneous, notwithstanding the statute provides that the credit to be given the testimony of accused is to be left to the jury, under the instructions of the court.

(January 7, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Union County convicting him of attempting to extort money. Reversed.

The facts are stated in the opinion.

Mr. Samuel White, for appellant:

It is error for the court, directly or in-

ferentially, to express an opinion to the jury as to the credibility of a particular witness, or as to the weight which they should attach to his testimony, or to discredit the defendant before the jury by giving undue prominence to the temptations which defendant might have to testify falsely.

Bellinger & C. Anno. Codes & Statutes, § 1400; State v. Bartmess, 33 Or. 110, 54 Pac. 167; State v. Tarter, 26 Or. 44, 37 Pac. 53; State v. Clements, 15 Or. 249, 14 Pac. 410; State v. Pomeroy, 30 Or. 16, 46 Pac. 797; McMinn v. Whelan, 27 Cal. 319; People v. Choynski, 95 Cal. 640, 30 Pac. 791; Lambert v. People, 34 Ill. App. 637; Chambers v. People, 105 Ill. 409; Buckley v. State, 62 Miss. 705; State v. Johnson, 16 Nev. 36; State v. Vasquez, 16 Nev. 42; State v. Holloway, 117 N. C. 730, 23 S. E. 168; State v. Collins, 118 N. C. 1203, 24 S. E. 118; People v. Van Ewan, 111 Cal. 144, 43 Pac. 520; Andrews v. State, 21 Fla. 598; Hicks v. United States, 150 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 144; Allison v. United States, 160 U. S. 208, 40 L. ed. 397, 16 Sup. Ct. Rep. 252.

Mr. C. H. Finn, with Messrs. F. S. Ivanhoe and A. M. Crawford, Attorney General, for respondent:

The instruction was proper.

State v. Jones, 78 Mo. 280; Solander v. People, 2 Colo. 48; 2 Thompson, Trials, § 2447.

Subject Note. — Right of court to caution jury as to believing testimony of accused in his own behalf.

- I. Introductory, 802.
- II. Instructing generally as to credit to be given to testimony of accused, 804.
- III. Instruction singling out testimony of accused generally, 809.
- IV. Instruction as to disregarding testimony of accused, 810.
- V. Instruction as to contradiction of accused, 811.
- VI. Instructing as to corroboration of testimony of accused, 812.
- VII. Instruction as to relation of accused to case.
 - a. Fact that he is party, 814.
 - b. Interest in result, 816.
- VIII. Instructing as to former conviction or other charges against accused, 825.
- IX. Instructing as to demeanor of accused, 825.
- X. Instructing as to statutory statement by accused, 827.

I. Introductory.

The right to determine the credibility of witnesses testifying in an action has been immemorially within the province of the

Where defendant testifies in his own behalf, it is not error for the court to call the attention of the jury to the fact that he is vitally interested in the outcome of the case, and to point out his situation and relation to it.

Johnson v. United States, 157 U. S. 320, 39 L. ed. 717, 15 Sup. Ct. Rep. 614; *State v. Tarter*, 26 Or. 38, 37 Pac. 53; *State v. Carey*, 15 Wash. 549, 46 Pac. 1050, 12 Cyc. Law & Proc. p. 608; *People v. Cronin*, 34 Cal. 191; *People v. Murray*, 86 Cal. 31, 24 Pac. 802; *People v. Faulke*, 96 Cal. 20, 30 Pac. 837; *People v. O'Brien*, 96 Cal. 182, 31 Pac. 45; *People v. Curry*, 103 Cal. 549, 37 Pac. 503; *People v. Lang*, 104 Cal. 363, 37 Pac. 1031.

The jury has the right to take into con-

sideration the interest of the defendant in the case, and it is to be the exclusive judge of his credibility.

State v. Clements, 15 Or. 250, 14 Pac. 410.

Moore, J., delivered the opinion of the court:

The defendant, E. W. Bartlett, was jointly convicted with one S. A. Gardinier of the crime of attempting to extort money, alleged in the information to have been committed by unlawfully threatening to accuse certain persons of the offense of gambling, and to prosecute them therefor. Bartlett appeals from the judgment which followed, and his counsel contend, *inter alia*, that the trial court erred in charging the jury. The

jury. This right includes the parties to the cause, as well as witnesses generally, and exists in both criminal and civil cases.

A charge to the jury is perfectly exceptionable only when the judge confines himself to the duty of setting forth the law applicable to the case, without either expressing or intimating any opinion as to the credibility of statements made by the party accused or by the witnesses. The court should not instruct the jury to give full credit to the testimony of the accused, nor generally as to the credence or weight to be given to his testimony. But the court may, in the absence of a statute forbidding it, direct the jury as to matters which they may consider in determining the credibility of the accused, such as his good character, the reasonableness or unreasonableness of his account of the transaction, the probability or consistency of his testimony, and his intelligence or want of intelligence. Nor does the rule against singling out a particular witness and charging the jury as to his credibility preclude the court from referring in an appropriate way to the weight to be given to the testimony of the accused.

It would be manifestly improper for the court, by a hostile or adverse charge, to deprive the accused of the benefit of his testimony, as by an intimation of disbelief in the truth of the defendant's testimony; but the court may properly authorize the jury to disregard the defendant's testimony if they believe it to be wilfully false as to any material matter, but the charge should not be of such a nature as to lead the jury to conclude that they may arbitrarily or capriciously reject the testimony of the accused.

It is permissible for the court to direct the jury to take into consideration the fact, if it be a fact, that the testimony of the accused has been contradicted, as well as the fact, if they find it to be a fact, that he has been corroborated by other credible evidence.

The court has a right to instruct the jury, in determining the credibility of the accused, to consider the fact that he is the party on trial; but whether the court may go further, and advise the jury that such fact is not of itself sufficient to discredit

his testimony, has been both affirmed and denied. It is objected to on the grounds that such an instruction would tend to do the accused more harm than good, and that it would also invade the province of the jury.

The jury may properly be authorized to consider the interest the accused has in the result of their verdict, as affecting his credibility, but the court should refrain from suggesting the degree of weight to be given to that fact. While the court may suggest to the jury that the interest of the accused may color his testimony, yet the charge should not be of such a nature as to disparage his evidence. The jury should not be told that the prisoner's interest tends to discredit his testimony, nor should the court place such stress upon the fact of his interest as would discredit his evidence in advance. It is improper to charge the jury to scrutinize the evidence of the accused with great caution; and a charge that the jury may disregard the testimony of the accused on account of his interest is prejudicial; but an instruction that the jury are not required blindly to receive the testimony of the accused as true is not regarded as prejudicial, especially when coupled with a further statement that they are not to disregard his testimony, but must give it due consideration.

It is generally proper to instruct the jury to treat the testimony of the accused the same as that of other witnesses, bearing in mind, however, his interest in the result, since he does not stand in the position of a disinterested witness. Instructions referring to the interest of the accused usually have been upheld as against an objection that his testimony is thereby prejudicially singled out, although sometimes considered ill-advised, and, in one jurisdiction, declared to be invasive of the province of the jury. A general instruction upon the fact of interest, applicable to all the witnesses, obviously is unobjectionable.

The court may properly authorize the jury to consider a former conviction of the accused, as affecting his credibility, where proof of such fact is admissible for that pur-

ed to testify under the act of 1872 (9 Sess. Assem. p. 95), her testimony became a fair subject of criticism before the jury, and the counsel for the people was at liberty to analyze her testimony, to compare it with the other testimony in the cause, and comment upon the omissions and contradictions, if any, therein. The prisoner was at liberty to contradict Knauss, and to give her own account of the matters related by him, and the fact that she did not do so might well be considered by the jury in determining the credibility of Knauss. *People v. Dyle*, 21 N. Y. 578. The prisoner was not required to testify, and, by the terms of the statute, if she had chosen to remain silent, no inference of guilt could be drawn from her conduct. By taking the witness stand

she opened the door to criticism, and cannot now complain that an effort was made to measure her testimony by the ordinary rules which govern human conduct." The foregoing observation, relating to the declarations upon oath of the accused as a witness in her own behalf, constitutes the only reference made by the court to any instruction requested by her counsel or to any charge given to the jury as to her testimony. How, then, can it be said, as indicated in the note adverted to, that the language quoted in the text by the noted author, and as given by the court in the case cited, was approved, when the instruction does not appear even to have been challenged by counsel for the accused, or commented upon in any manner by the justice who wrote the

cused and that of other witnesses, the court should not charge that the good character for peaceableness and honesty which the prisoner had established should have great weight with them; but the utmost that he ought to say to the jury is that, if they believe that the prisoner has established a good character, that will be a circumstance to be taken into consideration by them in forming their conclusion. *State v. Brown*, 34 S. C. 41, 12 S. E. 662.

A charge that the fact that accused had been drunk at a theater, and had been put out of the house, may or does weaken his testimony and affects his credibility as a witness, is a charge upon the weight of the testimony, and is erroneous. *Tally v. State*, 48 Tex. Crim. Rep. 474, 88 S. W. 339.

The jury may properly be instructed that, in determining the credit to be given to the testimony of the accused, they may take into consideration the reasonableness or unreasonableness of the defendant's account of the transaction. *Blair v. State*, 60 Ark. 558, 64 S. W. 948; *Hudson v. State*, 77 Ark. 334, 91 S. W. 299; *Com. v. Breyessee*, 160 Pa. 451, 40 Am. St. Rep. 729, 28 Atl. 824; *Dunn v. People*, 109 Ill. 635.

An instruction that the jury have a right to take into consideration the reasonableness or unreasonableness of the defendant's account of the transaction does not tend to discredit the defendant's testimony before the jury, where they are further told not to disregard the testimony of any witness, and that the weight to be given to the testimony of any witness is a matter solely within their province. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885; *Jones v. State*, 61 Ark. 88, 32 S. W. 81.

Nor does such a charge direct them to test the testimony of the accused by a more rigid rule than that which is applicable to other witnesses. *McIntosh v. State*, supra.

The jury may properly be told to consider the probability or improbability of the testimony of the accused. *Anderson v. State*, 104 Ind. 467, 4 N. E. 63; *Minich v. People*, 8 Colo. 449, 9 Pac. 4; *State v. Hilsabeck*, supra; *United States v. Kenney*, 90 Fed. 19 L.R.A. (N.S.)

257; *Housh v. State*, 43 Neb. 163, 61 N. W. 571.

An instruction that the jury have the right, in determining the credibility to be accorded to the testimony of the defendant, to take into consideration the probability of his statements in connection with the other evidence in the case, does not unreasonably and improperly disparage the defendant's testimony, especially where the jury were instructed that they were the sole judges of the credibility of the witnesses. *Younger v. State*, 12 Wyo. 24, 73 Pac. 551.

A charge that, in determining the credibility of the defendant, the jury may consider the consistency of his testimony with the established facts in the case, is properly given. *Com. v. Breyessee*, supra.

An instruction informing the jury in an action in which the accused testified, that they are at liberty to consider the consistency or inconsistency of the statements of a witness, one with another, is not erroneous. *Minich v. People*, supra.

The jury may be told that the testimony of the accused, if rational, natural, and consistent, may outweigh the testimony of all other witnesses. *People v. McArron*, 121 Mich. 1, 79 N. W. 944.

Such a charge is not objectionable on the ground that it should have used the words "any other witness or witnesses" instead of "other witnesses," since the language used by the court is in no sense limited, but applies to any other witness and to all other witnesses. *People v. Willett*, 105 Mich. 110, 62 N. W. 1115.

An instruction in reference to the testimony of defendants who were jointly indicted and tried together for murder, each of whom sought to exculpate himself and impute the crime to the other, that the jury could not believe them both, because they were wholly inconsistent as to the principal fact in the case, does not transgress a statutory and constitutional prohibition against charging jurors as to matters of fact, since the court may state the testimony as well as declare the law to jurors. *State v. McLane*, 15 Nev. 345.

The court should not direct the jury to

opinion? The only references to the case of *Solander v. People*, supra, that we have been able to find in the Colorado reports relate to other questions. See upon this subject, *Jones v. People*, 2 Colo. 355; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 576; *Jones v. People*, 6 Colo. 456, 45 Am. Rep. 526; *Minich v. People*, 8 Colo. 449, 9 Pac. 4; *Wisdom v. People*, 11 Colo. 174, 17 Pac. 519; *Babcock v. People*, 13 Colo. 518, 22 Pac. 817; *Thompson v. People*, 26 Colo. 505, 59 Pac. 51; *Johnson v. People*, 33 Colo. 237, 108 Am. St. Rep. 85, 80 Pac. 133.

In *People v. Cronin*, 34 Cal. 191, an instruction of similar import to that contained in the latter part of the charge complained of in the case at bar was approved.

disbelieve the sworn statements of the defendants if they are inconsistent with their actions or with the circumstances connected with the alleged offense.

An instruction which advises the jury that the actions of the defendant at the time of the commission of the alleged offense are a safer foundation from which to draw a conclusion as to his intention at the time of the alleged taking than his sworn statements as a witness is a decision upon a question of fact, and is erroneous. *State v. Maynard*, 19 Nev. 284, 9 Pac. 514.

An instruction to the jury as to the testimony given on his own behalf by one accused of murder, which substantially says to them that the circumstances as to the killing and concealment of the death of the deceased cannot be bribed, but the defendant can be; therefore you must consider that these circumstances outweigh his testimony, — is erroneous. *Hickory v. United States*, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327.

A charge that while defendant, who had been indicted for murder, has been permitted to testify what his intention was in doing any of the acts charged against him, yet that the jury should not take his statements as to what his intentions were as conclusive, but should weigh them in connection with the other circumstances connected with the perpetration of the offense, and, if the circumstances connected with the perpetration of the offense convince them that the statements of the defendant as to what his intentions were in shooting at the deceased are opposed to the circumstances connected with the perpetration of the offense, then it will be their duty to find that his intentions in so shooting were as manifested by the circumstances, to the exclusion of what he may say his intentions were, invades the province of the jury, which has exclusive power to pass upon the credibility of witnesses and determine the weight and sufficiency of evidence. *Lynch v. People*, 33 Colo. 128, 79 Pac. 1015.

But an instruction that, on account of a legal presumption of an intent to kill, arising from the use of a deadly weapon, the 19 L.R.A. (N.S.)

In *People v. Murray*, 86 Cal. 31, 24 Pac. 802, Mr. Justice McFarland, referring to the rule announced in the preceding case, says: "That instruction has been approved in subsequent cases, and it is now too late to question its correctness; but, if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful not to go further in that direction than courts have already gone. An instruction giving the general rule can do no harm, and is not of much importance, for every intelligent juror knows, without any instruction on the subject, that a defendant, whether innocent or guilty, is deeply interested in being acquitted. But when such an instruction is reiterated, and put into exceedingly strong

jury would be justified in believing that the defendant intended to kill the prosecuting witness, even though death did not ensue, and although the defendant testified that he did not intend to kill him, does not attempt to prescribe the weight to be given to the evidence of the accused, but rather to define and measure the weight and force they would be justified in giving to a legal presumption, and is not erroneous. *Newport v. State*, 140 Ind. 299, 39 N. E. 926.

The jury, in weighing the evidence of defendant, charged with embezzlement, and in determining how far, if at all, it is worthy of credit, may be told to regard, among other things, his intelligence or want of intelligence, and his opportunities for knowledge of business methods. *United States v. Kenney*, 90 Fed. 257.

In a prosecution for the illegal sale of intoxicating liquors, in which the defendant testified that he acted as agent for a non-resident dealer who had a right to make sales in original packages, the court may properly state that the failure of the defendant to call his alleged principal as a witness bears upon the credibility of the testimony of the defendant, since it leaves the testimony of the accused unsupported and reflects upon the good faith of his defense. *Com. v. Pendergast*, 138 Pa. 633, 21 Atl. 12.

In California it is not proper for the court to direct the jury as to the ways and methods by which they shall exercise their exclusive power to weigh the testimony of witnesses; but an instruction that the jury should carefully scrutinize all the testimony in the case, and, in so doing, consider all the circumstances under which each witness has testified, and which enumerates various matters which they are to take into account in weighing the testimony, although outside the proper powers of the court, which should not direct them as to the way in which they shall weigh the testimony of the witnesses and determine the facts, is not prejudicial to the accused, who testified in the action, since it merely tells the jury to do certain things which jurors would evidently do without being so told. *People v. Newcomer*, 118 Cal. 263, 60 Pac. 405.

ed to testify under the act of 1872 (9 Sess. Assem. p. 95), her testimony became a fair subject of criticism before the jury, and the counsel for the people was at liberty to analyze her testimony, to compare it with the other testimony in the cause, and comment upon the omissions and contradictions, if any, therein. The prisoner was at liberty to contradict Knauss, and to give her own account of the matters related by him, and the fact that she did not do so might well be considered by the jury in determining the credibility of Knauss. *People v. Dyle*, 21 N. Y. 578. The prisoner was not required to testify, and, by the terms of the statute, if she had chosen to remain silent, no inference of guilt could be drawn from her conduct. By taking the witness stand

she opened the door to criticism, and cannot now complain that an effort was made to measure her testimony by the ordinary rules which govern human conduct." The foregoing observation, relating to the declarations upon oath of the accused as a witness in her own behalf, constitutes the only reference made by the court to any instruction requested by her counsel or to any charge given to the jury as to her testimony. How, then, can it be said, as indicated in the note adverted to, that the language quoted in the text by the noted author, and as given by the court in the case cited, was approved, when the instruction does not appear even to have been challenged by counsel for the accused, or commented upon in any manner by the justice who wrote the

cused and that of other witnesses, the court should not charge that the good character for peaceableness and honesty which the prisoner had established should have great weight with them; but the utmost that he ought to say to the jury is that, if they believe that the prisoner has established a good character, that will be a circumstance to be taken into consideration by them in forming their conclusion. *State v. Brown*, 34 S. C. 41, 12 S. E. 662.

A charge that the fact that accused had been drunk at a theater, and had been put out of the house, may or does weaken his testimony and affects his credibility as a witness, is a charge upon the weight of the testimony, and is erroneous. *Tally v. State*, 48 Tex. Crim. Rep. 474, 88 S. W. 339.

The jury may properly be instructed that, in determining the credit to be given to the testimony of the accused, they may take into consideration the reasonableness or unreasonableness of the defendant's account of the transaction. *Blair v. State*, 69 Ark. 558, 64 S. W. 948; *Hudson v. State*, 77 Ark. 334, 91 S. W. 299; *Com. v. Breyessee*, 160 Pa. 451, 40 Am. St. Rep. 729, 28 Atl. 824; *Dunn v. People*, 109 Ill. 635.

An instruction that the jury have a right to take into consideration the reasonableness or unreasonableness of the defendant's account of the transaction does not tend to discredit the defendant's testimony before the jury, where they are further told not to disregard the testimony of any witness, and that the weight to be given to the testimony of any witness is a matter solely within their province. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885; *Jones v. State*, 61 Ark. 88, 32 S. W. 81.

Nor does such a charge direct them to test the testimony of the accused by a more rigid rule than that which is applicable to other witnesses. *McIntosh v. State*, supra.

The jury may properly be told to consider the probability or improbability of the testimony of the accused. *Anderson v. State*, 104 Ind. 467, 4 N. E. 63; *Minich v. People*, 8 Colo. 449, 9 Pac. 4; *State v. Hilsabeck*, supra; *United States v. Kenney*, 90 Fed. 19 L.R.A. (N.S.)

257; *Housh v. State*, 43 Neb. 163, 61 N. W. 571.

An instruction that the jury have the right, in determining the credibility to be accorded to the testimony of the defendant, to take into consideration the probability of his statements in connection with the other evidence in the case, does not unreasonably and improperly disparage the defendant's testimony, especially where the jury were instructed that they were the sole judges of the credibility of the witnesses. *Younger v. State*, 12 Wyo. 24, 73 Pac. 551.

A charge that, in determining the credibility of the defendant, the jury may consider the consistency of his testimony with the established facts in the case, is properly given. *Com. v. Breyessee*, supra.

An instruction informing the jury in an action in which the accused testified, that they are at liberty to consider the consistency or inconsistency of the statements of a witness, one with another, is not erroneous. *Minich v. People*, supra.

The jury may be told that the testimony of the accused, if rational, natural, and consistent, may outweigh the testimony of all other witnesses. *People v. McArron*, 121 Mich. 1, 79 N. W. 944.

Such a charge is not objectionable on the ground that it should have used the words "any other witness or witnesses" instead of "other witnesses," since the language used by the court is in no sense limited, but applies to any other witness and to all other witnesses. *People v. Willett*, 105 Mich. 110, 62 N. W. 1115.

An instruction in reference to the testimony of defendants who were jointly indicted and tried together for murder, each of whom sought to exculpate himself and impute the crime to the other, that the jury could not believe them both, because they were wholly inconsistent as to the principal fact in the case, does not transgress a statutory and constitutional prohibition against charging jurors as to matters of fact, since the court may state the testimony as well as declare the law to jurors. *State v. McLane*, 15 Nev. 345.

The court should not direct the jury to

opinion? The only references to the case of *Solander v. People*, supra, that we have been able to find in the Colorado reports relate to other questions. See upon this subject, *Jones v. People*, 2 Colo. 355; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 576; *Jones v. People*, 6 Colo. 456, 45 Am. Rep. 526; *Minich v. People*, 8 Colo. 449, 9 Pac. 4; *Wisdom v. People*, 11 Colo. 174, 17 Pac. 519; *Babcock v. People*, 13 Colo. 518, 22 Pac. 817; *Thompson v. People*, 26 Colo. 505, 59 Pac. 51; *Johnson v. People*, 33 Colo. 237, 108 Am. St. Rep. 85, 80 Pac. 133.

In *People v. Cronin*, 34 Cal. 191, an instruction of similar import to that contained in the latter part of the charge complained of in the case at bar was approved.

disbelieve the sworn statements of the defendants if they are inconsistent with their actions or with the circumstances connected with the alleged offense.

An instruction which advises the jury that the actions of the defendant at the time of the commission of the alleged offense are a safer foundation from which to draw a conclusion as to his intention at the time of the alleged taking than his sworn statements as a witness is a decision upon a question of fact, and is erroneous. *State v. Maynard*, 19 Nev. 284, 9 Pac. 514.

An instruction to the jury as to the testimony given on his own behalf by one accused of murder, which substantially says to them that the circumstances as to the killing and concealment of the death of the deceased cannot be bribed, but the defendant can be; therefore you must consider that these circumstances outweigh his testimony, — is erroneous. *Hickory v. United States*, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327.

A charge that while defendant, who had been indicted for murder, has been permitted to testify what his intention was in doing any of the acts charged against him, yet that the jury should not take his statements as to what his intentions were as conclusive, but should weigh them in connection with the other circumstances connected with the perpetration of the offense, and, if the circumstances connected with the perpetration of the offense convince them that the statements of the defendant as to what his intentions were in shooting at the deceased are opposed to the circumstances connected with the perpetration of the offense, then it will be their duty to find that his intentions in so shooting were as manifested by the circumstances, to the exclusion of what he may say his intentions were, invades the province of the jury, which has exclusive power to pass upon the credibility of witnesses and determine the weight and sufficiency of evidence. *Lynch v. People*, 33 Colo. 128, 79 Pac. 1015.

But an instruction that, on account of a legal presumption of an intent to kill, arising from the use of a deadly weapon, the

In *People v. Murray*, 86 Cal. 31, 24 Pac. 802, Mr. Justice McFarland, referring to the rule announced in the preceding case, says: "That instruction has been approved in subsequent cases, and it is now too late to question its correctness; but, if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful not to go further in that direction than courts have already gone. An instruction giving the general rule can do no harm, and is not of much importance, for every intelligent juror knows, without any instruction on the subject, that a defendant, whether innocent or guilty, is deeply interested in being acquitted. But when such an instruction is reiterated, and put into exceedingly strong

jury would be justified in believing that the defendant intended to kill the prosecuting witness, even though death did not ensue, and although the defendant testified that he did not intend to kill him, does not attempt to prescribe the weight to be given to the evidence of the accused, but rather to define and measure the weight and force they would be justified in giving to a legal presumption, and is not erroneous. *Newport v. State*, 140 Ind. 299, 39 N. E. 926.

The jury, in weighing the evidence of defendant, charged with embezzlement, and in determining how far, if at all, it is worthy of credit, may be told to regard, among other things, his intelligence or want of intelligence, and his opportunities for knowledge of business methods. *United States v. Kenney*, 90 Fed. 257.

In a prosecution for the illegal sale of intoxicating liquors, in which the defendant testified that he acted as agent for a non-resident dealer who had a right to make sales in original packages, the court may properly state that the failure of the defendant to call his alleged principal as a witness bears upon the credibility of the testimony of the defendant, since it leaves the testimony of the accused unsupported and reflects upon the good faith of his defense. *Com. v. Pendergast*, 138 Pa. 633, 21 Atl. 12.

In California it is not proper for the court to direct the jury as to the ways and methods by which they shall exercise their exclusive power to weigh the testimony of witnesses; but an instruction that the jury should carefully scrutinize all the testimony in the case, and, in so doing, consider all the circumstances under which each witness has testified, and which enumerates various matters which they are to take into account in weighing the testimony, although outside the proper powers of the court, which should not direct them as to the way in which they shall weigh the testimony of the witnesses and determine the facts, is not prejudicial to the accused, who testified in the action, since it merely tells the jury to do certain things which jurors would evidently do without being so told. *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405.

language, so as to give it peculiar emphasis, it is too apt to lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief."

In *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520, the trial court, in referring to the declarations under oath made by the defendant as a witness in his own behalf, charged the jury as follows: "In weighing his testimony you are to consider what he has at stake. You are to consider the temptations that may be brought to bear upon a man in his situation to tell a falsehood for the purpose of inducing you to acquit him, or to disagree." The defendant, having been convicted, appealed, and, in reversing the judgment, the court says: "If the question

were entirely an open one, we would feel constrained to hold, upon principle, that any instruction at all as to the credibility of any witness, or the weight to be given to his testimony, is violative of § 19 of article 6 of the Constitution, which provides that 'judges shall not charge jurors with respect to matters of fact,' and § 1887 of the Code of Civil Procedure, which, referring to a witness, provides that 'the jury are the exclusive judges of his credibility.'" It is further intimated that the instruction last above quoted was more restrictive than the charge approved in *People v. Cronin*, supra. It will thus be seen that the supreme court of California practically condemned the instruction given in *People v. Cronin*, supra, but felt impelled to follow the rule thus an-

An instruction in a criminal action in which the accused has testified, that the jury "will" take into consideration certain specified matters in determining the credibility of the witnesses, is not erroneous, since "will" has not an imperative force like the word "shall," the use of which, although condemned, has never been held to constitute reversible error. *State v. Hilsabeck*, 132 Mo. 348, 34 S. W. 38.

The wise and humane provision of the law that a person accused is a competent witness should not be defeated by hostile intimations of the trial judge. *Hicks v. United States*, 160 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 144; *Allison v. United States*, 160 U. S. 203, 40 L. ed. 395, 16 Sup. Ct. Rep. 252.

Where homicide is sought to be justified as committed in self-defense by the testimony of the accused, the instruction to the jury that "you must have something more tangible, more real, more certain than that which is a simple declaration of the party who slays, made in your presence by him as a witness, when he is confronted with a charge of murder. All men would say that,"—is erroneous, as practically depriving him of the benefit of his testimony. *Allison v. United States*, supra.

A charge which virtually tells the jury that the testimony of the accused, who, in support of his defense of an alibi, swore that he was at a certain place on the day on which the burglary with which he was charged was committed, was not true, but was false, and simply leaves it with the jury to say whether that statement was wilfully false or only inadvertently so, violates the constitutional provision that "judges shall not charge juries with respect to matters of fact," where the evidence upon the point is not necessarily open to such an interpretation. *People v. Lang*, 104 Cal. 363, 37 Pac. 1031.

An instruction which obviously shows that the judge does not believe the testimony of the accused, and which strongly conveys that impression to the jury in an argumentative form, violates a constitutional provision that judges shall not charge juries in 19 L.R.A. (N.S.)

respect to matters of fact, and constitutes reversible error. *State v. Addy*, 28 S. C. 4, 4 S. E. 814.

So, a charge calculated to lead the jury to the conclusion that the judge has no confidence in the testimony of the accused is a charge on the facts, in violation of the constitutional provision forbidding it, and constitutes reversible error. *State v. Caddon*, 30 S. C. 609, 8 S. E. 536.

A charge in a homicide case which discusses the question of self-defense, and states that the only testimony bearing upon that question is the testimony of the defendant himself, and which, from the manner in which the testimony is discussed, discloses to the jury that the court puts little or no confidence in the defendant's statements, is a charge upon matters of fact, in violation of the state Constitution. *State v. Wyse*, 32 S. C. 45, 10 S. E. 612.

A remark by the court, in instructing the jury, that the accused—who was charged with the larceny of a team of horses and a buggy, and who claimed that he met the real thief with the team, who escaped unobserved when the officers appeared—must either have stolen the team himself or have ascertained particulars in reference to the larceny from the thief, and that it was somewhat "significant" that he could have learned so many things from the alleged thief and given him so much advice in addition, in so short a time, does not amount to the expression of an opinion. *State v. Young*, 67 Vt. 450, 32 Atl. 251.

An instruction to the jury "that they should consider the opportunities the witnesses had for observing what was going on" is not objectionable as cautioning the jury against the testimony of the defendants, where they had the best of opportunities for knowing what took place at the time of the alleged assault with intent to rob, with which they were charged. *People v. Blanchard*, 136 Mich. 146, 98 N. W. 983.

A charge to the effect that the facts as testified to by the accused are not sufficient to constitute a ground for self-defense under the requirements of the law cannot be logically considered as a reflection on the tes-

nounced, because of its repeated approvals for nearly a generation.

In *Johnson v. United States*, 157 U. S. 320, 39 L. ed. 717, 15 Sup. Ct. Rep. 614, cited by counsel for the state in the case at bar, the jury were charged as follows: "The defendant goes upon the stand before you, and he makes his statement,—tells his story. Above all things in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way, you are to weigh it by its own inherent truthfulness,—its own inherent proving power that may belong to it." This instruction was approved by the Supreme Court of the United States;

timony of the defendant, or a criticism of his credibility as a witness. *Hicklin v. Territory*, 9 Ariz. 184, 80 Pac. 340.

An instruction that when it is successfully proven that the general reputation of a witness for general moral character is bad, the witness is impeached, and the jury will be warranted in disregarding the testimony of such witness, as unworthy of belief; that the defendants have been witnesses in their own behalf, and are subject to be impeached the same as any other witness, does not erroneously assume that the defendants were impeached, since the use of the expression "when it is successfully proven" is equivalent to saying "if it be successfully proven." *State v. Haberle*, 72 Iowa, 138, 33 N. W. 461.

So, an instruction advising the jury that they are to determine what weight impeaching evidence shall have is affecting the credibility of defendant as a witness, and what weight shall be given his testimony, and telling them under what circumstances his evidence may not be rejected entirely, is not erroneous as assuming that the defendant has been impeached. *State v. Chingren*, 105 Iowa, 169, 74 N. W. 946. The court said: Such evidence may affect the credibility of the witness and yet not warrant the rejection of his testimony entirely. Under such circumstances the jury are to say the extent to which his credibility is impaired. The instruction correctly stated the law.

For instruction upon interest as coloring testimony, see VII. b, *infra*.

III. Instruction singling out testimony of accused generally.

An instruction in relation to the credibility of the defendant, who offered himself as a witness, is not objectionable on the ground that it is not for the court to single out a particular witness and charge the jury as to his credibility. *People v. Cronin*, 34 Cal. 191. The court observed: The less abstract the more useful the charge. . . . It seldom happens that the exigencies of a case bring in question the credibility of all the witnesses, and, when they do not, there 19 L.R.A. (N.S.)

but, as the cause was originally tried in a Federal court, where the rules of the common law prevail, thereby permitting the judge to comment upon the weight of the testimony, no other deduction could well have been made. *Carver v. Jackson*, 4 Pet. 1, 79, 7 L. ed. 761, 789; *Magniac v. Thompson*, 7 Pet. 348, 389, 8 L. ed. 709, 723. The conclusion there reached, however, is not controlling in the case at bar, in consequence of our statute prohibiting such method of charging the jury.

In *Territory v. Romine*, 2 N. M. 114, a similar charge was upheld on the assumption that such an instruction was permissible under the rules of the common law, which, at the time of that trial, had not been changed, but subsequent thereto, and

can be no reason why the charge upon that subject should be made so general as to embrace them all. In our judgment such a course would be likely to cast suspicion where none is due, and thus tend to mislead the jury. Hence the judge should confine his charge to those whose credibility has been assailed by counsel, or is clouded by the circumstances of the case.

There is no rule prohibiting the court's mentioning in an appropriate way a particular witness or class of witnesses. *Minich v. People*, 8 Colo. 449, 9 Pac. 4.

But, in view of the difficulty in so framing an instruction where the defendant's name is mentioned at all, as not to give his testimony undue prominence either for or against him, it has been suggested that it would be better for trial judges to let him pass with all the other witnesses under the purview of a general charge as to the credibility of all the witnesses, leaving it to the attorneys to call the attention of the jury, in their argument, to any peculiar facts applicable to any particular witness. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

In *Territory v. Romine*, 2 N. M. 114, the court intimates that it would be better practice not to name the defendant; but the court does not hold the instruction to be error because the defendant was referred to.

An instruction that, although the law makes the defendant a competent witness, still the jury are the judges of the weight which ought to be attached to the testimony, and, in considering what weight should be given to it, the jury should take into consideration all of the facts and circumstances surrounding the case, as disclosed by the evidence, and give the defendant's testimony only such weight as they believe it entitled to in view of all the facts and circumstances proven on the trial, is not erroneous as singling out the defendant by naming him. *Territory v. Gonzales*, 11 N. M. 304, 68 Pac. 925.

In Texas, however, the testimony of an accused person is regarded the same as that of any other witness, and is held to be

prior to the hearing of the cause in the supreme court, a statute had been adopted by the legislative assembly of New Mexico, which precluded a court from commenting upon the weight of the evidence. In that case it is intimated that, after the passage of the statute, the giving of such an instruction would have been erroneous. Our statute regulating the giving of instructions was adopted in its present form, December 20, 1865 (Or. Laws 1865, p. 37), and is as follows: "In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact." Bellinger

& C. Anno. Codes & Statutes, § 139. This section practically prohibits the giving of an instruction as to the weight of the evidence, for, if a court cannot present the facts of a case, it is necessarily precluded from charging the jury in respect to any particular conclusion which might be deduced from a consideration of the testimony.

An early statute of this state prevented a defendant in a criminal action from becoming a witness for or against himself. Section 166, title 1 of chapter 16 of the Criminal Code, as compiled by Matthew P. Deady and Lafayette Lane. This section was amended October 25, 1880 (Or. Laws 1880, p. 28), so as to read, as far as deemed involved herein, as follows: "In the trial of

within the rule forbidding the court to sing out the testimony of any witness. For this reason the court should even refuse to instruct the jury that the defendant is a competent witness in his own behalf, and that the jury are the sole judges of his testimony, and that they should weigh it as they would the testimony of any other witness. Tardy v. State, 46 Tex. Crim. Rep. 214, 78 S. W. 1076.

For instruction upon interest of accused as singling out defendant, see VII. b, *infra*.

IV. Instruction as to disregarding testimony of accused.

An instruction that, if the jury are not satisfied that the testimony of the accused is true, then they may disregard it, is correct. Lewis v. State, 88 Ala. 11, 6 So. 755.

In a criminal prosecution where there is a direct conflict between the evidence of the defendant and of the complaining witness and of at least one other witness, statements by the court upon being requested to charge, that, if any witness had wilfully perverted the truth, the jury could disregard the whole of the testimony of such witness, that he did not charge it as matter of law, but that the jury have a right to consider the whole testimony, and further remarking, upon a repetition of the request, that they have a right to do so, but that he cannot instruct them as a matter of law upon the point that they must do so, are not erroneous. People v. Reavey, 38 Hun, 418.

A charge that, if the jury believe that the accused has wilfully sworn falsely as to any material matter in the case, they may, in their discretion, disregard his whole testimony, is properly given. Parham v. State, 147 Ala. 57, 42 So. 1.

But a charge that, if the jury find from the evidence that the defendant has sworn falsely in the case, then it will be their duty to disregard his testimony entirely, is erroneous for failure to hypothesize that the defendant was wilfully false in his evidence with regard to a material fact or facts. Funderburk v. State, 145 Ala. 661, 39 So. 672.

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An instruction stating that, if the accused has wilfully and corruptly testified falsely to any fact material to the issue, the jury have the right entirely to disregard his testimony, is not erroneous on the ground that it calls particular attention to the defendant instead of relating to the witnesses generally. McCracken v. People, 209 Ill. 215, 70 N. E. 749.

A charge that if the jury believe that any witness is unworthy of credit, or that any one of them has wilfully sworn falsely to any material fact in the cause, they are at liberty, if they see proper so to do, to disregard the whole or any part of such witness's testimony, does not, where the only witnesses for the defense were the defendants themselves, authorize the jury to reject their testimony arbitrarily. State v. Kelly, 9 Mo. App. 512.

An instruction in reference to the testimony of the accused, that a witness who testifies to a wilful falsehood is not entitled to credit, and that that fact authorizes the jury to disbelieve his entire testimony, does not direct the jury wholly to disregard the defendant's evidence in making up their verdict, and is not erroneous. People v. Petmecky, 99 N. Y. 415, 2 N. E. 145.

But a charge in a criminal case that, if any witness has made statements out of court, different and contradictory from those made in court, then the jury may disregard the whole testimony of such witness if they see proper to do so, is reversible error where the defendant testified in the case, since it would operate on the mind of the average juror as an injunction not to believe anything the defendant said if someone else testified that he, anywhere in his testimony, contradicted anything he had said outside. McDonald v. State (Miss.) 28 So. 750.

An instruction that the jury are bound by the testimony of the accused so far as they believe it true; that, if they believe that what the defendant states on the stand is false, and a story made up for the occasion, it is their duty to disregard it so far as it would, if believed, tend to show his innocence, but that they may give it such weight

or examination upon all indictments, complaints, information, and other proceedings before any court . . . against persons accused or charged with the commission of crimes or offenses, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court." Bellinger & C. Anno. Codes & Statutes, § 1400. As this alteration was made after the passage of § 139, *supra*, it would seem, from a construction of such amendment *in pari materia* with that section, that it had been impliedly amended so as to permit the court to call the attention of the jury to the credibility of a defendant in a criminal action when

he appeared as a witness in his own behalf. Our statute, elucidating the general principles of evidence, contains the following clause: "A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence; and, where the trial is by the jury, they are the exclusive judges of his credibility." Bellinger & C. Anno. Codes & Statutes, § 695. It has been the practice of courts to give this entire section or the substance thereof in charging juries. Construing this clause together with § 1400, *supra*, it would further appear that § 695, *supra*, was also impliedly amended, so as to allow the court

as it may, in their judgment, be entitled to as against his innocence, taking into consideration all the facts and circumstances in evidence, of which they are the sole judges, leaves the credibility of the defendant as a witness to the exclusive judgment of the jury, and is not erroneous. People v. Callaghan, 4 Utah, 49, 6 Pac. 49.

So, an instruction which tells the jury that, if the testimony of the defendant is convincing, and carries with it a belief in its truth, they may act upon it; if not, then they have the right to reject it, but this does not mean that they have a right arbitrarily to reject it, is not erroneous. People v. Hill, 1 Cal. App. 414, 82 Pac. 398.

It is proper for the court to charge the jury that while the law says that the accused is a competent witness and may testify in his own behalf, and that the jury should not capriciously disregard his testimony, it does not mean that they should believe it, but only that they should consider it, and ascertain, to the best of their judgment, whether it is true; and, if true, that they should act upon it as upon truth from any other source; that, if they should not believe it, they should reject it, and are the sole judges of the truth of the evidence. Harrison v. State, 144 Ala. 20, 40 So. 568.

A charge that the jury must not capriciously reject the testimony of the accused, but must give it the same consideration that they would any other witness, is calculated to mislead, as tending to lead the jury to believe that they are bound to give to the testimony of the defendant as much weight as they would give to that of any other witness, and should not be given. McKee v. State, 82 Ala. 32, 2 So. 451.

An instruction that the accused is a competent witness in his own behalf, and that the jury "have a right to consider his evidence," and are to give it such faith and credit as they believe it entitled to receive, is not objectionable as making it optional with the jury whether they will consider the evidence of the accused. State v. Buffington, 71 Kan. 804, 4 L.R.A. (N.S.) 154, 81 Pac. 465.

A charge that, if the testimony of the de-

fendant is convincing and carries with it a belief in its truth, the jury "have a right to" act upon it; if not, they have a right to reject it, does not, in effect, direct the jury that it is entirely optional with them whether they should act upon the testimony of the defendant even though they believe in its truth, where they were otherwise told they "must consider all the evidence." State v. Johnny, 29 Nev. 203, 87 Pac. 3.

As to discrediting or disregarding testimony of accused on the ground of the relation of the accused to the case, see VII. a, VII. b, *infra*.

V. Instruction as to contradiction of accused.

An instruction that, in determining the credibility of the testimony of the accused, the jury should take into consideration the fact, if such is the fact, that he has been contradicted by other witnesses, is not erroneous. Rider v. People, 110 Ill. 11; Siebert v. People, 143 Ill. 571, 32 N. E. 431; Miller v. People, 229 Ill. 376, 82 N. E. 391; Com. v. Breyessee, 160 Pa. 451, 40 Am. St. Rep. 729, 28 Atl. 824; Wilkins v. State, 98 Ala. 1, 13 So. 312.

Such a charge is not calculated to induce the jury to conclude that the court believed accused had been contradicted. Moeck v. People, 100 Ill. 242, 39 Am. Rep. 38.

Nor is such an instruction erroneous for failing to declare "if the accused was contradicted by credible witnesses," where there was no effort to impeach or call in question the reputation of witnesses for the people whose evidence contradicted the evidence of the defendant. Higgins v. People, 98 Ill. 510.

An instruction which directs the jury that, in determining the degree of credibility to be accorded to the testimony of the accused, they have a right to take into consideration, among other things, the fact, if it is a fact, that she had been contradicted by other and credible witnesses, is not erroneous on the ground that it authorizes the jury to discredit the defendant as a witness if she was contradicted by other cred-

to inform the jury that a defendant in a criminal action, when he appeared as a witness in his own behalf, is interested in any verdict which they might return.—a fact of which they have knowledge without such declaration. *People v. Murray*, 86 Cal. 31, 24 Pac. 802.

An instruction stating that, while the defendant in a criminal action is a competent witness in his own behalf, the jury, nevertheless, have the right to take into consideration his interest in the result of the trial, and all the facts and circumstances of the case, and to give his testimony only such weight as they, in their judgment, think it entitled to,—has been held proper. *Smith v. State*, 107 Ala. 139, 18 So. 306; *Hamilton v. State*, 62 Ark. 543, 36 S. W.

ible witnesses. *Maguire v. People*, 219 Ill. 16, 76 N. E. 67.

A charge that the jury are to take into consideration the fact, if such is the fact, that the accused has been contradicted by other witnesses, is not objectionable as assuming that the accused is contradicted. *Hirschman v. People*, 101 Ill. 568.

But an instruction informing the jury that, in determining the credibility of any witness, they might take into consideration, among other things, "proof of his having made statements which he denies under oath," is fatal error where the accused was the only witness in his behalf, and had denied making threats attributed to him by a witness for the state, since the instruction contained not only a suggestion of the probable falsity of the defendant's testimony, but it assumes that the discrediting fact that statements which had been made and denied under oath had been proved. *Glenn v. State*, 64 Miss. 724, 2 So. 109.

The judge's charge to the jury in a criminal case, that there was or might be "a conflict as to material facts between the statements of the accused while testifying in his own behalf, and the statements of the other witnesses, who are telling the truth," and that "then you would have a contradiction that would weigh against the statements of the defendant as coming from such witness," is objectionable in its assumption that the other witnesses whose statements contradicted those of the accused were "telling the truth." *Hicks v. United States*, 150 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 144.

An instruction that although the defendant may, on the day of the homicide, have made statements as to the manner of the death of the deceased different from what he testified to on the trial, there is no presumption of law from his doing so that what he testifies to is untrue, encroaches upon the province of the jury to pass upon the credibility of the defendant as a witness in the case. *Kent v. State*, 53 Fla. 51, 43 So. 773.

Remarks by the court, in ruling upon an objection to the admission in evidence of

1054; *State v. Ryan*, 113 Iowa, 536, 85 N. W. 812; *People v. Calvin*, 60 Mich. 113, 26 N. W. 851; *Gatliff v. Territory*, 2 Okla. 523, 37 Pac. 809; *Emery v. State*, 101 Wis. 627, 78 N. W. 145. Under the rule thus announced, the first part of the charge in the case at bar, which was manifestly modeled after § 2447 (2 Thompson Trials), a note to which is as follows: "Approved in *State v. Jones*, 78 Mo. 280," is supported by authority, though the jury were not instructed to take into consideration all the facts and circumstances of the case, nor informed that they were the exclusive judges of the defendant's credibility. No request, however, appears to have been made to enlarge the instruction in these particulars.

In *Chambers v. People*, 105 Ill. 409, the

letters, that the accused, who was on trial on the charge of receiving stolen goods, "had contradicted herself several times in the record," and "that is the chief reason why I admit those letters in evidence," which were neither retracted nor explained after being objected to, violate the constitutional provision that judges shall not charge jurors with respect to matters of fact. *People v. Willard*, 92 Cal. 482, 28 Pac. 585.

VI. Instructing as to corroboration of testimony of accused.

The jury may be told that, in determining how far, if at all, the testimony of the accused is worthy of credit, they should regard, among other things, to what extent, if any, he has been corroborated by other evidence in the case. *United States v. Kenney*, 90 Fed. 257.

After noticing the fact that the accused has been contradicted by other witnesses, the court should instruct that it is the right and also the duty of the jury to take into consideration the fact, if such is the fact, that the accused has been corroborated by other credible evidence. *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058.

The court may properly instruct the jury that, if they find that the accused has wilfully and corruptly testified falsely to any material fact, they are not bound to believe his evidence any further than it may have been corroborated by other credible evidence. *Hirschman v. People*, 101 Ill. 568; *Gullihier v. People*, 82 Ill. 145; *Siebert v. People*, 143 Ill. 571, 32 N. E. 431.

An instruction that, if the jury believe from the evidence that any witness in the case has wilfully sworn falsely on the trial as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his entire testimony except in so far as it has been corroborated by other evidence or by the facts and circumstances proved on the trial; that the defendant, having gone upon the stand as a witness in his own behalf, subjects himself to all the rules governing the credi-

following charge was given: "The court instructs the jury, for the people, that they are not bound to believe the evidence of the defendant in a criminal case, and treat it the same as the evidence of other witnesses, but the jury may take into consideration the fact that he is defendant, and give his testimony such weight as, under all the circumstances, they think it entitled to." In that case it was held that such instruction was calculated to mislead, and was, therefore, erroneous. A similar instruction was also condemned in *Sullivan v. People*, 114 Ill. 24, 28 N. E. 381, and *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245.

In *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797, the jury were instructed as follows: "In this case the defendant and members of

his family have given testimony. You have no right to reject the testimony they have given, simply because it comes from a source in which there would be strong motives to give the most favorable coloring possible to the facts on behalf of the defendant, but you have a right to consider, and you should consider, that testimony the same as you would other testimony, taking into account the relationship of the parties and the motives which may induce them to testify." The defendant, having been convicted, appealed, and, in reversing the judgment, it was held that the instruction was erroneous, as an expression of opinion on the motives of the witnesses.

Any person who carefully notices the trial of a cause before a jury must surely observe

bility of other witnesses, and that this instruction applies equally to him as well as to any other witness,—states the law correctly and is unobjectionable. *State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

In a criminal prosecution in which the accused testifies, an instruction relating to the weight and credibility to be given to the testimony of witnesses who, in the judgment of the jury, may have wilfully and corruptly sworn falsely, that the jury are at liberty to reject all of it not corroborated by other testimony, or give it such weight and credit as, in their judgment, from the circumstances, it is entitled to, is not erroneous. *State v. Clark* (W. Va.) 63 S. E. 402.

An instruction that, if the jury should deem the testimony of the accused untrustworthy, they may disregard it altogether, except such portion of it as may be corroborated by other credible testimony, although not as full and accurate as it should have been, does not constitute reversible error. *Padfield v. People*, 146 Ill. 660, 35 N. E. 469.

Nor is such an instruction objectionable as directing special attention to the testimony of the defendant himself in his own behalf as being under great suspicion. *Ibid.*

An instruction that if, after considering all the evidence in the case, the jury find that the accused or any other witness has wilfully and corruptly testified falsely to any fact material to the issue in the case, they have the right entirely to disregard "his" testimony excepting in so far as "his" testimony is corroborated by other evidence or facts and circumstances in evidence, cannot be logically or grammatically considered as informing the jury that, if they find that any witness had committed perjury, they have a right to disregard the uncorroborated testimony of the defendant. *Aldrich v. People*, 224 Ill. 622, 7 L.R.A. (N.S.) 1149, 115 Am. St. Rep. 166, 79 N. E. 964, 8 A. & E. Ann. Cas. 284.

A charge that if the jury believe that the defendant in a criminal prosecution wilfully swore falsely as to any of the facts in issue in the case, they may disregard all 19 L.R.A. (N.S.)

his testimony unless corroborated, is not erroneous for failure to limit the falsity of the testimony to material facts, since all facts in issue are undoubtedly material, because the whole case depends upon the facts in issue. *Johnson v. People*, 94 Ill. 505.

But an instruction that, in determining what weight to give to the evidence of the accused, the jury are not bound to believe his testimony any further than it may be corroborated by other credible evidence in the case, in effect treats the accused as a witness already impeached, and leads the jury to think that he should be corroborated in order to be believed, and should not be given. *State v. Hunter*, 118 Iowa, 686, 92 N. W. 872. The court observed: There is no case which sustains this doctrine. The one which comes most nearly doing so is *Hirschman v. People*, supra. But there the right to disbelieve was founded on the premise that the accused had wilfully and corruptly testified falsely to a material fact in issue. That is a very different proposition from the one announced in the instruction now under consideration. The instruction should not have been given.

A charge the general effect of which is to discredit the prisoner as a witness, and to lead the jury to throw out his testimony except where it was corroborated, is erroneous. *Com. v. Pipes*, 158 Pa. 25, 27 Atl. 839.

An instruction that the testimony of a defendant witness occupies the same attitude as that of an accomplice in crime regarding corroboration in order to be believed, is erroneous. *State v. Patterson*, 98 Mo. 283, 11 S. W. 728.

An instruction to the jury, on a trial for murder, that if the testimony of defendant, who took the stand as a witness for himself, was corroborated by facts otherwise proved, it was thereby strengthened; if it was not so corroborated, it was still to be considered in and of itself and in the light of "its own inherent proving power," is not erroneous. *Johnson v. United States*, 157 U. S. 320, 39 L. ed. 717, 15 Sup. Ct. Rep. 614.

the attention which they give to the remarks, gestures, facial expressions, or tones of voice which the judge may adopt, in their evident desire to gain from him some information as to the kind of verdict they think he would expect in the case. Any language, therefore, which might seem even to hint at what the court thought of the merits of a case, ought always to be avoided at a trial of the issue before a jury. Though the judge, in the instruction complained of, said to the jury: "You are not bound to con-

sider the testimony of the defendants as absolutely true . . . and you are to consider the great temptation which one so situated is under, so to speak as to procure his acquittal,"—he seems to leave an implication that it was incumbent upon them to consider the defendants' testimony as false, and for that reason to reject it. *Clark v. State*, 32 Neb. 246, 49 N. W. 307.

We think the language thus used is not warranted, and hence the judgment is reversed, and a new trial ordered.

An instruction which in effect tells the jury that they may believe the testimony of the accused if corroborated, and disbelieve it if contradicted, although faulty is not prejudicial, where defendant's evidence was not only corroborated by other witnesses, but the facts testified to by him were undisputed. *State v. Sanders*, 106 Mo. 188, 17 S. W. 223.

But a charge that the defendant is a competent witness in his own behalf, and that it is the duty of the jury to give his testimony such weight as they think it is entitled to in connection with all the evidence, if any, which tends to corroborate his statements, is objectionable, since it requires the jury to weigh his testimony in connection with all the testimony which tends to corroborate it instead of with all the evidence. *Dennis v. State*, 118 Ala. 72, 23 So. 1002.

VII. Instruction as to relation of accused to case.

a. Fact that he is party.

An instruction which tells the jury, in determining what weight to give the testimony of the accused, to consider the relation that he bears to the case, is not erroneous, since it is what any jury would do in fact. *People v. Herrick*, 59 Mich. 563, 26 N. W. 767.

An instruction which tells the jury that the fact that the defendant is a party is proper to be taken into consideration by them as affecting his credibility as a witness is properly given. *Smith v. State*, 118 Ala. 117, 24 So. 55; *State v. Moelchen*, 53 Iowa, 310, 5 N. W. 186; *State v. Zorn*, 71 Mo. 415.

So, a charge that, in considering the evidence of the accused, the jury may look to the fact that he is the defendant in the case, in connection with all the other evidence, in determining what credibility they will give to his testimony, is properly given. *Smith v. State*, 107 Ala. 139, 18 So. 306.

The court may properly charge the jury that, in determining the weight they will give to the defendant's testimony, they should consider, along with all the other circumstances having any bearing on the matter, the fact that he is the defendant. *Wilkins v. State*, 98 Ala. 1, 13 So. 312; *Helms v. United States*, 2 Ind. Terr. 605, 52 S. W. 60.
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But a charge that the Indiana statute makes it the duty of the court to tell the jury that the fact that the accused is the defendant is a matter to be taken into consideration by the jury in determining what weight they will give to his testimony is incorrect. *Hartford v. State*, 96 Ind. 461, 49 Am. Rep. 185.

It is not erroneous to instruct the jury that they should consider the fact that the defendant is the prisoner on trial, in weighing his evidence. *State v. Morrison*, 104 Mo. 638, 16 S. W. 492; *State v. Morse*, 66 Mo. App. 303.

An instruction that the fact that the accused is the party on trial should be taken into consideration for the purpose of affecting his credibility as a witness is properly given. *State v. Sanders*, 76 Mo. 35; *State v. Mounce*, 106 Mo. 226, 17 S. W. 226; *State v. Turner*, 110 Mo. 196, 19 S. W. 645.

An instruction that, in passing on the evidence in the case, the jury may consider the fact that the accused is the defendant on trial, together with any other fact or circumstance affecting the credit to be given to the testimony of any of the witnesses in the case, although subject to verbal criticism, is not erroneous. *State v. Wisdom*, 84 Mo. 177.

A charge that the jury, in considering what weight and credibility they will give to the testimony of the accused, should take into consideration, as affecting his credibility, the fact that he is the accused party on trial, is not invasive of the province of the jury. *State v. Young*, 99 Mo. 666, 12 S. W. 879, second appeal, 105 Mo. 634, 16 S. W. 408.

An instruction that, in weighing the testimony of the accused, the jury have a right to take into consideration his relation to the offense charged in the information, is not erroneous. *People v. Resh*, 107 Mich. 251, 65 N. W. 99.

Nor is a charge in the language of Mont. Penal Code, § 2442, that the jury, in judging of the credibility of the accused and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused, erroneous on the ground that it singles out a particular witness, and directs the attention of the jury to his testimony. *State v. DeLea*, 36 Mont. 531, 93 Pac. 814. The court said: It is a general rule that the court

ought not to single out a particular witness and direct the attention of the jury to his testimony, but the Code, in § 2442, has made an exception to this general rule.

An instruction that, in determining the weight which should be attached to the defendant's testimony in his own behalf, the jury may take into consideration the fact that he is such defendant, is not erroneous, where the court, upon its own motion, instructed the jury that they had no right to disregard the testimony of the defendant on the ground alone that he is the defendant, and stands charged with the commission of a crime. *Randall v. State*, 132 Ind. 544, 32 N. E. 305.

In Montana it is permissible to instruct the jury that the fact that the accused is the defendant is not of itself sufficient to impeach or discredit his testimony. *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182.

But in California it is held that a charge that the jury are not permitted under the law to discredit or reject the testimony of the defendant simply on the ground that he is accused and on trial on a criminal charge should not be given, since it would tend to discredit his testimony, and would invade the province of the jury. *People v. Winters*, 125 Cal. 325, 57 Pac. 1067.

So, a charge that the jury should not disregard the testimony of the accused simply because he is the defendant should not be given because it invades the province of the jury. *Stevens v. State*, 139 Ala. 71, 35 So. 122; *Dick v. State*, 87 Ala. 61, 6 So. 395.

A charge that the jury have no right to disregard the testimony of the defendant on the ground alone that he is the defendant and stands charged with the commission of a crime, but that they should fairly and impartially consider his testimony together with all the other evidence in the case, and if, from all the evidence, they have any reasonable doubt as to the guilt of the defendant, they should give him the benefit of that doubt and acquit him, invades the province of the jury, and should not be given. *Lang v. State*, 42 Fla. 595, 28 So. 856.

An instruction that the defendant is a competent witness in his own behalf, and that his evidence should not be discarded by the jury for the reason alone that he is the defendant on trial, but that such fact may be considered by the jury in determining the credit to be given to his testimony, tells the jury by implication that the defendant's evidence should be discarded on some ground, but not alone because he is the defendant on trial, and constitutes reversible error. *State v. Austin*, 113 Mo. 538, 21 S. W. 31. The court said: The jury may consider the fact that the defendant is on trial in weighing his credibility, but they should not be invited to discard his evidence, but to weight it.

This decision was followed in *State v. Hobbs*, 117 Mo. 620, 23 S. W. 1074, and *State v. Miller*, 162 Mo. 253, 85 Am. St. 19 L.R.A. (N.S.)

Rep. 498, 62 S. W. 692, where similar instructions were given.

It is within the discretion of the trial court to instruct the jury that they should not arbitrarily disregard what the defendant testifies simply because he is the defendant. *Hudson v. State*, 77 Ark. 334, 91 S. W. 299.

An instruction that the jury have no right to disregard the testimony of the defendants through mere caprice or simply because they are defendants; that the law makes them competent witnesses, and the jury are bound to consider their evidence, and are the sole judges of their credibility, is properly modified by adding, "yet the jury are under no legal obligation to believe them if, from all the facts proved in the case, they think their testimony not reliable." *Creed v. People*, 81 Ill. 565.

An instruction which in effect tells the jury that it is their duty to keep in mind the fact that accused is the defendant, and that his testimony, for that reason, cannot be taken as of controlling weight unless consistent with all the facts and circumstances in evidence, is erroneous. *Bird v. State*, 107 Ind. 154, 8 N. E. 14.

But an instruction which, after correctly giving the rules for weighing testimony, advises the jury that the defendant is a competent witness in his own behalf, and that his testimony should be weighed by the same rules, is not only correct, but in the interest of defendant, since it is an admonition that his evidence should not be cast aside because he is a party, but that it must be weighed by the rules given. *State v. Case*, 96 Iowa, 264, 65 N. W. 149.

An instruction which tells the jury that, in determining what weight to give defendant's testimony, they "should" consider the fact that he is the party accused and on trial in the cause, is not invasive of the province of the jury because of the use of the word "should" instead of "may." *State v. Cook*, 84 Mo. 40; *State v. Young*, 99 Mo. 666, 12 S. W. 879; *State v. Bryant*, 134 Mo. 246, 35 S. W. 597; *State v. Stanley*, 123 Mo. App. 294, 100 S. W. 678; *State v. Brown*, 104 Mo. 365, 16 S. W. 406. In the latter case the court said: Section 4218, Rev. Stat. 1889, provides that the fact that the defendant is the party on trial may be shown for the purpose of affecting his credibility. When it is shown, however, it is the duty of the jury to consider it. . . . They have no more right to leave it out of consideration entirely, than any other fact admitted in evidence.

A charge that the jury "should" take into consideration the fact, as affecting the credibility of defendant, that he is the accused party on trial, is not objectionable as using the word "should" instead of "might." *State v. Renfrow*, 111 Mo. 589, 20 S. W. 299.

In charging what credibility and weight are to be given to the testimony of the accused, an instruction that the jury "must" take into consideration the fact that he is the defendant, and the nature and enormity

of the crime of which he is accused, is not prejudicially erroneous for failure to use the statutory word "may." *State v. Dotson*, 26 Mont. 305, 67 Pac. 938.

An instruction that the defendant is a competent witness in his own behalf, "but" that the fact that he is a witness testifying in his own behalf might be considered by the jury, is not objectionable in using the conjunction "but" instead of "and." *State v. Miller*, 190 Mo. 449, 89 S. W. 377.

b. Interest in result.

A charge that, in considering the testimony of the accused, the jury would be authorized to consider the interest he has in the result of their verdict, is not erroneous. *Dryman v. State*, 102 Ala. 130, 15 So. 433; *Hammond v. State*, 147 Ala. 79, 41 So. 761; *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382; *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; *State v. Carey*, 15 Wash. 549, 46 Pac. 1060; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

Another statement of the rule is that the court may properly call the attention of the jury to the interest of the defendant on trial as affecting the question of his credibility. *Smith v. State*, 118 Ala. 117, 24 So. 55; *Felker v. State*, 54 Ark. 489, 16 S. W. 663; *Blair v. State*, 69 Ark. 558, 64 S. W. 948; *Hudson v. State*, 77 Ark. 334, 91 S. W. 299; *Dunn v. People*, 109 Ill. 635; *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63; *State v. Noeninger*, 108 Mo. 166, 18 S. W. 990; *State v. Maguire*, 113 Mo. 670, 21 S. W. 212; *State v. Lingle*, 128 Mo. 537, 31 S. W. 20; *State v. Hilsabeck*, 132 Mo. 348, 34 S. W. 38; *State v. Miller*, 159 Mo. 113, 60 S. W. 67; *State v. Adair*, 160 Mo. 391, 61 S. W. 187; *State v. Maupin*, 196 Mo. 164, 93 S. W. 379; *Territory v. Taylor*, 11 N. M. 588, 71 Pac. 489; *People v. Hess*, 8 App. Div. 143, 40 N. Y. Supp. 486; *United States v. Kenney*, 90 Fed. 257.

An instruction that the fact that the defendant is a witness, testifying in his own behalf, may be considered by the jury in determining the credibility of his testimony, is in conformity with the statute, and is properly given. *State v. Maguire*, 69 Mo. 197; *State v. Jones*, 78 Mo. 280; *State v. Miller*, 93 Mo. 263, 6 S. W. 57; *State v. Napper*, 141 Mo. 401, 42 S. W. 957; *State v. Smith*, 164 Mo. 567, 65 S. W. 270.

A charge that, in determining the degree of credit to be given to the testimony of the accused, the jury are "at liberty to consider the great interest which he has in the result," is properly given. *Minich v. People*, 8 Colo. 449, 9 Pac. 4; *St. Louis v. State*, 8 Neb. 405, 1 N. W. 371. In the latter case the court said: It is insisted that the court in effect told the jury they should not credit the testimony of the defendant, given in his own behalf. This is an unjust criticism of the charge. That the prisoner whose life was at stake was vitally interested in

the trial cannot be questioned, and it was not error for the court to state as much to the jury. Not only were the jury "at liberty to consider" this interest, but it was their duty to do so in determining the credit to be given to the prisoner's testimony.

An instruction which repeats a caution that the jury, in weighing the credibility of the witness, should consider the interest of the accused in the prosecution, is not reversible error, where the repetition is not of such a character as to prejudice the rights of the accused. *Dixon v. State*, 46 Neb. 298, 64 N. W. 961.

In Mississippi the rule is established that the trial court has no right to instruct the jury in either civil or criminal cases that they are authorized to take into consideration the interest of a party in determining his credibility.

An instruction that, if the jury believe from the evidence that any witness who has testified in the case has any feeling or interest in the result of the trial, then the jury should consider such feeling or interest, in connection with all the evidence in the case, in determining how far, if at all, they will believe such witness or consider such testimony, constitutes reversible error where the defendant was the only witness in his behalf. *Woods v. State*, 67 Miss. 575, 7 So. 495.

In Texas it is held that an instruction in a criminal prosecution in which the accused has testified, that, in determining the credibility of the witnesses, the jury may consider their interest in the case, is a charge directly on the weight of the evidence, and constitutes reversible error. *Harrell v. State*, 37 Tex. Crim. Rep. 612, 40 S. W. 799; *Williams v. State* (Tex. Crim. App.) 40 S. W. 801; *Penny v. State* (Tex. Crim. App.) 42 S. W. 297; *Oliver v. State* (Tex. Crim. App.) 42 S. W. 554; *Shields v. State*, 39 Tex. Crim. Rep. 13, 44 S. W. 844.

An earlier decision had held such a charge not objectionable as directly calling the attention of the jury to the testimony of the defendant. *Cockerell v. State*, 32 Tex. Crim. Rep. 585, 25 S. W. 421.

The rule is sometimes stated to be that an instruction that the interest accused has in the case may be considered by the jury in weighing his testimony is not erroneous. *Reagan v. United States*, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610; *Wright v. State*, 148 Ala. 596, 42 So. 745; *Norris v. State*, 87 Ala. 85, 6 So. 371; *Wilkins v. State*, 98 Ala. 1, 13 So. 312; *Brown v. State*, 142 Ala. 287, 38 So. 268; *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054; *Weatherford v. State*, 78 Ark. 36, 93 S. W. 61; *People v. Wheeler*, 65 Cal. 77, 2 Pac. 892; *State v. Hossack*, 110 Iowa, 194, 89 N. W. 1077; *State v. Wiggins*, 50 La. Ann. 330, 23 So. 334; *State v. McGinnis*, 76 Mo. 326; *State v. Patterson*, 98 Mo. 283, 11 S. W. 728; *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *Johnson v. State*, 34 Neb. 257, 51 N. W. 835; *Philamalee v. State*, 58 Neb. 320, 78 N. W. 625; *State v. Hymer*, 15 Nev. 51; *State v. Hartley*, 22 Nev. 342, 28 L.R.A.

33, 40 Pac. 372; *State v. Byers*, 100 N. C. 512, 6 S. E. 420; *Haines v. Territory*, 3 Wyo. 168, 13 Pac. 8.

An instruction which tells the jury that, in weighing the testimony of the accused, taken before the examining magistrate and introduced in evidence upon the trial, they have the right to consider the fact that he is the defendant and is interested in the result of the suit, is not erroneous. *Gott v. People*, 187 Ill. 249, 58 N. E. 293.

An instruction for the people that while the defendant was a witness in his own behalf, yet, in weighing his testimony, the jury have a right to take into consideration his interest in the result, and should apply all the tests applicable to any witness, and may "consider the interest he has in the case and the motive to swear falsely in his own behalf," while not technically accurate, is not of a character to mislead the jury. *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465. The court said: The purpose of considering the interest of the defendant when he offers himself as a witness in the case is that the jury may consider the influences which will affect his testimony. His interest is the motive which may influence his testimony.

The jury ought to be instructed that, in passing upon the weight to be given to defendant's testimony, they "should" instead of "may" take into consideration the fact that he is the defendant in the case and his interest in the result. *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895; *State v. Cook*, 84 Mo. 49.

Yet an instruction that the jury, in determining the credibility to be accorded to the testimony of the defendant, "should" consider his interest in the result of the trial, in addition to noticing his manner, and taking into consideration the probability of his statements in connection with the other evidence in the case, is not erroneous, although it would be better practice to inform the jury that they "may" or "have a right to" take into consideration the matters mentioned, rather than to state that they "should" do so. *Younger v. State*, 12 Wyo. 24, 73 Pac. 551.

An instruction which in effect tells the jury that, in ascertaining the extent of the credibility of the defendant, it is proper to consider the situation in which he is placed, and that they should give proper weight and effect to all of his evidence if they are convinced of its truth, or so much thereof as, in their best judgment, is entitled to credit, is not erroneous. *State v. Slingerland*, 19 Nev. 135, 7 Pac. 280; *Bulliner v. People*, 95 Ill. 394; *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *Wilson v. United States*, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895.

It is not error for the court to remind the jury of the defendant's particular personal interest in the trial, provided he refrains from intimating or suggesting the degree of weight to be given to it. *Minich v. People*, 8 Colo. 449, 9 Pac. 4.

After telling the jury that the interest

of the defendant in the result of the prosecution should be considered by them in determining the credibility of his testimony, a further instruction that "when the witnesses appear to be equally capable in every other respect, the one who appears to have the greater interest in the result of the case is to have the less weight of the two," invades the province of the jury. *Lee v. State*, 74 Wis. 45, 41 N. W. 960.

An instruction that a wise rule, which juries may adopt for their guidance when there is a conflict of testimony between the witnesses, is to give credence to the testimony of that witness or those witnesses who have the least inducement, through interest or other motives, to testify falsely, invades the province of the jury, and constitutes reversible error. *Schutz v. State*, 125 Wis. 452, 104 N. W. 90.

An instruction that the jury, in determining what weight, if any, they will give the testimony of the accused, have the right to consider his interest in the result of the prosecution, and that what he has testified to against his interest, if anything, is to be taken as true, and what he testifies to in his favor is to be given only such weight as the jury believe, from all the evidence in the case, it is entitled to, is not objectionable on the ground that it directs the jury that defendant's statements against his interest as a witness at the trial are to be taken as true. *State v. Brooks*, 99 Mo. 137, 12 S. W. 633. The court said: It is difficult to discern how a defendant could be prejudiced by an instruction directing the jury to take any part of his testimony as true.

An instruction that the jury have a right, in determining what weight to give to the evidence of the accused, to consider his interest in the case and the temptation to shield himself from the consequences of crime, does not erroneously assume that the defendant is guilty of the crime charged, or deny him the presumption of innocence which the law creates, where the jurors were further instructed that the defendant was presumed to be innocent until the evidence should convince them, beyond a reasonable doubt, that he was guilty. *State v. Harris*, 97 Iowa, 407, 66 N. W. 728.

An instruction that defendant is a competent witness in her own behalf, and that the jury should take her testimony into consideration and give it such weight as they may believe it entitled to, and that, in passing upon her testimony and weighing her statements, they may take into consideration the fact that she is the defendant, and her interest in the result of the case, is not objectionable on the ground that it comments on the testimony of the defendant, and is in conformity with the terms of the statute authorizing one on trial on a criminal charge to testify in his own behalf. *State v. Ihrig*, 106 Mo. 267, 17 S. W. 300.

Under the statutes of Oregon, providing that the credit to be given to the testimony of the accused is to be left solely to the jury under the instructions of the court; that

the jury are the judges of the effect or value of evidence except where it is by law declared to be conclusive; and that the credibility of a witness who has an interest in the event of the suit may be drawn in question,—the trial court is authorized to instruct the jury as to those particulars in which the evidence is to be declared conclusive, to advise them that the witness is presumed to speak the truth, but that such presumption may be overcome by the manner in which he testifies, by the character of his testimony, by evidence affecting his character or motive, by contradictory evidence, or by his having an interest in the event of the prosecution, the jury to be the exclusive judges of his credibility. *State v. Clements*, 15 Or. 249, 14 Pac. 410.

In *State v. Swain*, 68 Mo. 605, it is said that a jury should be told that a defendant testifying in his own behalf in a criminal case has as much credibility attached to his testimony as if testifying in a similar manner in a civil one.

But in *State v. Cooper*, 71 Mo. 436, it was held that a similar instruction was properly refused. In support of this holding the court remarked: In a criminal proceeding the defendant's status as a witness is the same as that of a party to a civil suit who becomes a witness for himself; but it cannot be declared, as a matter of law, that his testimony in his own behalf is entitled to the same credit as if he were testifying in a civil suit in his own behalf. The credit of a witness testifying for himself in a criminal cause is to be determined by the jury, as in a civil suit, by the demeanor of the witness, the character of his testimony, and the magnitude of his interest in the event; but it is not a correct proposition of law that he is entitled to the same credit, when testifying in his own behalf in a criminal cause involving his liberty or his life, as if he were testifying for himself in a civil suit involving but a trifling sum of money. Nothing appears in the opinion of the court in *State v. Swain*, 68 Mo. 616, on this subject, but the following paragraph: "Relative to the testimony of defendants themselves, we do not think that the instruction asked for them on that point should have been given. But we do think that the jury should have been told that a defendant testifying in his own behalf in a criminal case has as much credibility attached to his testimony as if testifying in a similar manner in a civil one." I do not know exactly what that paragraph means, but presume that the court meant that when he comes upon the witness stand his status is the same as if testifying for himself in a civil cause. The court certainly did not mean that, as a matter of law, one testifying to save his life was under no greater temptation to swear falsely than one testifying to recover or avoid the payment of an insignificant sum of money. It should not be declared, as a legal proposition, that one testifying for himself in a civil cause involving a thousand dol-

lars has as much credibility attached to his testimony as if testifying in a case involving five dollars.

An instruction that a defendant in a criminal prosecution is ordinarily entitled to the same credit as a party in an important civil suit should not be given. *Murphy v. State*, 15 Neb. 383, 19 N. W. 489.

Interest as coloring testimony.

An instruction that, in determining the credit to be given to the testimony of the accused, the jury may consider the very great interest which he must have and feel in the result of the case, and the effect which a verdict would have upon him, and determine to what extent, if at all, such interest may color his testimony or affect his credibility, is not erroneous, where there is no animadversion upon the testimony which he has given in the case. *Prior v. Territory (Ariz.)* 89 Pac. 412; *Halderman v. Territory*, 7 Ariz. 120, 60 Pac. 876.

A remark of the trial judge to the jury that the defendant had every interest to falsify if that would secure immunity to him is not prejudicial, since every member of the jury knew that fact. *People v. Kiernan*, 3 N. Y. Crim. Rep. 247.

Nor is an instruction reversible error which, in referring to the testimony of the accused, suggests the interest that he has in the result of the trial, and the inducements and temptations which would ordinarily influence a person in his situation, since it only undertakes to lay down for the guidance of the jury a matter that they would be apt to know about and act upon without any such instruction. *People v. Tibbs*, 143 Cal. 100, 76 Cal. 904.

A charge that, in determining whether the defendant has told the truth and all the truth, it will be proper for the jury to consider the fact that he is the defendant, and that the greatest possible temptation is presented to him to testify in his own favor if he is really guilty, although not commended, was held not erroneous. *Territory v. Romine*, 2 N. M. 114.

An instruction that it is proper for the jury to consider whether the interest of the accused may not affect his credibility and color his testimony is properly given. *People v. Knapp*, 71 Cal. 1, 11 Pac. 793; *People v. Faulke*, 96 Cal. 20, 30 Pac. 837; *People v. Hitchcock*, 104 Cal. 482, 38 Pac. 198.

A charge that the jury should consider the situation under which the accused gave his testimony, the consequences to him from the result of the trial, and the inducements and temptations "which would ordinarily influence a person in his situation," is not erroneous. *People v. Cronin*, 34 Cal. 191; *People v. Morrow*, 60 Cal. 142; *People v. O'Neal*, 67 Cal. 378, 7 Pac. 790; *People v. Wells*, 145 Cal. 138, 78 Pac. 470; *People v. Curry*, 103 Cal. 548, 37 Pac. 503; *State v. Streeter*, 20 Nev. 403, 22 Pac. 758.

Such a charge was reluctantly approved in *People v. O'Brien*, 96 Cal. 171, 31 Pac.

45. The court said: This instruction received its first sanction from courts acting under Constitutions which had no such inhibition as that found in art. 6, § 19, providing that judges shall not charge juries with respect to matters of fact, and never ought to have been approved here; but, as the provision of the Constitution referred to is the same as that of the Constitution of 1879, under which there were decisions holding it was not error so to charge the jury, the construction which was placed upon it by those decisions has become a part of the provision itself, and we are not at liberty to depart from it. As a slight change in the phraseology of the instruction, however, is liable to be considered as going beyond the limits of what has been approved, it would be a safer course, and one which would work no injustice to the people, if it were entirely omitted from the instructions asked and given on behalf of the prosecution.

In *People v. Boren*, 139 Cal. 215, 72 Pac. 899, the court again felt constrained to say concerning this charge, as it had theretofore said in *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520, that it is difficult logically to attribute the giving of any instruction whatever on the subject of defendant's testimony to anything else than a purpose expressly to disparage a witness before a jury,—the very thing that the court has no authority to do, in view of our constitutional provision. Justice would be more thoroughly accomplished if no such instruction were given, and the credibility of the defendant were left entirely to the jury, as this court has often said.

If the instruction referring to the temptation an accused person is under to color his testimony is of such a nature as to disparage his evidence, it is erroneous.

The court should not inform the jury that, in looking at the testimony of the accused, they must remember that it is the testimony of an accused man who has a powerful motive to swear himself out of the charge, and that, while they are not to disbelieve him merely because he is in that situation, still they should not shut their eyes to the fact that he has that motive. *People v. Lang*, 104 Cal. 363, 37 Pac. 1031.

An instruction which tells the jury that, in weighing the testimony of the accused, they are to consider what he has at stake and the temptations that may be brought to bear upon a man in his situation to tell a falsehood for the purpose of inducing the jury to acquit him or to disagree, constitutes reversible error. *People v. Van Ewan*, supra.

A charge that where the defendant offers himself as a witness it is proper to take into consideration, in determining his credibility, the consequences, inducements, and temptations which would ordinarily influence a person in his situation, is reversible error. *People v. Maughs*, 140 Cal. 253, 86 Pac. 187.

The giving of an instruction calling the special attention of the jury to the situa-

tion of the defendant and the manner in which he would be affected by the verdict and informing them that they should consider this in determining the weight to be given his statements and the likelihood of his coloring his testimony, is prejudicial error. *People v. Borrego*, 7 Cal. App. 613, 95 Pac. 381.

A charge that one on trial for murder has such an interest in the result of the case as might cause a person to make statements to influence a jury in passing upon the case that would not be governed by the truth tends to discredit the testimony of the accused, and is improper. *Hicks v. United States*, 150 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 144.

An instruction that it is proper for the jury to consider whether the position and interest of the accused may not affect his credibility or color his testimony is erroneous. *State v. Webb*, 6 Idaho, 428, 55 Pac. 892.

A charge that "there is, in every criminal case, a greater or less temptation for a defendant to testify falsely in his favor," is clearly erroneous. *State v. Johnson*, 16 Nev. 36.

An instruction that the jury should receive the testimony of the accused with great caution, for when one is being tried for a capital offense the temptation to pervert or distort the facts in favor of himself is very great, constitutes reversible error. *State v. Vasquez*, 16 Nev. 42.

An instruction that the jury are to consider the fact that defendant is the accused person, testifying in his own behalf, and are not bound to consider his testimony as absolutely true, nor as equal to the testimony of disinterested witnesses, but are to bear in mind that he speaks in his own behalf, to discharge himself of a criminal accusation, and they are to consider the great temptation which one so situated is under so to speak as to procure his acquittal, is erroneous as implying that the jury must consider the defendant's testimony as false, and reject it for that reason. *State v. Bartlett*, 50 Or. 440, 93 Pac. 243.

A statement in the charge of the court, when speaking on the subject of the credit to be given to several witnesses, that the jury "must bear in mind the tendency on the part of the guilty when accused of crime, to fabricate some story or stories which they think may effect their acquittal," may have caused the jury to understand the statement as referring to the defendant, and as casting upon him the imputation of guilt, and is reversible error. *State v. Hoy*, 83 Minn. 286, 86 N. W. 98.

An instruction in a criminal case in which the defendant has testified in his own behalf, that his testimony is subject to the usual tests of credibility as other interested witnesses, but that "one interested will not usually be as honest and candid as one not so," invades the province of the jury, and is erroneous. *Greer v. State*, 53 Ind. 420; *Veatch v. State*, 56 Ind. 584, 20 Am. Rep. 44.

Discrediting or disregarding testimony.

An instruction given in a criminal prosecution in which the accused has testified, that, if a witness is interested in the result of the prosecution, this tends to discredit his testimony, constitutes reversible error. *Pratt v. State*, 56 Ind. 179.

The court should not instruct the jury to bear in mind whatever interest the accused has in the case, as to whether his testimony is true, and that it is the duty of the jury to consider the interest of any witness in the case as to whether his testimony is true, since it tends to lead the jury to believe that the court did not give any credence to the testimony of the accused because of his great interest, and that he desired to impress upon them that they should not give it any credence for the same reason. *Hampton v. State*, 50 Fla. 55, 39 So. 421.

Nor should the court charge the jury that the defendant is most deeply interested in their determination, and that they would be warranted in discrediting his testimony so far as it is not substantiated or corroborated by other testimony. *Com. v. Pipes*, 158 Pa. 25, 27 Atl. 839.

The court should not, in its charge, place too much stress upon the interest of the accused in the case, or refer to it in a manner calculated to disparage his testimony. *Clark v. State*, 32 Neb. 246, 40 N. W. 367.

That the accused is an interested party is a fact that the jury may consider in weighing his testimony, and it is proper to instruct them that they may exercise that right; but it is not proper so to instruct them as to impose a consideration of his interest as a duty, and thereby cast discredit upon his testimony in advance. *Bird v. State*, 107 Ind. 154, 8 N. E. 14.

An instruction that the accused testifies as an interested witness and from an interested standpoint, and, as such, the jury should consider his testimony with all the surrounding circumstances developed by the evidence, and give the testimony such weight, in connection with other evidence in the case, as they think it entitled to, and no more, is not objectionable as throwing discredit on the testimony of the witness. *State v. Sterrett*, 71 Iowa, 386, 32 N. W. 387.

A charge that, in judging of the credibility of the defendant and the weight to be given to his testimony, the jury may take into account the fact that he is especially interested in the result of the action of their deliberations, and that they may give such testimony only such weight and credit as they think it fairly entitled to receive under all the circumstances of the case, and in view of the special interest of the witness in the result of the action, does not cast discredit upon the defendant's testimony. *Faulkner v. Territory*, 6 N. M. 464, 30 Pac. 905.

An instruction telling the jury that they might take into consideration defendant's interest in the result of the trial as affecting his credibility as witness is not erroneous, as disparaging the standing of the witness in

his own behalf. *Keating v. State*, 67 Neb. 560, 93 N. W. 980.

A charge that, in passing upon the credibility of a witness, they may consider "the interest he may have in the result of the case," does not in effect tell the jury that he should be disbelieved because of his "interest." *Territory v. Leyba* (N. M.) 47 Pac. 718.

An instruction that defendant's testimony is to be treated the same as if he were not a party and were not interested, but that, in weighing the whole evidence, the jury may consider the interest, prejudice, or bias of any witness who may have testified in the case, does not unfavorably comment upon the defendant's testimony. *State v. Wells*, 111 Mo. 533, 20 S. W. 232.

A charge that the jury may consider the interest of the accused in the result of their verdict as affecting his credibility does not tend to discredit his testimony, where the jury are further told not to disregard the testimony of any witness, and that the weight to be given to the testimony of any witness is a matter solely within their province. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885; *Jones v. State*, 61 Ark. 88, 32 S. W. 81.

An instruction that the jury have the right, in determining the credibility to be accorded to the testimony of the defendant, to consider his interest in the result of the trial, does not improperly disparage his testimony, where a similar instruction, applicable to all the witnesses, was given. *Younger v. State*, 12 Wyo. 24, 73 Pac. 551.

But a charge as to the credibility of an interested witness, given in a criminal prosecution, is erroneous although the accused was not the only witness on his own behalf, where he was the only one interested in the result of the jury's verdict in any proper sense, so that the instruction unmistakably marked him for discredit by the jury. *Townsend v. State* (Miss.) 12 So. 209.

An instruction that jurors should, in every instance, consider the testimony of a defendant with great caution, invades the province of the jury, and is erroneous and prejudicial. *State v. Johnson*, 16 Nev. 36.

It is erroneous, as constituting a charge upon the weight of evidence, to advise the jury that it is their duty to weigh the testimony of the accused carefully, and to scrutinize the same with great caution. *Thomas v. State*, 61 Miss. 60.

An instruction that it is the duty of the jury, in passing upon the evidence of the accused, to scrutinize his evidence with great caution, considering his interest in the result of the verdict, and, after so considering, to give it such weight as they deem proper, is erroneous, since, if they find the witness to be credible, and that he has sworn the truth, his testimony should have the same weight as if he were not interested. *State v. McDowell*, 129 N. C. 523, 39 S. E. 840; *State v. Holloway*, 117 N. C. 730, 23 S. E. 168; *State v. Graham*, 133 N. C. 645, 45 S. E. 514; *State v. Collins*, 118 N. C. 1203, 24 S. E. 118.

An instruction that the jury are not required to receive blindly the testimony of the accused as true, but are to consider whether it is true and made in good faith or only for the purpose of avoiding conviction, has been upheld. *Blair v. State*, 69 Ark. 558, 64 S. W. 948; *State v. Walker*, 133 Iowa, 489, 110 N. W. 925; *Hudson v. State*, 77 Ark. 334, 91 S. W. 299.

A charge that the jury are not required to receive blindly the testimony of the accused as true, but are to consider whether it is true and made in good faith or only for the purpose of avoiding conviction, does not tend to discredit his testimony, where the jury are further told not to disregard the testimony of any witness, and that the weight to be given to the testimony of any witness is a matter solely within their province. *Vaughan v. State* and *Jones v. State*, supra.

An instruction that the jury are not required to receive blindly the testimony of the accused as true is not erroneous as casting discredit in the minds of the jury upon his testimony, where they were further told that they were not at liberty to disregard the testimony of the defendant, but must give it due consideration, and determine whether or not his statements were true. *McIntosh v. State*, 151 Ind. 251, 51 N. E. 354.

A charge that the jury are not required "blindly" to receive the testimony of the defendant as true, but the jury are fully and fairly to consider whether it is true and "made in good faith," is not erroneous, since the use of the word "blindly" implies no disbelief by the court. *Carleton v. State*, 43 Neb. 373, 61 N. W. 699.

But an instruction that the jury are not required to receive blindly the testimony of the accused as true, but are to consider whether it is true and made in good faith or only for the purpose of avoiding conviction, is calculated to disparage the testimony of the accused, and constitutes reversible error. *Donner v. State*, 72 Neb. 263, 117 Am. St. Rep. 789, 100 N. W. 305. This case is distinguishable from the preceding one on the ground that the instruction there considered did not go to the extreme length of suggesting that the testimony of the accused might have been given in bad faith and for the purpose of avoiding a conviction.

An instruction that the jury are not required to receive blindly the testimony of the accused person as true, but are to consider whether it is true and made in good faith or only for the purpose of avoiding conviction, places the defendant in a different class from that of the other witnesses, and lays down the duty of the jury to scrutinize his testimony in a way that tends to discredit him, and goes beyond the province of the court. *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

But, on the other hand, it has been held that a charge that the jury are not required to receive blindly the testimony of the accused as true, but are to consider whether it is true and made in good faith or only for the purpose of avoiding conviction, is not 19 L.R.A. (N.S.)

objectionable as making the defendant a mark for suspicion. since, as the instruction relates to the weighing of the evidence of the accused, it, of necessity, applies to the defendant alone. *State v. Mecum*, 95 Iowa, 433, 64 N. W. 286.

The one isolated fact of the interest of the accused, however great, cannot be said, as a matter of law, to authorize the jury to disregard his evidence.

A charge that, in considering the defendant's testimony and what weight they may give to it, it is the duty of the jury to remember that he is the defendant, and interested in the result of the verdict, and that they may, for this reason, if they think it sufficient, entirely disregard his testimony if it is in conflict with the other evidence in the case, is erroneous. *Allen v. State*, 87 Ala. 107, 6 So. 370.

An instruction that, because of the interest of the accused in the result of the verdict, the jury may arbitrarily reject his evidence and refuse to consider it, is reversible error. *Townsend v. State*, supra.

It is reversible error to instruct the jury that, in weighing the testimony of the accused, the jury should consider the interest he has in the result, and that they may disregard his testimony altogether. *Buckley v. State*, 62 Miss. 705.

A charge that the jury should consider all the evidence, and that they should not ignore the testimony of the defendant merely because he had a vital interest in the outcome of the case is not erroneous. *State v. Ames*, 90 Minn. 183, 96 N. W. 330.

An instruction that the jury have the right to and should take into consideration the fact that the defendant is on trial, charged with an offense, and an interested witness, yet that this should not cause them to disregard his testimony, is properly given. *State v. Ryan*, 113 Iowa, 536, 85 N. W. 812.

A charge that the defendant is a competent witness in his own behalf, and that the jury may consider his testimony, but, in determining what weight and credit they will give it, they may take into consideration the fact that he is the defendant on trial, and interested in the result of the trial, is not erroneous as directing the jury to ignore the testimony of the defendant. *State v. Brown* (Mo.) 115 S. W. 967.

An instruction that the persons on trial are competent witnesses, but that the fact that they are the defendants on trial may be taken into consideration by the jury as well as their interest in the result of the trial, in determining the weight, "if any," that should be given to their testimony, is not reversible error where the jury were also advised that each of the defendants is a competent witness to testify in his own behalf and in behalf of his codefendant, and that their evidence cannot be disregarded because they are the defendants and stand charged with the commission of a crime, but should be fairly and impartially weighed and considered, together with all the other testimony in the case. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

An instruction that defendant is a competent witness in his own behalf and his testimony is to be weighed by the same rules that govern the testimony of other witnesses, but, in passing upon the weight to be given his testimony, they may take into consideration the fact that he is the defendant in the case, and his interest in the result of the trial, is not rendered erroneous by adding that they "are not to reject his testimony if believed to be true, simply because he is the defendant." *State v. Summar*, 143 Mo. 220, 45 S. W. 254. The court said: This clause was inserted out of abundant caution, and we can discover nothing harmful in it.

A charge that the jury should not capriciously reject the testimony of the accused simply because he is interested, but that, unless they have good reason to believe, under all the circumstances, that he has sworn falsely, then they should believe his testimony and consider it along with all the other testimony in the case in making up their verdict, should not be given, since it invades the province of the jury in instructing them as to what they should believe. *Bodine v. State*, 129 Ala. 106, 29 So. 926.

Treating testimony of accused like that of other witnesses.

The court may properly instruct the jury to treat the testimony of the accused like the testimony of any other witness, but that they may consider the great interest which he must feel in the result of the trial. *People v. Knapp*, 71 Cal. 1, 11 Pac. 793; *People v. Faulke*, 96 Cal. 20, 30 Pac. 837; *People v. Calvin*, 60 Mich. 113, 26 N. W. 851; *People v. Crowley*, 102 N. Y. 234, 6 N. E. 384; *Alexis v. United States*, 63 C. C. A. 502, 129 Fed. 60.

And an instruction that the jury should weigh the testimony of the accused as they would that of any other witness, and may take into consideration his interest in the result of the trial, is not erroneous. *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; *State v. Weeden*, 133 Mo. 70, 34 S. W. 473; *State v. Dilts*, 191 Mo. 665, 90 S. W. 782; *Housh v. State*, 43 Neb. 163, 61 N. W. 571; *Gatliff v. Territory*, 2 Okla. 523, 37 Pac. 809; *State v. Tarter*, 26 Or. 44, 37 Pac. 53.

The accused is not entitled to have his testimony regarded as the evidence of a disinterested witness.

An instruction that the jury should give the same weight to the defendant's testimony as they would give to any other witness should not be given. *People v. Hiltel*, 131 Cal. 577, 63 Pac. 919; *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228.

An instruction that the evidence of the accused is to be taken just the same as that of any other witness in the case, and believed by the jury as they would believe any other witness in the case, according as they may regard it credible; that the fact that the defendant is the accused in the case raises no presumption or implication against the credibility of his testimony, should not be 19 L.R.A. (N.S.)

given, since it would tend to mislead the jury into the idea that they must lend the same credence to the testimony of the accused as to that of any disinterested witness, notwithstanding his deep interest in the result of the trial. *Blanton v. State*, 52 Fla. 12, 41 So. 789.

An instruction that the jury are to take into consideration the defendant's appearance, his manner of testifying, the reasonableness of his story, and above all are to take into consideration the fact that he is the accused in the case, is not erroneous in using the words "above all," since the accused is not entitled to have his evidence regarded as the evidence of a disinterested witness. *State v. Fiske*, 63 Conn. 388, 28 Atl. 572.

An instruction that formerly a man interested in a case, civil or criminal, was not allowed to testify at all; that the experience of the world seemed to demonstrate satisfactorily to the lawmakers that a man who was interested directly, even where money was involved, ought not to be heard, and especially that criminals, persons charged with crime ought not to be heard at all; but the modern opinion is the other way; they have a right to be heard and have their testimony submitted to the consideration of twelve men who are supposed, from their experience in the affairs of mankind, to give it proper weight and no more, but they do not stand in the same position as a witness who is entirely disinterested,—although just on the verge of error, is not erroneous. *People v. Ferry*, 84 Cal. 31, 24 Pac. 33.

A charge that while the defendant and others jointly indicted with him are allowed to testify, their testimony is not given the same effect as witnesses unattended by indictment or men not charged, if not error, is at least on the verge of error. *People v. Murray*, 86 Cal. 31, 24 Pac. 802.

An instruction given at the instance of the people, that the jury are not bound to believe the evidence of the defendant in a criminal case and "treat it the same as the evidence of other witnesses," but that the jury may take into consideration the fact that he is the defendant, and give his testimony such weight as, under all the circumstances, they think it entitled to, is misleading and erroneous, since the fact that the witness is the defendant charged with the crime, although sometimes requiring his evidence to be treated differently from that of other witnesses whom the jury believe, does not require his evidence to be treated differently from that of other witnesses whom they disbelieve, so that the only difference between this and other evidence is not in the way in which it shall be treated, but, in the credence that shall be given to it. *Chambers v. People*, 105 Ill. 409.

So, a charge that the jury are not bound to believe the evidence of the accused, "nor are they bound to treat his testimony the same as the testimony of other witnesses," but they may take into consideration the fact that he is the defendant, and his interest in the result of the case as such, and give his testimony such weight as, under all

the facts and circumstances in evidence in the case, they may think it entitled to, is calculated to mislead the jury, and is erroneous. *Sullivan v. People* 114 Ill. 24, 28 N. E. 381.

But an instruction that the jury are not bound to treat the testimony of the defendant the same as the testimony of other witnesses constitutes reversible error. *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245.

And an instruction telling the jury that while the defendants are competent witnesses in their own behalf, the jury are not bound to believe their evidence and treat it the same as that of other witnesses, is erroneous. *Lambert v. People*, 34 Ill. App. 637. The holding in the last two cases is based upon the ground that the instructions given are in conflict with *Chambers v. People*, supra.

It is within the discretion of the trial court to instruct the jury that they should give the defendant's testimony the same impartial consideration that they accord to the testimony of other witnesses. *Hudson v. State*, 77 Ark. 334, 91 S. W. 299; *Henry v. People*, 198 Ill. 162, 65 N. E. 120.

An instruction that the jury have the right to take into consideration the interest of the defendant in the result of the case as affecting his credibility does not direct them to test the testimony of the accused by a more rigid rule than that which is applicable to other witnesses. *McIntosh v. State*, 151 Ind. 251, 51 N. E. 354.

The jury should not be directed to test the credibility of the accused by any different standard than that applied to the testimony of other witnesses. *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

An instruction that the jury, in considering the weight of the testimony of the accused have the right to bear in mind his interest in the result of the trial and everything bearing upon his credibility, and then give his evidence such weight as they believe it entitled to receive, should be qualified by a further instruction that considerations of interest, appearance, manner, etc., apply to the accused in common with all other witnesses. *Schutz v. State*, 125 Wis. 452, 104 N. W. 90.

An instruction that the testimony of the defendant should not be received blindly as true is not erroneous, as directing them to test his credibility by any different standard than that which should be applied to the testimony of the other witnesses, where the jury were previously advised that the accused was a competent witness in his own behalf, that the credibility of his testimony was a matter exclusively for them to determine, and that, in doing so, they had a right to take into account his interest in the result of the case. *Porter v. People*, 31 Colo. 508, 74 Pac. 879.

A charge that the jury may take into consideration, among other things, the interest of the accused in the case, and that they should consider his testimony and determine whether it was true or not, is not objectionable as not requiring the jury to treat

his testimony the same as that of others. *Waller v. People*, 209 Ill. 284, 70 N. E. 681.

But an instruction that the jury are to treat the accused, who testified as a witness in her own behalf, the same as any other witness, and subject her to the same tests, and only the same tests, "except as far as relates to her interest," as are legally applied to other witnesses, authorizes the jury to apply a different rule to the testimony of the accused from that which they applied to the testimony of other witnesses when they should undertake to consider her interest, and is erroneous. *Schultz v. People*, 210 Ill. 196, 71 N. E. 405.

Nor should the jury be instructed that the testimony of the accused is to be weighed like the testimony of other witnesses in the case, provided it is corroborated by other unimpeached testimony, since it is a charge as to the weight to be given certain testimony, and is an invasion by the court of the special province of the jury. *People v. Piereson*, 2 Idaho, 76, 3 Pac. 688.

A charge that the testimony of the defendant should be weighed the same as that of any other witness is not erroneous, although the defendant, who offered to testify, was not permitted to answer the questions propounded to him by his counsel. *State v. Ulsemer*, 24 Wash. 657, 64 Pac. 800.

Instruction singling out defendant.

In some jurisdictions an instruction as to the interest of the accused in the result of the trial is not objectionable as singling out his testimony, while in others it is regarded as ill-advised, prejudicial, or as invasive of the province of the jury to thus call special attention to the fact of interest.

An instruction that the jury have the right to take into consideration the situation and interest of the accused in the result of their verdict, and all the circumstances which surround him, and give to his testimony only such weight as, in their judgment, it is fairly entitled to, is not prejudicial by thus directing the attention of the jury specially to him. *State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

An instruction that the jury are the judges of the weight which ought to be attached to the testimony of the defendants, and, in considering what weight should be given it, the jury should take into consideration all the facts and circumstances surrounding the case, as disclosed by the evidence, and give the defendant's testimony such weight as they believe it entitled to in view of all the facts and circumstances proved on the trial, and of his interest in the result, is not objectionable as singling out the accused from the body of the witnesses for comment. *Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8. The court said: It is conceded that the instruction contains nothing but sound legal propositions, and the only complaint made is that defendants were singled out from the body of the witnesses for comment. We do not think the court erred in giving the instruction as it did.

So, an instruction which informs the jury that the accused testifies as an interested witness and from an interested standpoint, and that they should consider his testimony as such, is not erroneous as singling out the accused, where, in the same connection, they were advised that the accused was a competent witness, and that his evidence was to be considered in connection with the other evidence and circumstances surrounding the case, and given such weight as the jury might think it entitled to. *State v. Bursaw*, 74 Kan. 473, 87 Pac. 183.

It is not reversible error to instruct the jury that, in determining what weight they will give the testimony of the defendant, they should take into consideration the interest he has in the result of the suit, etc. *Helms v. United States*, 2 Ind. Terr. 605, 52 S. W. 60. The court said: While we find no reversible error in this charge, we think the better practice, instead of singling out the defendant and giving the jury the rule by which his testimony is to be measured, is to lay down the rule as to the testimony of all the witnesses, including that of the defendant.

It is error for the court, after instructing the jury that, as a witness, the defendant is to be judged as other witnesses are judged and weighed, to modify the instruction by adding that, in determining the credibility of the defendant, his interest in the issue involved is to be considered, since it singles out of the defendant as a witness, and invades the province of the jury. *Mueley v. State*, 31 Tex. Crim. Rep. 155, 18 S. W. 411, 19 S. W. 915.

A charge to the jury to take into consideration the interest a witness may have in the result of the trial is erroneous where the accused was the only witness as to the facts of the alleged crime, in his own behalf. *Smith v. State*, 90 Miss. 111, 122 Am. St. Rep. 313, 43 So. 465. The court remarked: The charge would have been no stronger if it had called his name. His testimony should not be so hampered by such express reference.

A general instruction as to the credibility of witnesses is not objectionable as singling out the defendant.

A charge to the jury that, in considering the weight and effect to be given to the testimony of witnesses, the jurors have the right, among other things, to "consider the consequences resulting to the witness, if any, from the result of the trial," is not open to the criticism that it singles out the defendant. *People v. Botkin* (Cal. App.) 98 Pac. 801.

So, an instruction that, in passing upon the credibility of a witness, they may consider "the interest he may have in the result of the case." *Territory v. Leyba* (N. M.) 47 Pac. 718.

An instruction given in a criminal prosecution in which the defendant has testified in his own behalf, that, in determining the weight to be given to the testimony of the different witnesses, the jury are authorized to consider the interest of any of the wit-

nesses in the result of the suit, does not erroneously single out the defendant, and call special attention to his interest in the case. *Territory v. Livingston* (N. M.) 84 Pac. 1021.

An instruction that, in deciding which of the testimony is entitled to the greater credibility and weight, the jury may consider the interest, apparent bias or prejudice, if any, of the witnesses, as well as their manner of testifying, is not objectionable as calculated to call attention to the interest of the accused, who was a witness on his own behalf. *McGrath v. State*, 35 Tex. Crim. Rep. 413, 34 S. W. 127, 941.

A charge which applies to the testimony of the accused the same tests applicable to other witnesses does not improperly single out his evidence.

An instruction that the credibility of the accused is to be tested by and subjected to the same tests as are legally applied to any other witness, and, in determining the degree of credibility that shall be accorded to his testimony, the jury have a right to take into consideration the fact that he is interested in the result of the prosecution, does not give undue prominence to the testimony of the accused. *Hirschman v. People*, 101 Ill. 568.

Nor is an instruction which tells the jury that the accused is a competent witness in his own behalf, and, in laying down the rule by which evidence is to be weighed, subjects the testimony of the defendant to the same tests, interest, etc., as are applied to the evidence of other witnesses, objectionable, although to single out the defendant and call special attention to his interest in the case would be reversible error. *Territory v. Livingston*, *supra*.

A charge that the jury have a right to consider the situation of the accused, his interest in the result of the trial, and everything appearing in the case bearing on his credibility; that his testimony should be considered in connection with all of the other evidence in the case, and the same tests that are applied to his testimony, for the purpose of determining its credibility, should be applied to the testimony of each and every other witness, is not objectionable as discriminating against a single witness. *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805.

An instruction that the jury may take into account the interest of the accused in determining the weight and credibility to be given to his testimony is not prejudicially erroneous, as singling out the accused from all other witnesses in the case, since no other witness occupies the same position as the accused, and such an instruction does not apply to him a test which could have been applied to others. *State v. Wiggins*, 50 La. Ann. 330, 23 So. 334.

So, an instruction telling the jury that, in considering the amount of credit or value they will give to the testimony of one of the defendants who testified in the case, they may take into consideration his interest in the case, his desire to avoid punishment for the crime with which he is charged, and

all other interests or motives that will likely surround or affect the testimony of a person similarly surrounded or situated, is not erroneous on the ground that it does not treat the defendant, testifying, as other witnesses in the case, but singles him out by name, since it does not apply to him a test of credibility which could have been applied to others. *Doyle v. People*, 147 Ill. 394, 35 N. E. 372.

The court may properly call the attention of the jury to the fact that the defendant is directly interested in the result of the case, without referring to other witnesses individually, where the accused appears to be the only witness directly interested. *State v. Young*, 104 Iowa, 730, 74 N. W. 693.

And a charge of general application, which states the law as to the credibility of witnesses, is not erroneous on the theory that the defendant being the only interested witness in the result of the case, the charge must be taken as directly referring to and designating him, especially where a cautionary instruction referring directly to the defendant's interest in the result of the trial as affecting his credibility and the weight to be given to his testimony would have been proper. *Savary v. State*, 62 Neb. 166, 87 N. W. 34.

VIII. Instructing as to former conviction or other charges against accused.

A charge as to a former conviction of the accused is not erroneous where, by statute, such fact is admissible to affect his credibility.

An instruction that a former conviction of the defendant on trial may be considered by the jury as a matter affecting his credibility as a witness in his own behalf is in conformity with *Bellinger & C. Anno. Codes & Statutes*, § 852, and is not erroneous. *State v. Reyner*, 50 Or. 224, 91 Pac. 301.

A charge that the jury may take into consideration the fact, if the same is proven, that the defendant had been convicted of a felony and confined in the penitentiary of another state, as affecting his credibility as a witness, is not objectionable as disparaging his standing as a witness in his own behalf, where, by statute, conviction of a felony may be shown for the purpose of affecting the credibility of a witness. *Kenting v. State*, 67 Neb. 500, 93 N. W. 980.

An instruction that, if the accused has testified to the commission of any other or different crime from the one charged in the indictment, the jury must not permit it to prejudice them or bias their judgment against his case, but they may consider it in determining what credibility should be given to the defendant's testimony in the case, is not prejudicial, since, by statute, conviction of an infamous crime may be proved against the credibility of a witness. *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203.

An instruction as to a former conviction or indictment of the accused or as to other

charges against him should not bear on the weight of evidence nor be misleading.

A charge that evidence brought out on cross-examination of defendant with reference to former charges against her can be considered by the jury only as affecting, if they believe the same does affect, her credibility as a witness in the case, and not as showing or tending to show that defendant committed the offense for which she is on trial, is not objectionable as a charge on the weight of evidence. *Jasper v. State* (Tex. Crim. App.) 61 S. W. 392.

But an instruction that the testimony of the defendant as to his having been charged with any other crime than the one for which he is on trial was admitted only for the purpose of going to the credibility of the defendant as a witness, and for no other purpose, is upon the weight of evidence, since it assumes that he had testified that he had been charged with other crimes, and because it tells the jury that it goes to the credibility, which is equivalent to telling them that it affects his credibility. *Stull v. State*, 47 Tex. Crim. Rep. 547, 84 S. W. 1059.

So, a charge that the defendant, who was on trial for robbery, admits that he has been convicted of petit larceny, and that as to how much credit such a man is entitled to is for the jury to determine, can be understood in no other way than as a statement that, in the opinion of the court, such a man as the defendant is entitled to but little credit, and invades the province of the jury. *People v. Murray*, 86 Cal. 31, 24 Pac. 802.

An instruction which directs the jury wholly to disregard the testimony of the accused, who, on cross-examination, stated that he had theretofore been in the state prison and had served out his term, constitutes reversible error, since the degree of credit to which he is entitled is to be decided by the jury, and not by the court. *Newman v. People*, 63 Barb. 630.

An instruction that the jury are to look to other charges against the defendant in weighing his evidence as a witness is misleading, since, while such testimony is advisable as going to discredit him as a witness, and causing the jury to disregard his testimony altogether, it is not a factor to be weighed against his evidence. *Scott v. State* (Tex. Crim. App.) 36 S. W. 277.

A charge that testimony regarding former indictments against the accused was admitted for the sole purpose of affecting her credibility as a witness should state that it can be considered for no other purpose. *Tardy v. State*, 46 Tex. Crim. Rep. 214, 78 S. W. 1076.

IX. Instructing as to demeanor of accused.

It is within the discretion of the trial court to instruct the jury that, in considering the degree of credit to be given to the testimony of the accused, they may take into consideration his appearance and man-

ner while testifying. *Hudson v. State*, 77 Ark. 334, 91 S. W. 299; *Blair v. State*, 69 Ark. 558, 64 S. W. 948; *Felker v. State*, 54 Ark. 489, 16 S. W. 663; *Minich v. People*, 8 Colo. 449, 9 Pac. 4; *Dunn v. People*, 109 Ill. 635; *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63; *State v. Hilsabeck*, 132 Mo. 348, 34 S. W. 38; *Territory v. Taylor*, 11 N. M. 588, 71 Pac. 489; *Keating v. State*, 67 Neb. 560, 93 N. W. 980.

An instruction that the jury are the sole judges of the credibility of the witness, and that they need not believe anything to be a fact simply because a witness testifies to it positively, if, from all the evidence and circumstances arising in the case, the demeanor of the witness upon the stand, the manner of his testifying, and his apparent candor and fairness, they believe that he has knowingly testified falsely, does not criticize or cast reflections upon the testimony of the accused, and is properly given. *Chezem v. State*, 56 Neb. 496, 76 N. W. 1056.

A charge that the jury have the right, in determining the credibility to be accorded to the testimony of the defendant, to consider his actions and demeanor on the witness stand, does not improperly disparage his testimony, where a similar instruction, applicable to all the witnesses, was given. *Younger v. State*, 12 Wyo. 24, 73 Pac. 551.

An instruction that the jury have the right to take into consideration the manner of the accused in testifying does not tend to discredit his testimony, where the jury are further told not to disregard the testimony of any witness, and that the weight to be given to the testimony of any witness is a matter solely within their province. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885; *Jones v. State*, 61 Ark. 88, 32 S. W. 81.

Nor does an instruction that, in weighing the testimony of the defendant, the jury have the right to take into consideration the manner of his testifying, direct them to test the testimony of the accused by a more rigid rule than that which is applicable to other witnesses. *McIntosh v. State*, 151 Ind. 251, 51 N. E. 354.

An instruction that, if conflicting testimony cannot be reconciled, it is the duty of the jury to decide which of the testimony is entitled to the greater credibility and weight, and that, in so determining, they may consider the witnesses' manner of testifying, is a charge upon the weight of the testimony, and erroneous. *Williams v. State* (Tex. Crim. App.) 40 S. W. 801; *Penny v. State* (Tex. Crim. App.) 42 S. W. 297.

A charge instructing the jury as to how they should weigh the testimony of the defendant—that is, treat him the same as any other witness, judging his appearance, demeanor, etc.—is properly refused. *Clark v. State* (Tex. Crim. App.) 59 S. W. 887.

The giving of an instruction that, in determining the degree of credibility that shall be accorded to the testimony of the accused, the jury have a right to take into

consideration the fact that the accused is interested in the result of the prosecution, as well as his demeanor and conduct on the witness stand and "during the trial," is reversible error. *Purdy v. People*, 140 Ill. 46, 29 N. E. 700; *Vale v. People*, 161 Ill. 309, 43 N. E. 1091. The court said: The jury were sworn to try the issue submitted to them according to the law and the evidence; and most assuredly the demeanor and conduct of the defendant during the progress of the trial and while he was not a witness upon the stand were no part of the evidence in the case. Evidence may be introduced which was not anticipated; a witness may greatly exaggerate a trifling circumstance, or may deliberately make a misstatement; a witness may fail to testify to a fact which the defendant fully believed was within the knowledge of such witness and would be stated by him, exaggerated denunciation may be indulged in by attorneys; the presiding judge may decide contrary to the expectations of the defendant in respect to the admissibility of certain evidence, or may rule a point of law against him. Under these and other like circumstances a prisoner, and especially in a trial where his life was at stake, might frequently, and especially so if he was not a hardened criminal, demean himself while under the influence of his disappointment, fears, and feelings, in such a manner as that an observer would regard his conduct and demeanor as indicative of guilt. It would be illogical and unjust, under circumstances such as stated, to deduce a conclusion unfavorable to the defendant.

It has very frequently been held that a jury may, in determining the credibility of witnesses, consider their demeanor and conduct while upon the witness stand, and there is reason in such holding. A person charged with crime can be examined as a witness only at his own request; and so, when he voluntarily assumes the character of a witness, it is proper to apply to him the rules which apply to other witnesses. But we are not advised that it has ever been adjudicated or held that the conduct and demeanor of a defendant during his trial for crime, when he is not examined as a witness, or while he is not being examined as a witness, is to be regarded in the light of evidence, or that it can be taken into consideration by the jury in arriving at a verdict. In two instances within the knowledge and recollection of the writer of this opinion, men on trial for grave crimes have made assaults upon witnesses who testified against them, and this during the trials and in the presence of the jury. Assuming that, in such cases, the defendants were examined as witnesses in their own behalf, it would have been unjust, and highly detrimental to the rights of said defendants, if the trial judge had instructed that, in determining the degree of credibility that should be accorded to the testimony of such defendants, the jury had the right to take into consideration the demeanor and conduct of said defendants during their trials. We think

that it is improper to authorize a jury to consider, in arriving at a verdict, anything that is other than the law or the evidence in the case.

An instruction similar to that declared erroneous in *Purdy v. People*, supra, had theretofore been given, without objection, in *Hirschman v. People*, 101 Ill. 568, and *Rider v. People*, 110 Ill. 11.

The instruction subsequently given in *Siebert v. People*, 143 Ill. 571, 32 N. E. 431, omits the words "during the trial," but refers approvingly to the two preceding cases, and says that there was no intention in the *Purdy* Case to change the rule of law laid down in the two earlier cases, and that there was no conflict between them and the *Purdy* Case.

Mr. Justice Campbell in the opinion written in *Boykin v. People*, 22 Colo. 496, 45 Pac. 419, remarked: A critical examination of the decision in the *Purdy* Case shows that the defendant was the only witness in his own behalf; and this fact, and the further fact that the court was in grave doubt as to the sufficiency of the circumstantial evidence to warrant a conviction, led the court to hold that the instruction did not fully and fairly submit to the jury the question of defendant's credibility. We are unable to harmonize the decision in the *Purdy* Case with the two earlier cases, unless the rule announced in the former is to be confined to the peculiar state of facts of that case, and possibly, as so restricted, it might not be objectionable.

A rule contrary to that expressed in *Purdy v. People*, supra, is laid down in *Boykin v. People*, supra, holding that an instruction that the jury may consider the demeanor of the accused during the trial is not erroneous. The court observed: We cannot agree with the argument that the defendant's conduct during the trial of a case and in the presence of the jury is not a proper subject of their observation. Indeed, we know it to be a fact, grounded in human nature, that the conduct of a defendant, or of a party to a suit, during the trial, is more or less potential, and has necessarily more or less influence with the court and jury upon the question of his credibility; and it would be manifestly improper to instruct the jury that they should not accord to a defendant's demeanor at such times due consideration as to affecting his credibility. So we fail to see why it would be improper, or how it could be avoided, for the jury to be favorably or unfavorably impressed with the defendant's conduct during the trial, the impression depending upon the character of the same. If this be so, we fail to perceive the vice in an instruction telling the jury that they may do the very thing which common experience and common observation teach that the human mind inevitably will do.

An instruction that, in determining the weight to be given to the testimony of the defendant on trial for crime, the jury are authorized to consider the demeanor of the witnesses while testifying, is erroneous. *El-19 L.R.A. (N.S.)*

ler v. People, 153 Ill. 443, 38 N. E. 060. The court said: While the jury may properly consider the manner in which a witness testifies, and other like matters, in determining the degree of credit to be given to his evidence, yet the demeanor of other witnesses could not be considered in determining what credit should be given to the defendant.

A jury may properly be told to consider, as a matter affecting the credibility of one accused of murder, the fact that he kept silent respecting the crime, after his arrest and after he had consulted counsel, and up to the time he testified on the trial. *R. v. Higgins*, 36 N. B. 18, 7 Can. Crim. Cas. 68. The court said: It would be a material and proper matter to comment upon as respecting the credibility of the story then advanced by the prisoner, to the effect that the murder was committed by a companion who had testified against him.

X. Instructing as to statutory statement by accused.

In Alabama, Florida, Georgia, and Michigan enabling acts were heretofore passed, by the provisions of which persons accused of crime were permitted to make statements to the jury in their own behalf. In Florida and Michigan these statements were sworn to, but in Alabama and Georgia they were not required to be made under the sanction of an oath. These statutes were passed to mitigate the severity of the common-law rule which precluded one on trial for crime from testifying in his own behalf. Subsequent legislation enacted in Alabama, Florida, and Michigan has made the accused a competent witness at his own request.

Weight of statement for jury.

The court may properly inform the jury that they may consider the prisoner's statement in considering the evidence, and give it such weight as they think proper. *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781.

A charge that the statement of the prisoner is entitled to such weight as the jury should think it is worthy of is correct. *Durant v. People*, 13 Mich. 355.

A statement of the accused, made under a statute permitting him to make a statement to the jury of the facts, in his own behalf, but not under oath, is entitled only to such weight as the jury may, in good conscience and justice, see fit to give it; and the court may properly instruct them that they may believe such statement or not, at their pleasure, giving it such weight as they may believe it entitled to. *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323.

It is error for the court to charge that a statement under oath, made by the defendant before the jury, in pursuance of Fla. act of 1865, § 4, is not evidence, and cannot be considered by the jury as such, since, after the court has granted leave to the defendant to make such a statement, it is the jury

alone who are entitled to consider it, and, if it be remarked upon at all, it should be to suggest to the jury, in effect, that they are to attach to it such importance, in view of the nature of the offense charged and of the testimony before them, as, in their good judgment, it is entitled to. *Barber v. State*, 13 Fla. 675.

An instruction given by the court of its own motion, which charges the jury, in substance, that the sworn statement of each of the prisoners is to be considered and weighed as evidence, and compared with the other evidence in the case, and that the jury are authorized to give such weight to the sworn statements as, in their judgment, they were entitled to, in view of all the other evidence in the case, and that they are the exclusive judges of the evidence and of the weight it is entitled to and of the credibility of the witnesses, is proper, and does not trench upon the exclusive province of the jury as to the weight and credibility of the testimony of the witnesses and defendants. *Ballard v. State*, 31 Fla. 260, 12 So. 865.

A charge that the statement of the prisoner is evidence before the jury, to be allowed such weight, and such only, as they see fit to give it, is not objectionable as tending to cast discredit upon the statement of the accused in using the words "such only," where no unusual or undue stress or emphasis was placed upon the words by the court. *Olive v. State*, 34 Fla. 203, 15 So. 925. In support of this holding, it is said: The court must not comment on the prisoner's statement, but we see no objection to stating to the jury just what the law authorizes, that the prisoner's statement is evidence before them, and to be allowed such weight and such only as they see fit to give it.

A charge to the jury that the statement of the accused is not evidence, but is entitled only to such weight as the jury choose to give it, is in conformity with, and almost in the words of, Ga. Code, § 4637, and is properly given. *Ross v. State*, 59 Ga. 248.

In charging the jury in reference to the prisoner's statement, the court should keep the evidence distinct from the statement, and shape the general tenor of the charge alone by the evidence and law applicable to it; but, at some stage of the charge, the statutory provisions touching the statement ought to be known to the jury. The jury are to give the statement such force as they think proper. Its rightful force may be either against the prisoner or for him, or it may be entitled to none whatever. The jury are to deal with it on the plane of statement, not on the plane of evidence, and may derive from it such aid as they can in reaching the truth. The law fixes no value upon it; it is a legal blank. The jury may stamp it with such value as they think belongs to it. *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64.

A charge which limits and restricts the jury in their consideration of the defendant's statement is erroneous, since the statute provides that the statement shall have such force only as the jury may think right to give it. *Pease v. State*, 63 Ga. 631.
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Nor should the court, after instructing the jury that the sworn statement made before the coroner's inquest, by defendant, who is on trial for murder, is evidence before them, and that they can give it such credit as they think it entitled to, charge that the jury should believe it unless contradicted by two witnesses, or one witness and corroborating circumstances. *Inman v. State*, 72 Ga. 209.

Pointing out that statement is not sworn to.

A charge which reminds the jury that the defendant's statement is not made under oath, and that the defendant incurred no penalty for not speaking the truth, is not erroneous. *Poppell v. State*, 71 Ga. 276. The court said: Surely there can be no wrong in calling the attention of the jury to circumstances which would impair the force of such testimony, or which should enable them to give it the weight to which it is entitled.

A charge that it is the province of the jury to give to the sworn evidence or to the defendant's statement such weight as they may see proper, bearing in mind that the defendant's statement is not under oath and the sworn evidence is under oath, is not erroneous, where the court added that this distinction should not control them, the consideration of the evidence or statement being entirely within their province. *Keaton v. State*, 99 Ga. 197, 25 S. E. 615.

It is not error on the part of the trial court, after having properly charged the jury in reference to the prisoner's statement, and after instructing the jury that they may believe that statement in whole or in part, to the exclusion of the sworn testimony, to add, "remembering it is not under oath, and does not subject him to the penalty incident to a sworn witness." *Teasley v. State*, 105 Ga. 842, 32 S. E. 335.

After correctly instructing the jury as to the law in reference to the prisoner's statement, it is not error for the court to add, in connection therewith, "it is not delivered under oath, and he incurs no penalty in not telling the truth." *Ryals v. State*, 125 Ga. 266, 54 S. E. 168.

A charge to the jury after the prisoner had finished his statement and had announced to the solicitor general, that he was willing to be cross-examined, and had been so cross-examined, that the prisoner's statement was not under oath, nor was he subject to cross-examination without his consent, and that the jury were allowed to give his statement just as such force and weight as they saw proper, is not erroneous. *Wilson v. State*, 69 Va. 224.

The court may properly charge that the law allows a defendant to make such statement in his own behalf as he may see proper, and that he does not make his statement under oath, and is not subject to be cross-examined, since it is simply a quotation from the statute, and the court had a right to put the jury on notice that the statement was *ex parte* on the part of the defendant. *Murray v. State*, 85 Ga. 378, 11 S. E. 655.

Believing statement in preference to sworn testimony.

The court should inform the jury that they may believe the prisoner's statement in preference to the sworn testimony. *Burns v. State*, 89 Ga. 527, 15 S. E. 748; *Doster v. State*, 93 Ga. 43, 18 S. E. 997.

And in *Hendrix v. State* (Ga.) 63 S. E. 939, an instruction upon the defendant's statement to the jury, considered as a whole, was held not erroneous, the jury having been told that they had a right to believe the statement, and the right to believe it even in preference to the sworn testimony.

It is not erroneous to charge that the jury might believe the defendant's statement in preference to the sworn testimony, or might disbelieve it. *Poppell v. State*, 71 Ga. 276.

After charging the jury that they might give the statement of the accused such force as they think proper, and believe it in preference to the sworn testimony if they think proper, a further charge that what the law means by believing defendant's statement in preference to the sworn testimony is where the latter and the statement conflict; that the statement, to avail the prisoner, must be in those parts that are in conflict with the evidence and in conflict in material matters, is erroneous, since under it the prisoner's statement, to avail him, must be in conflict with the sworn testimony, and only when in conflict could he get any benefit from his statement, whereas, on the contrary, the prisoner's statement should avail him not only where the same is in conflict with the sworn testimony, but where no such conflict exists. *Lovejoy v. State*, 82 Ga. 87, 8 S. E. 66.

But a charge on the subject of the prisoner's statement, that what the law means by believing it in preference to the sworn testimony is when the sworn testimony and the statement conflict in material matters, is not objectionable as instructing the jury that the prisoner's statement cannot avail him unless in conflict with the sworn testimony. *Harrison v. State*, 83 Ga. 129, 9 S. E. 542.

It is not error for the judge, in instructing the jury in relation to the prisoner's statement, to charge that, if they should find the statement consistent and true, they have a right to believe it in preference to the sworn testimony in the case; that they should not do so carelessly and capriciously, but under their oaths as jurors, considering the statement in connection with the sworn testimony in the case, and, testing it in the light of that testimony, give it such weight as they might think proper. *Keller v. State*, 102 Ga. 506, 31 S. E. 92; *Smalls v. State*, 105 Ga. 669, 31 S. E. 571; *Barnes v. State*, 113 Ga. 716, 39 S. E. 488.

In *Barnes v. State*, *supra*, Little, J., as in *Keller v. State* and *Smalls v. State*, *supra*, when a like charge was before the court, dissented from the ruling of the court approving the charge, on the ground that the instruction deprived the defendant of a material legal right,—of the right to have his

statement weighed by the jury and given such weight as they might consider it to be worth, without testing the correctness of it by the evidence in the case, and to have the jury accept the same if they believe it to be true, regardless of the question whether it is consistent with the evidence or with itself.

It is proper to charge the jury that the defendant is permitted by law to make a statement in his own behalf, not under oath, and that it is the right and duty of the jury to weigh and consider that statement; that they may believe it in preference to the sworn testimony in the case; that, if they believe it, they may accept the unsworn statement of the defendant in preference to the sworn evidence; not capriciously and arbitrarily, but in search of truth; and that there is no presumption touching the defendant's statement,—no presumption that it is true or any presumption that it is untrue. *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154.

An instruction to the jury that they can give the prisoner's statement just such credit as they think it ought to have, that they may believe it "if they want to do so" in preference to the sworn testimony in the case, or may believe it in part or reject it in part, or reject it altogether, does not authorize them to act arbitrarily in the matter of giving credence to the statement, where the court added an express direction that they should give it such weight and credence as they think it ought to have in determining the truth of the issue. *Adams v. State*, 125 Ga. 11, 53 S. E. 804.

It is error for the court to charge in a criminal case that the jury should not discard sworn testimony entirely, in order to believe the statement in preference thereto, since the credit to be given to the statement is a question exclusively for the jury. *Hayden v. State*, 69 Ga. 731.

An instruction requested by the defendant, that the prisoner's statement should be weighed by the jury like all other testimony, and that they may, if they see fit, pass their verdict upon it alone, is properly refused, since, aside from singling out and giving prominence to the testimony of a particular witness, it does not require the jury to believe the testimony of the defendant to be true in order to base a verdict upon it, but authorizes them, if they see fit, to discard the other evidence in the case, however credible, and base a verdict upon defendant's evidence, however incredible. *Green v. State*, 40 Fla. 191, 23 So. 851.

It is error, after correctly charging on the statement of the prisoner, which, if true, showed that he was guilty of manslaughter, to add: "If the statement is a statement, in your judgment, which demonstrates his innocence, and you believe that statement to be the truth of the case, as I have just stated to you, you have the privilege and it would be your duty in that case to acquit him upon it. On the other hand, if you do not believe that statement to be such a statement as demonstrates his innocence, or if you believe that statement to be untrue, then you

may accept the sworn testimony in place of it." *Wrye v. State*, 95 Ga. 466, 22 S. E. 273.

An instruction that the prisoner's statement would not warrant the jury setting aside unimpeached sworn evidence is erroneous. *Durant v. People*, 13 Mich. 355. The court said: This instruction was in some measure contradictory of a former portion of the charge which correctly informed them that the statement of the prisoner was entitled to such weight as they should think it was worthy of; for if the jury may give the statement such weight as they think it entitled to, it follows that they may believe it in preference to unimpeached sworn testimony, if, under all the circumstances, and in view of all the evidence in the case, they believe it entitled to greater weight. It is not to be supposed that a jury would give it such greater weight unless they believed it most likely to be true; but, if satisfied of this, there is not, and cannot be, any arbitrary rule which is to prevent them from acting upon that belief, or which can require them to give greater credit to sworn testimony, though unimpeached, when they conscientiously believe it less likely to be true.

An instruction that the jury have a right to take into consideration the statement of the prisoner and give it such weight and credit as they think it entitled to, under all the facts and circumstances of the case, and that they may give it more weight than the sworn testimony of unimpeached witnesses if, under all the facts and circumstances of the case, they honestly believe it entitled to such weight; but, in order to find what weight they ought to give to the prisoner's statement, they should consider whether it is consistent with the other facts which may have been proved to their satisfaction, whether the statement is corroborated or not by other proofs, facts, or circumstances of the case, is not objectionable as laying down an arbitrary or artificial rule by which to estimate the credit due to the prisoner's statement. *People v. Jones*, 24 Mich. 215.

But a charge that the statement of the defendant, as made on the stand, is not sufficient to overcome the sworn testimony of credible witnesses, although not commended, was held not erroneous in *Brown v. State*, 60 Ga. 210. In this case Judge Bleckley was of the opinion that where the evidence and the statement conflict, the latter should yield to the former; that, as a general rule, sworn evidence must be more trustworthy than the prisoner's bare word.

Yet a charge that the statement of the defendant in criminal cases "and in this case" is not sufficient, as a general rule, to overcome the testimony of a sworn credible witness, is erroneous as withdrawing from the consideration of the jury the effect which they might have thought proper to give to the defendant's statement "in this case." *Day v. State*, 63 Ga. 667.

Believing whole or part of statement.

A charge that the jury are authorized to 19 L.R.A. (N.S.)

accept defendant's statement in its entirety, and believe the whole of it, and discard the entire sworn testimony in the case, or to discard the statement, or take such portion of it as they desire to believe, and discard the other; that they are to determine the weight and credit they are to give to the statement of the defendant,—is substantially correct, and is certainly not given unfavorably to the defendant. *Parker v. State*, 1 Ga. App. 781, 57 S. E. 1028.

Where the court had given full and fair instructions as to the statement of the accused, and had distinctly informed the jury that they could believe a part of the statement and reject a part, if they thought a part of it was true and a part of it was false, a charge in the following language, "Find out what the truth of the case is and what the real facts are; and look to the evidence for that purpose, and to the prisoner's statement, if you think it worthy of credit," could not have had the effect of impressing the jury "that they were not to look to, or believe, nor consider any part of the prisoner's statement unless they consider the whole of it worthy of credit." *Westbrook v. State*, 97 Ga. 189, 22 S. E. 398.

A charge that the jury may believe the statement of the prisoner in preference to the sworn testimony of the case is not erroneous as intending that they must believe it all or none, especially where the court read to the jury the provisions of Ga. Penal Code, § 1010, to the effect that the jury shall give the statement of the accused such force only as they may think right to give it, and may believe it in preference to the sworn testimony in the cause. *Caesar v. State*, 127 Ga. 710, 57 S. E. 66.

After the court had instructed the jury with reference to the statement of the accused in the following words: "To this statement you can give just such credit as you think it is entitled to; you may believe the whole of it or any part of it; you may reject the whole of it or any part of it; you may go to the extent of believing it in preference to the sworn testimony in the case,"—there was no error in adding the words, "provided you believe it to be the truth." *Mason v. State*, 97 Ga. 388, 23 S. E. 831.

Excluding statement from consideration.

That the jury were charged to arrive at their verdict solely from the evidence and the law, and by nothing else, does not erroneously exclude from them all consideration of the defendant's statement, although no instructions were given as to the statement of the accused until the close of the judge's charge. *Washington v. State*, 124 Ga. 423, 52 S. E. 910. The court said: The charge was not erroneous, especially in view of the oft-repeated rule that "the general tenor of the charge of the court on the trial of a criminal case should be shaped by the evidence alone, and the law applicable thereto," adding, "or, at some stage of the charge

incorporating the statutory provisions touching the prisoner's statement."

After instructing the jury fully and correctly as to the law in reference to the prisoner's statement, a charge the purpose of which is to inform the jury that they are the sole judges of what the facts in the case are, and that, in finding the facts, they can consider only the evidence before them, does not erroneously confine the jury to the sworn testimony in the case to find the facts, and deprive the defendant of the benefit of his statement to the jury. *Tolbirt v. State*, 124 Ga. 767, 53 S. E. 327. The court said: It has frequently been held that it is proper for the judge to shape his general charge to the jury upon the evidence alone, appropriately instructing them, however, at some stage of the charge, with reference to the prisoner's statement.

An instruction that the jury, in determining what is the truth of the case, should look to and carefully weigh the evidence before them, is not erroneous as excluding the statement of the accused from the consideration of the jury, where an appropriate instruction had been given in regard thereto. *Hoxies v. State*, 114 Ga. 19, 39 S. E. 944.

That the court instructed the jury upon a branch of the case, to take into consideration the sworn testimony, and weigh it carefully and impartially, without, at the same time, requesting the jury to consider in this connection the statement of the accused, is not erroneous, where an appropriate instruction had been given in regard to the statement. *Knight v. State*, 114 Ga. 48, 88 Am. St. Rep. 17, 39 S. E. 928.

An instruction upon the evidence alone, after refusing an inappropriate requested instruction concerning the prisoner's statement, is not erroneous, where it appears from the charge as a whole that the jury were fully informed as to the statutory provisions concerning the statement, and that the accused was given the benefit of all the statement contained, in case the jury should accept the same as true. *Lacewell v. State*, 95 Ga. 346, 22 S. E. 546.

A charge that, in determining the various questions in the case, the jury must look to the testimony of the witnesses that have been sworn in the case, is not erroneous, although it would have been more appropriate, and would have given to the accused the full measure of his legal right, had the court added, "and the statement of the accused, giving to the latter such force as you think it entitled to receive." *Sledge v. State*, 99 Ga. 684, 26 S. E. 756.

A charge to the jury that the prisoner's statement is in no sense binding upon them, while not commendable, does not practically withdraw from the jury the consideration of the prisoner's statement, where evidently the judge only meant, and the jury must have understood, that this statement was not binding upon them in the sense that they were obliged to base their finding upon it. *Knight v. State*, supra.
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Charging in language of Code.

In charging upon the prisoner's statement, a trial judge can employ no better language than that embodied in the Penal Code, § 1010, providing that the prisoner's statement shall have such force only as the jury may think right to give it, and that they may believe it in preference to the sworn testimony in the cause. *Rouse v. State*, 2 Ga. App. 183, 58 S. E. 416.

It has been said that it would be better in all cases to give in charge the statute and there leave the matter. *Brown v. State*, 60 Ga. 210; *Hendricks v. State*, 73 Ga. 581; *Ozburn v. State*, 87 Ga. 185, 13 S. E. 247.

In *Harrison v. State*, 83 Ga. 136, 9 S. E. 542, Chief Justice Bleckley said: "But why should the presiding judge be more specific than the statute itself, or go beyond its terms? There is no obscurity or ambiguity in the statute. The legislature has made the matter as clear as can the judiciary. Why should not the legislature be left to address the jury in its own language?"

But it is not erroneous to use other language if the substance of the law is correctly stated. *Pitts v. State*, 114 Ga. 35, 39 S. E. 873.

It is not error for the trial court to make appropriate comments on the effect to be given to the statement of the prisoner. The court is not limited merely to reading the section of the Penal Code on the subject, without commenting thereon. *Strickland v. State*, 115 Ga. 222, 41 S. E. 713.

But the court need not amplify an instruction given in the language of the Code upon the prisoner's statement, by telling the jury that, if they believe the statement, they should acquit the accused, or by charging them that they are the exclusive judges of the statement, and authorized to give the accused the benefit of any part of it. *Howell v. State*, 124 Ga. 698, 52 S. E. 649.

Disparaging charge.

A charge is not erroneous which tells the jury that, in determining what weight, if any, the jury are to give to the statement of the defendant, they should take into consideration his manner upon the stand, his manner of making the statement, what he says and how he says it; consider that he is not under oath; that he is under no penalty to speak the truth; that he is not subject to cross-examination without his consent; that they should also consider his interest in the case, and determine whether or not to give his statement any faith or credit; they should consider it along with all the testimony in the case, and determine whether he is guilty as charged. *Hackett v. State*, 108 Ga. 40, 33 S. E. 842.

In *Morgan v. State*, 119 Ga. 566, 46 S. E. 836, the trial judge gave a charge on the prisoner's statement similar to that complained of in *Hackett v. State*, supra, and, while not approved, it was held not to constitute reversible error.

An instruction which cautions the jury not

to view the evidence in detached portions, but to consider the whole of it along with the prisoner's statement, if they believe any of it, and that, if they do not, they may discard it entirely, is erroneous, since the prisoner is entitled to have his entire statement considered by the jury, unaffected by any disparaging intimation by the court that all he said in his defense could not reasonably be accepted as truth. *Field v. State*, 126 Ga. 571, 55 S. E. 502.

It is erroneous for the court to advise the jury that they may set aside the prisoner's statement solely because he has not adduced cumulative evidence or additional or other testimony to the assertions made in the statement, or some of them. *People v. Arnold*, 40 Mich. 710.

A charge to the jury that they are to form their verdict upon the facts sufficiently proved, and that the statement of the prisoner is to be considered by them along with the other evidence in the case, but subject to the same tests as to credibility as apply to the witnesses, and subject, therefore, to be received with caution, because of the position he occupies here, is erroneous, since the statute gives to one accused the right to make his statement to the jury unqualified by caution as to the credibility they shall give to it in view of his momentous interests. *Andrews v. State*, 21 Fla. 598.

An instruction that, in criminal cases, the defendant is not allowed to be sworn as a witness for himself, since it would be too great a temptation to commit perjury, but, while not permitted to swear, the law will not absolutely close his mouth in his own defense, but it permits him to make an unsworn statement as to the whole transaction, is erroneous, since it, in substance, instructs that, in such a case, the accused ought not to be permitted to swear as a witness because he would be under too great a temptation to commit perjury and thus creates the idea that the accused would be under an equal if not greater temptation to speak falsely when availing himself of his privilege to make an unsworn statement to the jury. This error is not cured by the fact that the judge followed this charge with appropriate instructions with respect to the right of the jury to reject or accept the statement of the accused, as they saw proper, but prefaces them with the warning to the effect that the jury should be extremely cautious in believing what the accused said. *Alexander v. State*, 114 Ga. 206, 40 S. E. 231.

That the court after correctly charging the law as to the defendant's statement, added that he was bound by law to instruct the jury on that subject, is not objectionable as detracting from the force and worth of the prisoner's statement by showing that the opinion of the court was that the prisoner's statement was worth but little, but that he was compelled by law to refer to it. *McCord v. State*, 83 Ga. 521, 10 S. E. 437. 19 L.R.A. (N.S.)

Considering statement in connection with evidence.

An instruction authorizing the jury to consider the statement of the accused in connection with the sworn testimony, and to see if the evidence corroborated the statement, although incorrect, and not happily expressed, is not erroneous, where the judge had previously charged the jury explicitly that they might, if they saw fit, believe the statement of the accused in preference to "all the sworn evidence in the case." *Walker v. State*, 120 Ga. 491, 48 S. E. 184.

A charge by the court, after stating the statute law applicable to the statement of the prisoner, that the jury should consider the statement in connection with all the evidence in the case in determining what the truth is and what their verdict ought to be, is not objectionable as confusing the statement with the evidence, nor did it take from the jury the right of believing it in preference to the evidence, where the court had, immediately before, charged that the jury might believe the prisoner's statement in preference to the sworn evidence in the case. *Sutherland v. State*, 121 Ga. 190, 48 S. E. 915.

The court did not err in instructing the jury that they should determine the issues in the case from the testimony submitted to them, considered in connection with the statement of the accused, giving the latter such credit as, in their judgment, it was entitled to, where the court elsewhere told the jury that they could believe the prisoner's statement in preference to the sworn testimony in the case if they believed it to be true. *Murphy v. State*, 122 Ga. 149, 50 S. E. 48.

A charge that the defendant is a competent witness in his own behalf, and that the jury must give his testimony such weight as they think it is entitled to, in connection with all the evidence, if any, which tends to corroborate his statement, should not be given, because it requires the jury to weigh it in connection with all the testimony which tends to corroborate it, instead of with all the evidence. *Dennis v. State*, 118 Ala. 72, 23 So. 1002.

An instruction that, if the jury find from the evidence in the case that the only persons present at the time of the killing were the deceased and the two defendants, and that no other person saw the homicide committed, and that, if the jury find that the defendants have made a reasonable statement of the facts and circumstances of the killing, and the facts stated by them are not denied or contradicted by any other witness on the part of the state, or proved to be untrue by any other evidence in the case, the jury will be warranted in believing what the defendants state, and finding a verdict in accordance with such statements, —invades the province of the jury, and should not be given. *Ballard v. State*, 31 Fla. 266, 12 So. 865.

A charge that the statement of the defendant does not directly deny the assault

with which he is charged, and that his silence would go far to confirm the testimony of the complainant, is not erroneous. *DeFoe v. People*, 22 Mich. 224. The court said: The prisoner's statement may be just as significant in what it omits as what it contains; and its omissions as well as its contents may tend to corroborate or impair the facts of the testimony upon which it may happen to bear; and the jury have a right to give it such weight in this and all other respects as, under all the circumstances of the case, they may think it entitled to; and it cannot, therefore, be erroneous in the court to instruct them that they have such right.

A. W. R.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

EDWARD BELL, Plff. in Err.,

v.

GEORGE H. CARTER et al.

(— C. C. A. —, 164 Fed. 417.)

Trial — evidence — direction of verdict.

1. Whilst it is true that a substantial conflict in the evidence must be determined by the jury as a question of fact, it is also true that, when the evidence is undisputed, or is so clearly preponderant that it reasonably admits of but one conclusion, the proper disposition of the case upon the evidence becomes a question of law, to be determined by the court.

Conversion by sheriff — prisoner's property — trover — demand.

2. A sheriff, who takes from a prisoner in his custody property rightly belonging to the prisoner and thereafter surrenders it to another, in disregard of the prisoner's rights and in recognition of an adverse claim asserted by another, is guilty of a conversion, and becomes liable in trover, without any precedent demand for a return of the property.

(October 8, 1908.)

Headnotes by VAN DEVANTER, Circuit Judge.

Case Note. — Liability of officer who turns over articles taken from prisoner to a third person in recognition of the latter's adverse claim.

There is very little authority upon the question presented by the foregoing case.

In *Houghton v. Bachman*, 47 Barb. 388, it was held that an action in trover will not lie against an officer who has taken certain articles from a prisoner, and has, under the direction of the court, turned the property over to a third party who claimed the ownership thereof. This decision was cited with approval in *Smith v. Jerome*, 47 Misc. 22, 93 N. Y. Supp. 202, in which case the court denied a motion for a mandatory

ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment in plaintiff's favor in an action of trover for the alleged conversion of a gold ingot and certain gold and silver ores. Affirmed.

The facts are stated in the opinion.

Argued before Van Devanter and Adams, Circuit Judges, and Phillips, District Judge. Messrs. Edward J. Boughton, Ralph Talbot, John H. Denison, and William H. Wadley, for plaintiff in error:

Trover will not lie where a defendant has come lawfully into possession of property, until after demand and refusal to deliver.

1 Chitty, Pl. 157; Cooley, Torts, p. 530; Taylor v. Hanlon, 103 Pa. 504; Yeager v. Wallace, 57 Pa. 365; Moore v. Monroe Refrigerator Co. 128 Ala. 621, 29 So. 447; Gillet v. Roberts, 57 N. Y. 28; Dieterie v. Bakin, 143 Cal. 683, 77 Pac. 664; Phelps, D. & P. Co. v. Halsell, 11 Okla. 1, 65 Pac. 340; Moynahan v. Prentiss, 10 Colo. App. 295, 51 Pac. 94; Davis v. Hurt, 114 Ala. 146, 21 So. 468.

Messrs. R. S. Morrison and Emilio D. DeSoto, for defendants in error:

The sheriff was guilty of conversion at the moment he turned this property over to an unauthorized and irresponsible party.

Burton v. Dangerfield, 141 Ala. 290, 37 So. 350; Matheny v. Johnson, 9 Mo. 235.

Mr. A. R. Morrison also for defendants in error.

Van Devanter, Circuit Judge, delivered the opinion of the court:

This was an action of trover for the alleged conversion of a gold ingot and 20 sacks of crushed gold and silver ores. At the trial, which was to a jury, the evidence, without any conflict, established these facts: The defendant was the sheriff of Teller county, Colorado, and as such took the plaintiffs into custody upon a charge of larceny, which was subsequently dismissed. At the time of their arrest the plaintiffs had with them the ingot and ores, and were the right-

injunction that the district attorney turn over to the plaintiff certain letters received by him from his wife, and which had been seized by the police upon the plaintiff's arrest for conspiracy.

A somewhat analogous question is treated in the case note to *Moss Mercantile Co. v. First Nat. Bank*, 2 L.R.A. (N.S.) 657.

Cases involving the liability of an officer who retains in his own possession property taken from a prisoner are not within the scope of this note. A number of such cases will be found in a case note upon *Right of officer, in executing criminal process, to take possession of evidentiary articles*, to *Getchell v. Page*, 18 L.R.A. (N.S.) 253.

ful owners thereof. The defendant took this property into his possession and custody, insisting that it was stolen, and then turned it over to one Burbridge, who was the secretary of the Cripple Creek District Mine Owners' & Operators' Association. Burbridge delivered the ores to the Eagle Ore Sampling Company, and shortly thereafter it disposed of them at the direction of the Mine Owners' & Operators' Association, and paid to the latter the full value of them. Subsequently, when the criminal charge was dismissed, the plaintiffs commenced an action against the defendant in the district court of Teller county to compel the redelivery to them of the specific ingot and ores so taken from them. In that action the defendant answered under his personal oath, alleging that the property never belonged to the plaintiffs, that their possession had been without right and unlawful, that, after the property came into his possession, he delivered it to the Mine Owners' & Operators' Association as the agent of the real owner, and that the property had thus passed out of his custody and into the hands of its true and lawful owner. Without further pursuing their action for a redelivery, the plaintiffs then commenced the present action, charging an unlawful conversion of the property by the defendant. He answered with a general denial.

Apart from a dispute respecting the value of the property, the only possible conflict in the evidence related to the nature and purpose of the delivery to Burbridge. The circuit court was of opinion that the evidence, reasonably interpreted, admitted of but one conclusion; that is, that the delivery to Burbridge was intended to be, and was, a delivery to the Mine Owners' & Operators' Association, and was intended to be, and was, a repudiation of the claim of the plaintiffs, and a recognition of the adverse claim of another, of whom the association was claiming to be the agent. A verdict for the plaintiffs was accordingly directed, only the question of value being submitted to the jury.

Without questioning that the verdict was rightly directed, if the evidence reasonably admitted of no other conclusion than the one stated, the defendant insists that there was evidence which made the nature and purpose of the delivery to Burbridge a question of fact for the jury. It becomes necessary, therefore, to consider whether there was a substantial conflict in the evidence on that point. If so, the insistence is well taken; otherwise, it is untenable. Whilst, it is true that a substantial conflict in the evidence must be determined by the jury as a question of fact, it is also true that, when the evidence is undisputed, or is so clearly

preponderant that it reasonably admits of but one conclusion, the proper disposition of the case upon the evidence becomes a question of law, to be determined by the court. *Robinson v. Denver City Tramway Co.* (C. C. A.) 164 Fed. 174, and cases cited.

The chief item of evidence bearing upon the question under consideration was the defendant's declaration, in his sworn answer in the prior proceeding, that he had delivered the property to the Mine Owners' & Operators' Association as the agent of another claimant, whom he described as "its true and lawful owner." Of course, that deliberate and solemn declaration could not be easily overcome or lightly disregarded. His attention was directed to it when he was testifying in his own behalf, and all that he could say about it was that he did not remember making it.

The substance of his other testimony, which was somewhat contradictory, is embodied in the following extract from his cross-examination:

Q. What date did you deliver this (the property in question) over to the Mine Owners' Association?

A. The same day it arrived in Cripple Creek.

Q. The very day?

A. Yes, sir.

Q. Then it had been arranged in advance that it should be delivered to them as soon as it got there, had it?

A. No, sir.

Q. How did it come to happen, then, on the same day that you delivered it?

A. In taking the ore from the express company's office I met Colonel Burbridge, as I said a while ago.

Q. He was the secretary of this association?

A. Yes, sir.

Q. You say you delivered it to him simply for safe-keeping?

A. I turned it over to him, and it was with the understanding that it was to go to the Eagle Ore Sampling Company's vault for safe-keeping, as I had no safe in which to keep it.

Other answers given by him indicated that, shortly after he delivered the property to Burbridge, he was looking to the Mine Owners' & Operators' Association, rather than to the sampling company, for indemnification, if he met with loss by reason of what was done. One of his witnesses, a deputy sheriff, testified that he put the sacks of ore in the sampling company's vault at the direction of Burbridge, and also turned over to him the gold ingot; and another of his witnesses, the manager of the sampling company, testified that that com-

pany received the ore from the Mine Owners' & Operators' Association and did not know the defendant in the transaction, that the ore was disposed of at the direction of the association and payment therefor was made to it, that the course pursued was the same as in other cases where ore had been seized by the association, and that the gold ingot was not delivered to the sampling company. There was no evidence that Burbridge was a suitable person to be charged with the safe-keeping of the property, or that he had any official connection with the sampling company, or that he had actual or apparent authority to speak for it, or that the defendant exacted from him or it a receipt acknowledging that the property was received for safe-keeping merely. Burbridge was not called a witness, and it was conceded that the gold ingot went to the Mine Owners' & Operators' Association, and not to the sampling company.

From this recital of all the evidence upon the subject, it is apparent that the conflict therein respecting the nature and purpose of the delivery to Burbridge resulted from the conflicting statements in the personal testimony of the defendant, and that but for his statement, repeated two or three times, that that delivery was upon the understanding that the property was to be placed in the vault of the sampling company for safe-keeping, the evidence would all have been the other way. That statement is not only without corroboration, but is altogether inconsistent with his statement that he turned the property over to the Mine Owners' & Operators' Association on the very day that he reached Cripple Creek with the prisoners and the property, is inconsistent with his conduct at the time and shortly thereafter, is inconsistent with his deliberate and solemn declaration in his sworn answer in the other case, is inconsistent with what was actually done by Burbridge, the association, and the sampling company, and is inconsistent with the reasonable purport and effect of the testimony of the deputy sheriff and the manager of the sampling company. In that situation we think that the conflict in the evidence was unsubstantial, and that, reasonably considered, the evidence that the delivery was actually to the Mine Owners' & Operators' Association, and was in disregard of the plaintiffs' claim and in recognition of an adverse claim, was so clearly preponderant that no other conclusion was reasonably admissible.

It is also said that, as the defendant lawfully came into possession of the property, he could not be charged with conversion in the absence of a proper demand for its return. Ordinarily that would be so; but when such a custodian delivers the property

to another in disregard of the rights of the owner, and so puts it out of his power to return it, he makes a demand unnecessary. 2 Cooley, Torts, 3d ed. 870 et seq.; 1 Chitty, Pl. 16th Am. ed. *178.

As it follows that a verdict for the plaintiffs was rightly directed, the judgment is affirmed.

IDAHO SUPREME COURT.

STATE OF IDAHO, Respt.,
v.

L. CHURCHILL, Appt.

(— Idaho, —, 98 Pac. 853.)

Dogs — malicious killing — gist of action.

1. In a prosecution under § 7153, Rev. Stat. 1887, for the malicious killing, maiming, or wounding of a dog, malice is the gist of the action, and must be established to the satisfaction of the jury beyond a reasonable doubt, in order to justify a conviction.

Same — presumption of malice — burden of proof.

2. In a prosecution for maliciously killing, wounding, or maiming dogs, the state must either show that the defendant entertained malice against the owner of the dogs,

Headnotes by AILSHIE, Ch. J.

Case Note. — Right to kill dogs.

This note is supplemental to that appended to the case of Hamby v. Samson, 40 L.R.A. 510, and excludes cases of negligent killing of dogs.

Under police power.

The summary destruction of a dog by a humane society without notice to the owner, when he has failed to procure a license therefor as required by law, does not constitute a taking of property without due process of law. Fox v. Mohawk & H. River Humane Soc. 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353.

Neither does the grant of such authority to a humane society constitute an unconstitutional delegation of governmental power, since unlicensed dogs have long been regarded as subject to destruction by any person. Ibid.

And the killing by a police officer of an unmuzzled dog found running at large upon the city streets unattended by any person, at a time when hydrophobia is to be apprehended, is justified by an ordinance authorizing police officers to kill all unmuzzled dogs found running at large. Walker v. Towle, 156 Ind. 639, 53 L.R.A. 749, 59 N. E. 20.

A deputy game and fisheries commissioner who, believing a dog had been chasing deer, shoots it for no other reason, may justify

Mo. 452; *Brown v. State*, 26 Ohio St. 176; *State v. Toney*, 15 S. C. 409; *State v. Doig*, 2 Rich. L. 179; *Manes v. State*, 20 Tex. 38; *Nutt v. State*, 19 Tex. 340; *R. v. Tivey*, 1 Den. C. C. 63; *Bromage v. Prosser*, 4 Barn. & C. 247; *State v. Roscum*, 128 Iowa, 509, 104 N. W. 800; *State v. Dowdell*, 106 La. 645, 31 So. 151; *Funderburk v. State*, 75 Miss. 20, 21 So. 658; *State v. Gilligan*, 23 R. I. 400, 50 Atl. 844; *R. v. Elston*, 10 N. B. 2; *State v. Williamson*, 68 Iowa, 351, 27 N. W. 259; *Ex parte Mauch*, 134 Cal. 500, 66 Pac. 734.

Malice is inferred from the act of killing and the manner of committing it.

People v. Burkhardt, 72 Mich. 172, 40 N. W. 240; *People v. Petheram*, 64 Mich. 252, 31 N. W. 188; *Com. v. Burton*, 1 Susquehanna Leg. Chron. 66; *Wallace v. State*, 30 Tex. 758.

Dogs killing or worrying other domestic animals and fowls.

In *Harrington v. Hall* (Del.) 63 Atl. 875, a nisi prius case, the court instructed the jury that the killing of a trespassing dog in the act of killing a turkey is justifiable.

A killing of a trespassing dog, which is not doing any injury at the time, is not justified by the fact that it had been a frequent trespasser, and had previously chased and killed fowls, and the owner had been requested to restrain it. *Harris v. Eaton*, 20 R. I. 81, 37 Atl. 308. See also *McChesney v. Wilson*, supra.

As a statute permitting any person to kill a dog found out of the inclosure or care of its owner, worrying neat cattle, sheep, or lambs, does not take away the common-law right to kill a dog in defense of one's property, it is justifiable to shoot a dog found killing fowls, if one rightfully believes there is no other way to protect them. *Nesbitt v. Wilbur*, 177 Mass. 200, 58 N. E. 580.

The killing of a dog, found in one's inclosure frightening and chasing cattle, without any effort being made to prevent it so doing, renders him guilty of a wanton killing, as there is no apparent necessity for killing it. *Brookerson v. State*, 49 Tex. Crim. Rep. 421, 93 S. W. 725.

A statute permitting the killing of a dog "found worrying, wounding, or killing any domestic animals outside the inclosure or immediate care of its owner" will not justify killing a dog unless caught in the act. *Chapman v. Decrow*, 93 Me. 378, 74 Am. St. Rep. 357, 45 Atl. 295.

An act to prevent sheep and other domestic animals being killed by dogs, and permitting the killing of any dog doing damage thereto, will not justify one in shooting a dog that has injured his own dog in a fight. *Brown v. Graham* (Neb.) 114 N. W. 153.

Malicious killing of dogs.

One who, intending to shoot his own dog with small shot in order to drive him home, by mistake shoots the dog of another, is 19 L.R.A. (N.S.)

Trespassing animals may be killed only when there is reasonable cause to believe that such killing is necessary to protect property, or human life or safety.

Fenton v. Bisel, 80 Mo. App. 135; *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582; *State v. Rivers*, 90 N. C. 738; *Com. ex rel. Wilson v. Fourteen Hogs*, 10 Serg. & R. 393; *Sosat v. State*, 2 Ind. App. 586, 28 N. E. 1017; *McChesney v. Wilson*, 132 Mich. 252, 93 N. W. 627, 1 A. & E. Ann. Cas. 191; *Brookerson v. State*, 49 Tex. Crim. Rep. 421, 93 S. W. 725; *Harris v. Eaton*, 20 R. I. 81, 37 Atl. 308; *Hodges v. Causey*, 77 Miss. 353, 48 L.R.A. 95, 78 St. Rep. 525, 26 So. 945; *Reed v. Goldneck*, 112 Mo. App. 310, 86 S. W. 1104; *Harrington v. Hall* (Del.) 63 Atl. 875; *State v. Brigman*, 94 N. C. 888; 1 Wigmore, Ev. § 68; 1 Jones, Ev. § 102.

punishable under a statute declaring it malicious mischief to shoot dogs in malice, sport, or cruelty. *Ross v. State* (Tex. Crim. App.) 108 S. W. 697.

A person traveling upon a highway is guilty of malicious mischief in shooting a dog when 25 or 30 yards from it, merely because it protrudes its nose through its owner's fence and barks. *Atchison v. State*, 44 Tex. Crim. Rep. 551, 72 S. W. 998.

It is for the jury to determine whether a dog was "maliciously" poisoned where one whose small son had been bitten by the dog, which, contrary to warnings, he was teasing, after the former had demanded the custodian of the dog to kill it, two weeks later coaxed it from the latter's premises and fed it poisoned meat. *State v. Coleman*, 29 Utah, 417, 82 Pac. 466.

And, from such circumstances, as the killing was intentional and unlawful, malice may be inferred. *Ibid*.

In the absence of a denial by the respondent, a conviction of unlawfully killing a dog is justified upon evidence that he told the owner of the dog that he killed it, and no excuse for so doing appeared. *Henderson v. State*, 53 Tex. Crim. Rep. 533, 111 S. W. 736.

Dogs are within a statute making one liable for the malicious, wilful, or wanton killing of any animal which it is larceny to steal. *State v. Soward*, 83 Ark. 264, 11 L.R.A. (N.S.) 1117, 119 Am. St. Rep. 136, 103 S. W. 741.

In a prosecution for malicious mischief in shooting a dog, for the purpose of rebutting a charge of malice, wilfulness, and wantonness, and showing if it was shot by the respondent it was in protecting his property, it may be shown that the dog was shot when among respondent's sheep, and that its presence there would have frightened them and caused ewes heavy with lamb to lose them. *Caldwell v. State* (Tex. Crim. App.) 115 S. W. 597.

See also *Miller v. State* and *Brookerson v. State*, supra.

Allshle, Ch. J., delivered the opinion of the court:

The defendant was prosecuted on the charge of malicious mischief for shooting, maiming, and killing dogs belonging to one John A. Kelly, the complaining witness. The jury returned a verdict against the defendant, and he was thereupon sentenced to pay a fine. He moved for a new trial, and his motion was denied, and he thereupon appealed from the judgment and order denying his motion. This prosecution is founded on §7153, Rev. Stat. 1887, which is as follows: "Every person who maliciously kills, maims, or wounds an animal, the property of another, or who maliciously and cruelly beats, tortures, or injures any animal, whether belonging to himself or another, is guilty of a misdemeanor."

The chief contention urged is that the evidence wholly fails to establish malice. In the consideration of both the facts and the law in the case, it should be borne in mind that this is a criminal prosecution, and not a civil action for damages, and what may hereafter be said in this opinion will be with special reference to the status of the defendant in his conduct toward the dogs as viewed by the criminal law. It appears that, on January 12, 1908, the complaining witness, Kelly, started out with a pack of 13 hounds to hunt coyotes. The defendant, his wife, and two hired men testified that, sometime before noon that day, a number of these hounds came onto his place, and ran through his corral and barn lot, apparently chasing after his cattle and hogs, and frightening the cows and likewise the hogs; that defendant chased the dogs away several times with sticks and stones. In the afternoon they appeared on several occasions, running through the corral and barn lot, and apparently after the cows and hogs, bawling and yelping as they ran. The defendant, who was at work on a building near the barn, got down from his work several times and drove the dogs away, and, finally, when they were chasing some of his hogs, he got his gun and took several shots at the dogs, killing one and wounding others. Two of the dogs that were wounded were produced in court, and the defendant, his wife, and the two hired men testified that to the best of their knowledge these were the same dogs that were on defendant's ranch at several different times on the 12th day of January, the day on which the shooting occurred. The defendant owned a farm of some 300 acres, and was engaged chiefly in the dairy business. He also had a number of hogs and other live stock on the place. The leading facts in the occurrence are covered by the defendant's evidence, which is substantially corroborated by that

of his wife and hired men. It is as follows: "Our cows were in there, and, as many of them were heavy with calf, I had been watching them very carefully. When the dogs ran in there barking, I got down and ran there as quick as I could. At that time they had the cattle bawling and chasing around, and I went after the dogs with anything I could pick up—sticks and stones—and chased the dogs, who were following the cattle down this path going to the river. I chased the dogs down that way, and they would run and look back to see what I was throwing, and dodging. I followed the dogs down this way, and took a circle around this brush. I must have been gone a half hour. I was looking for a man with a gun going with the dogs and I could not find anyone on the place, and I went back and went to work again. . . . Not only would the dogs run through the corral and chase things around, but they chased the calves and pigs in those yards here, and had nearly everything on the place stampeded. I drove these dogs out this way and down that way just as quick as I could each time. The dogs were chasing cows. They appeared to be chasing them. They would run this way and that way. At the time they went in the corral I had no idea they were on any scent. They weren't running in a bunch. Each dog was chasing something individually. The only time I saw the dogs together trailing each other in a bunch, or approaching that, was in the morning when I saw the four. In the evening I saw four dogs out here in one bunch, and I saw three in this corral around the barn. I never saw more than four dogs together that day in one bunch. I began to be pretty well annoyed late in the afternoon. I thought I had had enough of it. About 5 o'clock, just before we were to do our chores, some dogs ran into the corral in this direction and began to chase the calves and pigs here, and I just ran into the house and picked up a gun, a small 22-caliber rifle. I have no other gun on the place. I picked up a few 22 cartridges,—smokeless cartridges,—and I ran out here to this point [indicating], and ran to the barn where the dogs were chasing the pigs [indicating] right in there, and I intended to shoot them right here. I could not get rid of them any other way. I had stoned and sticked them all day, but there were so many animals there I did not dare to shoot them. I chased them down in this direction, and they got into the brush before I got a shot at them. I came back up here between the haystack and the barn. My wife was standing over heré somewhere, and she called to me that the dogs were out in front of the house, chasing the pigs, so I

went out in that direction as fast as I could. I ran past the corner of the milk house, and almost on a line with the corner of that fence just about in that direction [indicating south]. That is just about as near my direction as I can point it. I came out at a point just here, and here is where I took a shot at the dogs. At the time I went out there were four dogs chasing the pigs. Each dog was chasing a bunch of pigs. Some of these pigs were brood sows, and I went out there to stop it. Two bunches of pigs were driven off in this direction [indicating], and one bunch was driven over to this fence, and they went through the fence into my neighbor's field. This was at the time I shot the dogs. I shot them while they were in the act of chasing the pigs. At that time on the ranch I had eight head of horses, about 50 cattle stock, a flock of chickens, a flock of pigeons, and over 100 hogs of different sizes. I have mostly Jersey cattle on the ranch, 31 head, and am trying to dispose of everything else. On the ranch that day there were 8 or 9 cows that were expected to calve very soon. One cow dropped her calf within twenty-four hours from the time I shot at the dogs. That was Monday. On Tuesday another cow dropped her calf, and on the following Monday we had another Hereford calf and the Tuesday following another, and on the 28th of January another, making five that have dropped their calves since the shooting. All were milch cows that were on the place. At that time we milked 10 head. The drove of hogs consisted of 8 brood sows, 1 boar, and the balance of the 100 were fair-sized pigs three months old up to pigs that weighed 150 to 200 pounds. One of the sows had farrowed three days before the shooting, and the others were heavy with pig. Since the shooting four of the sows have aborted; that is, produced their pigs prematurely. The pigs didn't live. . . . Twenty-four pigs died. My object in shooting at the dogs that day was to protect my stock, and prevent the dogs from doing it any injury. At the time of the shooting I did not know to whom these dogs belonged. During the day no man appeared on the ranch to look after the dogs or to take care of them."

The state on rebuttal produced witnesses who testified that these hounds were at other places at or near the times when defendant says they were on his ranch, and that they could not, therefore, have been on his place as frequently that day as he and his witnesses claim. This evidence had a tendency to establish an alibi for the dogs for a part of the day, but does not take into consideration the capacity of the dogs for rapid transit between the *locus* of the

alibi and the defendant's ranch. It is admitted that the dogs were there in the afternoon. The state also attempted to rebut and contradict the evidence of defendant and his witnesses by producing experts on the pedigree, traits, habits, and instincts of the dogs, and especially of English fox hounds, such as these were shown to be. It appears that they were full-blood English fox hounds, bred in Missouri and brought from thence to Idaho, and the older ones are referred to by the prosecutor as Missouri hounds. These experts on dog lore testified that such hounds as these would neither chase nor harm domestic animals, and that they would pay no attention to them. They also testified to a personal acquaintance with and observation of these hounds, and that they would not and could not be induced to chase or disturb cattle or hogs. Where the evidence was direct from four eyewitnesses, as was the case here, proof of traits, habits, and reputation, or, as commonly designated, character evidence, would not contradict the eyewitnesses and had no real bearing on the case. The transaction was not established by circumstantial evidence, but by eyewitnesses. Under the rule applicable in cases of homicide, the good reputation of the deceased may not be shown by the state until it is attacked by the defendant. Here the character, or rather the reputation, of the deceased dog was not attacked by the defendant, but only his positive acts and conduct were shown by defendant. This evidence could throw no light on the issue unless it was shown that the defendant knew these traits of the dogs in question. On the contrary, it appears from his own testimony and otherwise that he knew nothing about the traits, habits, or instincts of English fox hounds or dogs of the chase. In the absence of such knowledge in advance, he had a right to act on appearances. In other words, defendant contends that there was apparent impending danger to his live stock such as a reasonable man would resist. *Marshall v. Blackshire*, 44 Iowa, 475; *Livermore v. Batchelder*, 141 Mass. 179, 5 N. E. 275. The question that confronted defendant was not what the dogs really meant to do (in the absence of positive information to that effect), but what they were doing or apparently intended to do. As said by the supreme court of New Hampshire in *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339, a leading case on the right of defense of property as against the assaults of animals: "He [the defendant] might have entertained, and had good cause to entertain, erroneous ideas of the character of the minks. . . . The evidence against them tended to show what in a human creature

would be the ordinary symptoms of a felonious spirit regardless of social duty and fatally bent on mischief." And again the same court, in considering the question as to whether the defendant was in fact acquainted with or informed as to the habits of certain animals, held that he was not chargeable with such knowledge, and said: "It was not his duty to postpone the defense of his property until, neglecting his usual occupations and incurring expense, he could examine zoölogical authorities, consult experts, or take the opinion of the county on the question whether his 'half-grown' geese were actually endangered in life or limb, etc. The law does not require the farmer who engages in raising live stock to first familiarize himself with the traits and habits of all the breeds of dogs that may infest the country. He may not know the difference between a tramp dog or common cur and a blooded English fox hound with a pedigree antedating the landing of the Mayflower. He may not know, in fact, that the fox hound when he gallops and cake walks up and down the barn lot to the great confusion and consternation of the cattle, hogs, and fowls is merely following the trail of a hungry coyote that had been pilfering the night before, bent on murder and theft; but, on the contrary, he may honestly assume that the hound, himself a trespasser, is bent on mischief, and, if he does not retreat when warned, may at once become liable to forcible ejection. In such case the farmer cannot risk the dangers to his live stock while he investigates the dog's pedigree; and, even if he were advised of that, how can he know at what moment the vicious traits of the dog's remote wolf and jackal ancestors may not get the better of his breeding and social training and run riot in that same barnyard? *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693. Even if it were a fact that defendant knew the traits and habits of the hounds and their alleged kindly and amiable disposition toward his cows and hogs, he had no way of imparting that knowledge to his frightened animals, neither did the cows and hogs have any notice that the hounds, though bawling, yelping, and bay-ing, would not bite, maim, or kill them. They were not informed as to the hounds' pedigree. They, too, were acting on appearances and the instinct of self-protection. The result was that the animals became alarmed and frightened, and as a consequence defendant thereafter suffered a direct pecuniary loss to the extent of 24 prematurely born pigs and 10 per cent falling off in the production of milk.

Here the defendant's cows and hogs were 19 L.R.A. (N.S.)

in their owner's field,—a place where they had a lawful right to be. The hounds were trespassers in the first place. After they had been warned away and sticks and stones had been thrown at them, they became forcible trespassers,—trespassers *vi et armis* as it were. The assault made by the trespassers upon defendant's cows and hogs was one of apparent danger and peril. So imminent was the peril that the hogs not only retreated but broke the fence, and became themselves kind of involuntary trespassers in the field of defendant's neighbor. The cows, in their alarm, retreated to the wall, and there gave the sign of distress, and sounded the bovine call for help. Now, the question arises: Was it *per se* malicious for defendant, under these circumstances, to come to the defense of his property, and, in ejecting the trespassing canines, to shoot them? The farmer is not required to fence against dogs. The dogs were unaccompanied by their master, and were undoubtedly running back and forth among defendant's cattle and swine. They were either chasing defendant's live stock or following the scent of a wild animal, neither of which their master owned. If they were only following the trail of a wild animal across the field and through the barnyard, and the defendant had been apprised of that fact and that their intentions toward his kine and swine were honorable and well disposed as would become English fox hounds born and bred in Missouri, then he would perhaps not have been justified in making a deadly assault on them. Of these things, however, he had no notice; besides, he was justified in considering the effect the conduct of the trespassers was having on his cows and hogs, and especially on his gravid animals. He was not obliged to wait until the injury was done and rely on an action for damages to recompense him. The law of trespass is that the injured party shall gently lay hands on the trespasser (*manus molliter imposuit*), and warn him to move on before further force can be used. In this case the defendant for obvious reasons could not lay hands on the hounds, but he warned them with sticks and stones, but to this they gave no heed. It then became a question with the owner of the premises as to whether the trespassers should be ejected or allowed to scare, frighten, and terrorize defendant's live stock off the ranch. For similar reasons, he could not distrain or impound the hounds.

This is a prosecution where criminal intent is the gist of the action, and must be shown (§ 7153, and subdivision 4, § 6301, Rev. Stat. 1887; 19 Am. & Eng. Enc. Law, p. 641; 2 Cyc. Law & Proc. p. 428), and differs materially from a civil action for dam-

ages for the killing or maiming of such animals. In an action for damages, evidence of the pedigree, habits, traits, and reputation of the dog is important in determining his value to his owner. The admission of this class of evidence was considered by Mr. Justice Wilkes in the cases of *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 40 L.R.A. 518, 66 Am. St. Rep. 754, 45 S. W. 790, and approved, and it was said that "there are high and low degrees among dogs as well as among men," and that the dog there involved stood high in "dog circles," and properly belonged to the "blue blood and inner circles of the 400" of Tennessee. The ruling of the court in admitting the evidence in that case was sustained on the ground that it was proper in estimating the value of the dog. There is a great diversity of opinion among the courts in actions for damages as to the circumstances and conditions under which a trespassing dog may be killed. It was aptly remarked by Justice Wilkes in *Citizens' Rapid Transit Co. v. Dew*, *supra*, that "dog law" is as hard to define as 'dog latin.'" See 2 Cyc. Law & Proc. p. 427. Some courts, out of an abundant admiration for the dog, have descanted on his fidelity and good qualities from the spaniel that saved the life of William of Orange (*Mullaly v. People*, 86 N. Y. 365) to the tramp cur "Roger" eulogized in "The Vagabonds;" and in so doing they have generally overlooked the rights of property owners who were subjected to the dog's trespasses. For interesting discussions and notes, see *Fink v. Evans*, 95 Tenn. 413, 32 S. W. 307; *Hamby v. Samson*, 105 Iowa, 112, 40 L.R.A. 508, 67 Am. St. Rep. 285, 74 N. W. 918; *McChesney v. Wilson*, 132 Mich. 252, 93 N. W. 627, 1 A. & E. Ann. Cas. 191; *Patton v. State*, 93 Ga. 111, 24 L.R.A. 732, 19 S. E. 734.

From what has been said, it clearly appears that whether or not the defendant could, in a civil action for damages, justify the use of force to the extent and degree it was exercised by him in ejecting the dogs, nevertheless, his action and conduct was in no manner prompted by malice toward the owner of these hounds, nor was it characterized by a wanton and reckless disregard of the rights of property in such animals. The defendant evidently used violence on the dogs through a desire and for the unmistakable purpose of removing them from his premises, and preventing them from annoying and disturbing his live stock. Whether he clearly and accurately measured the force he was using sufficiently to justify him in the eye of the civil law is beside the question here. That he did not act with criminal and malicious intent to wantonly

and recklessly destroy the property of another is too clear and apparent to leave any question for submission to a jury on that score. "Malicious," as used in the statute under which this prosecution is had, is not equivalent to the word "wrongful" as used in the law of torts. The former word means more than the latter. It necessarily involves crime, while the latter does not necessarily do so. *Chappell v. State*, 35 Ark. 345; *State v. Hussey*, 60 Me. 410, 11 Am. Rep. 209; 2 Wharton, *Crim. Law*, §§ 1068-1070; *State v. Phipps*, 95 Iowa, 491, 64 N. W. 411; *United States v. Gideon*, 1 Minn. 292, Gil. 226; *State v. Rector*, 34 Tex. 565; *Note to State v. Robinson*, 32 Am. Dec. 661; 19 Am. & Eng. Enc. Law, p. 643. The evidence is not sufficient to support the verdict. Instead of establishing malice on the part of the defendant, the evidence negatives malice. However liable a man may be in damages for injury to or destruction of trespassing dogs, it will not do to say that he can be brought to the bar of the criminal courts every time he protects his property against the depredations and annoyances of dogs, whether they be patrician or plebeian dogs.

The judgment is reversed, and a new trial granted.

Sullivan, J., concurs. Stewart, J., concurs in the conclusion reached.

IOWA SUPREME COURT.

J. H. QUEAL & COMPANY, Appt.,

v.

JAMES PETERSON.

(— Iowa, —, 116 N. W. 593.)

Contract — debt of another — consideration.

An agreement in writing by one to take up a past-due note of another if it remains unpaid at a certain future date, without additional consideration to support it, is without consideration, and unenforceable, where the promisor makes no request for forbearance of suit against the maker of the note, and the promisee does not agree to forbear suit; and the mere fact that he does so forbear is not sufficient to establish either such promise or request.

(June 4, 1908.)

Case Note. — *Mere forbearance to sue as consideration for promise by a third person to pay an existing obligation.*

That an agreement to forbear to sue in consideration of a promise by a third person to pay the debt of another constitutes a valid

APPEAL by plaintiff from a judgment of the District Court for Lyon County in defendants' favor in an action brought to hold defendant liable on a guaranty. Affirmed.

The facts are stated in the opinion.

Mr. Simon Fisher for appellant.

Mr. E. C. Roach, for appellee:

A contract to pay the debt of another, made subsequent to the date of the main contract, must be in writing and supported by a distinct and good consideration other than the original indebtedness.

9 Cyc. Law & Proc. p. 319; Walker v. Irwin, 94 Iowa, 448, 62 N. W. 785; 1 Beach, Modern Law of Contr. p. 594, § 505.

McClain, J., delivered the opinion of the court:

On April 8, 1896, one Nielson was indebted to plaintiff on a promissory note for \$120 then past due, and defendant executed to plaintiff his promise to pay the same in the following words: "In regard to the N.

S. Nielson note of \$120 held by you and due September 1, 1895, if this note is not paid by said Nielson by October 1, 1896, I hereby agree to take it up October 1, 1896, for \$100." Action being brought against defendant on this obligation, nonpayment by Nielson of his note being alleged, defendant denied his liability on the ground that his obligation was entered into without any consideration, and the evidence showed that, while defendant did voluntarily undertake to satisfy Nielson's obligation for \$120, with interest, by paying \$100 at a future date, provided Nielson's note then remained unpaid, there is no evidence that defendant requested plaintiff to forbear suit on the Nielson note, or that plaintiff agreed to forbear such suit, or that plaintiff did forbear in reliance on defendant's guaranty. An agreement to forbear for a time the enforcement of a claim is a valid consideration for the promise of a third person to pay. Burke v. Dillin, 92 Iowa, 557, 564, 61 N. W. 371; Rix

contract is well settled. The cases so holding are not included herein.

Cases involving a promise under seal to pay, which imports a valuable consideration, are also excluded.

The apparent conflict among the cases on this proposition will, if the language of the courts be confined to the issues presented, and in reference to which the language was used, generally be found to be reconcilable. At first glance it would appear that there is one line of authority holding that there must be a valid and enforceable mutual agreement to forbear between the promisor and promisee in order to support the promise; while still another line of cases hold that such an agreement may be implied from a promise to pay, and other circumstances, followed by actual forbearance in reliance thereon; and still another class of cases hold that a request to forbear, express or implied, followed by forbearance in compliance therewith, may furnish a good consideration for a promise to pay.

These cases, however, are not necessarily in conflict. In the first class of cases, it did not appear that the promisor had requested the promisee to forbear, and the court was therefore merely considering the effect of a mere promise to pay, followed by actual forbearance. And while in those cases, as will hereafter be seen, language was used which would indicate that there must be an enforceable agreement to forbear in order that the promise to pay in consideration of forbearance be valid, yet, as stated, this language was not used in reference to a case in which there was evidence of a request to forbear.

The same may be said of the second class of cases. In those cases there was no evidence of an actual request to forbear. The doctrine of these cases, that a mutual agreement to forbear may be inferred from the promise to pay, together with other circum-

stances, followed by actual forbearance, is not in conflict with the third class of cases that either hold or recognize that an actual request to forbear, followed by forbearance, is sufficient to authorize an implication of a promise upon the part of the promisor to pay, although the promisee has at no time been bound by a valid, enforceable agreement to forbear. The promise implied in this latter class of cases seems to be a promise on the part of the promisor rather than the promisee; that is, where the promisor asks a forbearance and agrees to pay the debt, it is apparently regarded as a complete arrangement or contract where there is an actual forbearance in compliance with the request. The promise to pay will be implied as of the time of the forbearance. In a way it is a continuing promise.

Reverting to the first class of cases, the doctrine may be said to be well settled that the mere forbearance to sue, although in reliance upon a promise by a third person to pay the debt of another, is not a sufficient consideration to render the promisor liable on the promise. This was the doctrine of Hargroves v. Cooke, 15 Ga. 321, wherein an express promise to pay the debt of another was held invalid under the statute of frauds, because there was nothing contained in the promise to indicate that forbearance entered into the consideration, or that there was any agreement to forbear.

So, in Bieber v. Beck, 6 Pa. 198, the fact that a person undertook to be bail for another to secure a stay of execution, but the entry on the judgment docket was not in such form as to comply with the statute, and was therefore not enforceable as statutory bail, was held not to be sufficient to enable the promisee to hold the promisor on the theory that it was a promise to pay the debt of another in consideration of the forbearance to sue out execution, followed by actual forbearance. The court said that

v. Adams, 9 Vt. 233, 31 Am. Dec. 619. While it seems to have been thought at one time that the promise to forbear which would serve as consideration for a guaranty by a third person must be for a definite time, or for a reasonable time, nevertheless it has been held that, where there is an agreement to forbear, it will be presumed to be for a reasonable time, in the absence of any stipulation as to a specified time. *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330; *Sidwell v. Evans*, 1 Penn. & W. 383, 21 Am. Dec. 387. If the creditor does in fact forbear from suing at the request of another, there is a good consideration for the guaranty of the indebtedness in connection with such request. *Crears v. Hunter*, L. R. 19 Q. B. Div. 341. But the mere fact of forbearance is not sufficient evidence from which a promise to forbear may be presumed, in the absence of any circumstances from which such agreement may be inferred. *Manter v. Churchill*, 127 Mass. 31,

As the defendant did not request plaintiff to forbear suit on the Nielson note, and plaintiff did not agree to do so, the fact of forbearance does not indicate that it was in pursuance of a promise to forbear, nor does the forbearance itself imply a request. Had plaintiffs brought suit against Nielson immediately after the execution of defendant's obligation, Nielson could not have defended on the ground that there was an agreement of extension. Therefore plaintiff, having remained without interruption entitled to all the rights which they had against Nielson, suffered no detriment in consequence of the guaranty given by defendant, and, on the other hand, neither Nielson nor defendant received any benefit in consequence of defendant's promise. It is clear that, under such circumstances, defendant's promise to pay Nielson's debt was without consideration.

Judgment of the trial court is therefore affirmed.

the jury found no more than an offer to be bail for a stay of execution, and that execution did not issue within the period, and that it did not follow from such facts that the offer was accepted, and the court added that the acceptance of the offer, if such was the fact, ought to have been expressly found by the jury.

To the same effect, under a very similar state of facts, is *Shupe v. Galbraith*, 32 Pa. 10.

And in *Hoffman v. Mayaud*, 35 C. C. A. 256, 93 Fed. 171, where it was sought to hold guarantors on a guaranty of the debt of a third person, which made no reference to forbearance, on the theory that, in reliance thereon, the promisee did forbear, the promise was held invalid as not being based upon a valuable consideration, although for seven months the third person had the benefit of not being sued. The doctrine is here enunciated that "forbearance without an agreement on the part of the creditor to forbear will not be deemed a sufficient consideration. 'There must be promise for promise.'"

The fact that a third person gave an order to a creditor for the payment of a sum of money sufficient to cover the debt of another, and, in reliance thereon, the creditor did not file his claim against the estate of the principal debtor, was held, in *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403, not a sufficient consideration to support the order, treating the order as a promise to pay the debt of another. On this subject it is said: "In such a case as this, there must be a consideration to sustain the promise. It is urged herein that the forbearance by the creditor to present his claim against the estate of the deceased and actual forbearance is a sufficient consideration. . . . We cannot see how it became a considera-

tion unless the minds of the parties met on an agreement for such forbearance. There must not only be an agreement to forbear, but actual forbearance. . . . The mere forbearance to sue is not a sufficient consideration for a promise to pay the debt of another."

And in *Mecorney v. Stanley*, 8 Cush. 85, where it was sought to hold one who signed a note after delivery, upon the theory that he was a promisor, and that the consideration was an agreement to forbear to sue the original maker, the promisee having failed to prove an agreement binding upon him to forbear to sue, the promise was held to be invalid because not based on a sufficient consideration. The doctrine is enunciated that forbearance to sue a third person is not of itself a sufficient consideration for a promise. "To constitute a forbearance to sue a third person a good consideration for a promise by a stranger to the original consideration, it must have been in pursuance of an agreement to forbear." It is, however, said that "it is undoubtedly true that an actual forbearance to sue may often, in connection with other facts, be evidence of an agreement to forbear, and, as such, form a good consideration for a promise."

In *M'Farland v. Smith*, 6 Cow. 669, defendant addressed a letter to a third person to the effect that, if the writer's brother could make an arrangement with his creditors, the writer would be responsible for payment in one year, and authorizing him to give such assurance to the creditors, which letter was shown to the plaintiff, a creditor, who was, at the same time, assured by the addressee that the letter would legally bind the defendant to pay the debts. It was held that there was no evidence from which the jury could infer an agreement

on the plaintiff's part to forbear suit, even though he did, as a matter of fact, forbear for one year, and consequently, even apart from any other objections, he could not maintain an action against the defendant for the debt.

And in *Cobb v. Page*, 17 Pa. 469, where a debtor had failed and absconded, and a third person told the creditors of the absconder that he would pay all his honest debts, such promise was held invalid because not based on a valuable consideration. From these facts the court said it did not appear that indulgence of the debtor was given, or even thought of. That it could not be inferred from the mere fact that the debtor was not sued or pursued.

An agreement to forbear or give time to a debtor cannot be implied from the fact that the promise to pay by a third person is evidenced by a note running to the creditor, payable one year after date, when the case shows clearly that no agreement with the debtor, nor any agreement taking him into account, was made. *Vehon v. Vehon*, 70 Ill. App. 40.

To the same effect is *Beggs v. First Nat. Bank*, 134 Ill. App. 403.

In some jurisdictions, however, apparently very slight circumstances, together with actual forbearance, are sufficient to at least make a *prima facie* case of an agreement to forbear. Indeed, if the doctrine that mere forbearance would not furnish a sufficient consideration for a promise to pay were not apparently recognized, these cases might fairly be said to establish a contrary doctrine to those just considered. Thus, in *Webbe v. Romona Oolitic Stone Co.* 58 Ill. App. 222, while recognizing that mere forbearance is not a sufficient consideration for a promise to pay the debt of another, the court held that a written guaranty of the debt of a third person, although it contained no express request for forbearance, or agreement to forbear, was based on a valuable consideration, and was binding upon the promisors, where there was in fact an actual forbearance to sue the principal debtor, together with different payments by the debtor in accordance with the promise to pay, and where nothing whatever was shown to raise a contrary presumption. Under such circumstances it was said that the inference or presumption was that it was agreed by the parties that there should be a forbearance for the time mentioned in the written guaranty.

In *Union Trust Co. v. Conus*, 129 Mich. 156, 88 N. W. 407, the probate court having ordered a guardian to pay "over forthwith" to his successor funds which he had converted, the latter having put the claim into the hands of an attorney for collection, and a bond with sureties having been executed, conditioned for the payment of the amount in future instalments, the court said that it was a fair inference from all the facts and circumstances that the bond was given to enable the principal to have such additional time in which to pay the indebted-

ness as would enable him to do so. The court adds that extending the time was a sufficient consideration for giving the bond. Whether there were any "facts and circumstances" other than those already referred to and the fact of actual forbearance, aiding the inference of an agreement to extend the time, does not appear from the opinion.

To the same effect also is *Mosher v. Lansing Lumber Co.* 112 Mich. 517, 71 N. W. 161.

In *Hill v. Omaha, K. C. & E. R. Co.* 82 Mo. App. 188, where a third person promised to adjust and settle a matter if the promisee would withhold action for a period of time, which the promisee did, the court said there was no reason why the promise should not be enforced, as it was supported by a sufficient consideration.

So, in *Waters v. White*, 75 Conn. 88, 52 Atl. 401, where the payee of a note was induced to forbear taking immediate steps to rescind the loan for which the note was given, upon the ground of the maker's fraud, in reliance upon the signing of the note by the maker's wife, her signature was held to be based upon a sufficient consideration so as to render her liable thereon, the court holding that this state of facts authorized an implication that the promisee did agree to forbear.

And in *Steadman v. Guthrie*, 4 Met. (Ky.) 147, it was said that a guaranty by several persons of the deposits of a bank, made generally to all depositors, was binding upon such guarantors in favor of any depositor who accepted the terms of the guaranty by forbearing to take proceedings to enforce his claim, provided he accepted the guaranty, and notified the guarantors of his intention so to do.

There is also another class of cases which imply an agreement to forbear from the fact of forbearance, together with other facts and circumstances relating to the promise. The evidence in these cases, from which an agreement to forbear is inferred, is of a much stronger character than was presented in the cases just considered.

In *Edgerton v. Weaver*, 105 Ill. 43, it was said that, "whether actual forbearance, following a promise to pay interest upon interest for forbearance, is evidence of an acceptance of the promise, is a question of fact. If, under all the circumstances in evidence throwing light upon the question, it is reasonable to believe the party acted upon the faith of, and pursuant to, the promise, a jury would be justified in finding that he so acted,—otherwise not. But it is a mere matter of reasoning about human affairs, in which the individual knowledge and experience of the reasoner as to the motives of human action become a factor. It is finding a fact from circumstantial evidence; or, as is said by some writers on evidence, a principal fact from subordinate evidentiary facts. If the question were whether there was an express acceptance by words, there could be no difficulty in perceiving the question to be purely one of fact; yet

the only difference between that and the present question is that between direct and circumstantial evidence."

And in *McMicken v. Safford*, 197 Ill. 540, 64 N. E. 540, where a third person signed a past-due note, in reliance upon which the holder thereof forbore suit, forbearance, together with other evidence, hereafter adverted to, was held to constitute a sufficient consideration to render such third person liable thereon. As to the necessity of a mutual agreement to forbear, followed by forbearance, the court said: "While the plaintiffs in error technically argue that the language used by these parties in this conversation was not sufficiently exact to constitute an agreement of forbearance, we think the proper and natural inference to be derived from it was that Safford proposed that if McMicken would have his sons sign the note, he would give him a reasonable extension of time, and would forbear for a reasonable time to bring suit upon the note that was then due. They did sign the note, and Safford did wait more than three years before bringing suit, which seems to bring the contract within the rule."

To the same effect, also, is *Breed v. Hillhouse*, 7 Conn. 523, wherein an indorsement on a note,—“I hereby guaranty the payment of this note within four years from this date,”—made after the maturity of the note, was held to be binding upon the guarantor, where it appeared that the holder of the note, in reliance thereon, forbore the collection of the note for the stipulated time. On this subject it is said: “The agreement in question to forbear was clearly proved on a principle of probable presumption which harmonizes with common sense and is conformed to experience; and both reason and experience bear concurrent testimony to the inference of a consideration in this case. The acceptance of the indorsed guaranty by the plaintiff, and his consequent forbearance, prove the agreement in question, and are incompatible with any other supposition.”

Considering this proposition in *Boyd v. Freize*, 5 Gray, 554, in holding an acceptor upon bills of exchange liable thereon, on the theory that such bills of exchange were accepted to secure the forbearance of suit against a third person, although there was no express agreement to that effect, the court said: “Such agreement may be express, or implied by law. The question, we think, has been between the mere fact of forbearance, without any promise to forbear, and a forbearance in conformity with such express or implied agreement. . . . Whether there was an implied agreement to forbear is a question of fact, depending on the circumstances; and, if they are such as lead to a natural and reasonable conclusion that the new security or other new promise was given to induce the creditor to forbear, and he did in fact forbear, a jury may find that there was such implied agreement or understanding, upon which a court would hold that there was a good and legal consideration to give effect to the new promise. . . . The result, we think, is, that where 19 L.R.A. (N.S.)

the holder of a debt due, or coming due, presses for payment, and a third party pays part in cash, and gives his own notes on time as collateral security for the residue, and the creditor forbears to take any other measures to enforce his claim on the original demand until the collateral notes become due, a jury may very properly infer an agreement on the part of the creditor thus to forbear enforcing his original claim.”

In *Armstrong v. Snyder*, 15 Tex. Civ. App. 394, 39 S. W. 379, a third person having written creditors a letter, which the court construed as a promise to pay the claim if the matter were not pressed before January next, to which the creditors replied, thanking him for the guaranty, and asking, as a special favor, the payment of at least part of the claim by the 20th of October, it was held that the inference from the latter letter, in connection with the subsequent conduct of the creditors in declining to press the claim before January, led to the conclusion that the extension of time was based on the previous guaranty, which was therefore supported by a sufficient consideration.

So, where the promise to pay the debt of a third person in itself implied an extension of time, because it was to be paid out of future dividends to be earned, and it was understood that no proceedings would be taken against the original debtor, and none were taken, the promise was held supported by a sufficient consideration. *Lansing Nat. Bank v. Coleman*, 117 Mich. 177, 75 N. W. 624.

A distinction between the cases already considered and cases wherein it has been sought to hold the promisor on his promise after the promisee has forborne in reliance thereon, and at the request of the promisor, was apparently recognized in *Gilman v. Ferguson*, 116 Ill. App. 347, where, as construed by the court, the evidence failed to show a request by the promisor of the promisee to forbear to sue a third person, or an agreement upon the part of the promisee to forbear, a promise to pay the debt of another, followed by actual forbearance, was held not to constitute a consideration for the promise. It is said there must be an agreement to forbear, either express or implied. The mere forbearance, voluntarily granted by the complainant, will not suffice. Citing 6 Am. & Eng. Enc. Law, 2d ed. p. 743.

In *Mathews v. Seaver*, 34 Neb. 592, 52 N. W. 283, a promise to a creditor that, if he would refrain from legal proceedings against a debtor, the promisor would pay the debt, was said to be valid and binding if acted upon by the promisee. In this case, however, the plaintiff alleged that he consented, meaning evidently that he consented to forbear; and the court said that the plaintiff's right to subject the debtor's property to attachment or execution was “waived.”

In New York the doctrine is asserted that, if the promisor requests the promisee to forbear suit against a third person, and, as

a part of such request, the promisor agrees to pay the debt, that the forbearance in reliance upon this request and promise is a sufficient consideration to support an action on the promise, although, as a matter of fact, no enforceable agreement to forbear was made. Thus, in *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330, a wife was held liable on a promise to pay a debt of her husband in consideration of forbearance to sue him, where a promise was made by simply indorsing the past-due note of her husband. The only consideration for the wife's indorsement which was or could be claimed was that, as part of the transaction, there was an agreement by the promisee when the note was indorsed, to forbear its collection, or a request for forbearance, which was followed by forbearance. In reaching its conclusion, the court said: "There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes, in consideration of forbearance being given, to become liable as surety or otherwise, and the creditor does in fact forbear, in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested."

This case is cited and followed as authority in *Niles-Bement-Pond Co. v. Ury*, 53 Misc. 305, 103 N. Y. Supp. 226, wherein a request by the promisor for a forbearance to enforce the debt of another, and a promise to pay later, followed by an actual forbearance for a reasonable time, was held to be sufficient consideration for the promise, although no agreement was made to forbear.

This case was also cited with approval on this proposition by that court in *Muir v. Greene*, 191 N. Y. 201, 83 N. E. 685, wherein the court, in considering the validity of a mortgage executed by a wife to secure the forbearance of a debt owing by her husband, where there had been an actual forbearance in compliance, with a request to forbear, held that forbearance, under these circumstances, furnished a consideration for the promise. It is worthy of note in this case that the collateral promise was payable on demand. Certain provisions therein, however, indicated that there was to be an extension of the original debt for some time. It was held that the fact that the debt was

payable on demand under these circumstances was not in conflict with the provision of the bond, which was found to contemplate an extension of time from its date. While the question was not considered in the *Strong Case*, yet the facts in that case also show that the collateral agreement was either a demand agreement or an agreement to pay within a reasonable time. (This case involves the validity of a promise under seal, and is only used because of its support of the doctrine enunciated in the *Strong Case*.)

In *Crears v. Hunter*, L. R. 19 Q. B. Div. 341, the collateral promise did not in terms provide for any delay in payment, but the court said that it did, nevertheless, indicate on its face, that the parties contemplated that the note might not be sued on for some time. It was therefore said not to be inconsistent with the theory that the promise was made in consideration of an extension of time. This is an interesting case also upon the question here under consideration. In this case the promisor joined with the original debtor in a note which, as stated, did not provide for delayed payment. It did, however, provide for payment of interest half yearly. There was an actual forbearance for some time after the giving of the note, although there was no evidence of any request in express terms by the promisor of the promisee to forbear suit on the original indebtedness. It was, however, held that the request to forbear need not be express, but that it might be inferred from the circumstances, and it was said that the circumstances detailed authorized the jury to infer an understanding between the promisor and promisee that, if the promisee would give time to the original debtor, the promisor would make himself responsible. The jury found in favor of the promisee under an instruction by the trial court in substance to the effect that, if the note was signed by the promisor in order that the plaintiff might give time to his father, and plaintiff did give time, there would be a good consideration for the making of the note by the promisor; and he left it to the jury to say whether there was such a consideration. The verdict of the jury in favor of the promisee was set aside by the divisional court on the ground that there was no evidence of consideration, and judgment was entered for the defendant. On appeal, this judgment was set aside for the reasons already stated. As to the effect of an actual forbearance in compliance with a request to forbear, Lord Esher, M. R., said: "It may be true that there was no evidence of any request in express terms by the son that the plaintiff would forbear to sue the father, but what was the substance of the transaction contemplated in the minds of the parties? Was not the understanding obviously that, if the plaintiff would forbear to sue the father, the defendant would become liable on the note? I take it to be undoubted law that the mere fact of forbearance would not be a consideration for a person's becoming surety for a debt. It is quite clear, on

the other hand, that a binding promise to forbear would be a good consideration for a guaranty. The question is whether, if the guarantor requests the creditor to forbear from suing, and the creditor, on such request, although he does not, at the time, bind himself to forbear, does in fact afterwards forbear to sue, there is a good consideration for the guaranty. . . . If, at the request of the guarantor, the creditor does in fact forbear, there is a sufficient consideration to bind the guarantor, who has promised to pay the debt. . . . The question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request."

But the fact that a promisor had requested a forbearance of the promise, which was complied with, has not always been held sufficient to authorize an implied promise to forbear. Thus, in *Manter v. Churchill*, 127 Mass. 31, a mere promise to pay an account of a third person, which induced the promisee to forbear suit, was held not to be founded upon a sufficient consideration, and was therefore said to be a mere *nudum pactum*. Although the forbearance was at the request of the promisor, the finding of the lower court was to the effect that this request, followed by actual forbearance, did not, under the circumstances, constitute an agreement upon the part of the promisee to forbear. And on appeal the finding was treated as one of fact, and the decision is based thereon. The doctrine is recognized, however, that the agreement to forbear need not be express, but may be implied from the circumstances.

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

ROBERT PIGG et al., Appts.

(— Kan. —, 97 Pac. 859.)

Intoxicating liquors — Manhattan cocktail — judicial notice.

A Manhattan cocktail is generally and popularly known as an intoxicating liquor, and no proof of its intoxicating character is necessary in prosecutions under the prohibitory law.

(October 10, 1908.)

Headnote by PORTER, J.

Case Note. — Judicial notice of intoxicating character of mixed drink.

An extensive search has revealed but one other case in which this question has arisen. That case is *United States v. Ash*, 75 Fed. 651, in which the court said that it would "neither stultify itself nor impeach its own

APPEAL by defendants from a judgment of the District Court for Shawnee County convicting them of unlawful sales of intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Messrs. J. R. McNary, F. J. Lynch, George Hayden, R. F. Hayden, E. D. Woodburn, F. T. Woodburn, and A. E. Crane, for appellants:

To support a conviction the state must not only show that there was a sale made to the parties of a liquor known as cocktails, but what composed the same, and whether or not it had any intoxicating effect upon those who drank it.

Intoxicating-Liquor Cases, 25 Kan. 751; 37 Am. Rep. 284; *Topeka v. Zufall*, 40 Kan. 47, 1 L.R.A. 387, 19 Pac. 359.

Messrs F. S. Jackson, Attorney General, J. S. Dawson, and J. J. Schenck for the State.

Porter, J., delivered the opinion of the court:

The information in this case charged the defendant with a number of unlawful sales of intoxicating liquor, and also with keeping and maintaining a common nuisance under the prohibitory law. The jury returned a verdict finding defendant guilty of three sales, as charged in the eighth, ninth, and tenth counts of the information, and guilty of maintaining a nuisance, as charged in the eighteenth count, and not guilty on the other counts.

There is nothing substantial in the claim of error in the admission of testimony. In prosecutions of this kind certified copies of the records of the collector of internal revenue are admissible. *State v. Nippert*, 74 Kan. 371, 86 Pac. 478; *State v. Schaeffer*, 74 Kan. 390, 86 Pac. 477; *State v. Shook*, 75 Kan. 807, 90 Pac. 234. The objection to the question asked of Leona Larson was properly overruled. The question was asked in rebuttal of something first brought out by the cross-examination, and, besides, could not have prejudiced the defendant.

We find no error in the refusal to give the instructions asked. The abstract contains no reference to any evidence tending to show that Grant Richards was a "spotter." In *State v. Blackman*, 32 Kan. 615, 5 Pac. 173, it was held that a judgment of conviction in a criminal case cannot be reversed for any

veracity" by telling the jury that it had not judicial knowledge that the drink commonly called a "whisky cocktail" is an intoxicating drink, but that, on the contrary, it would assume judicial knowledge that it is intoxicating.

supposed error in the instructions with respect to the evidence of informers, where it does not appear that the conviction might have been founded upon the evidence of an informer.

In the instructions given the jury were charged that every material fact and allegation necessary to constitute the crime must be proved to their satisfaction beyond a reasonable doubt, and were also instructed that, if they found the defendant was the proprietor of the place where intoxicating liquors were sold, and that such liquor was in his possession and control as proprietor, and was sold with his knowledge and consent, he would be guilty of a sale, although he might not have performed the physical act of handing out the liquor to the customer himself. This instruction, taken in connection with the evidence, was sufficient. Sheriff Wilkerson testified as to this particular sale, and that at the moment it was made he was standing with the defendant in a doorway leading into another room. The jury found that the defendant was the proprietor of the place, upon evidence sufficient to support such a finding, and the testimony was that this sale was made by someone, not while the proprietor was absent, but while he was present, and when he might have seen all that the sheriff saw. Being the proprietor of the place, the sale was made by some one presumably in his employ.

On the tenth count the state elected to rely upon a sale of two Manhattan cocktails to Leona Larson and Kitty Edie. The precise question raised is that there was no evidence to show that a Manhattan cocktail is intoxicating, and the evidence can hardly be said to have established this fact. The Century Dictionary defines a cocktail as "an American drink, strong, stimulating, and cold, made of spirits, bitters, and a little sugar, with various aromatic and stimulating additions." The particular kind of cocktail under discussion is popularly understood to have taken its name from the island whose inhabitants first became addicted to its use. While its characteristics are not so widely known as those of whisky, brandy, or gin, it is our understanding that a Manhattan cocktail is generally and popularly known to be intoxicating. Apparently the jury held the same view. It has been said by this court: "Whatever is generally and popularly known as intoxicating liquor, such as whisky, brandy, gin, etc., is within the prohibitions and regulations of the statute, and may be so declared as matter of law by the courts." *Intoxicating-Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284.

A further contention is that the verdict is insufficient and indefinite, and not in the 19 L.R.A. (N.S.)

form required by law. The verdict, omitting the caption, is as follows :

We, the jury impaneled and sworn in the above-entitled case, do, upon our oaths, find the defendant Robert Pigg guilty on the eighth, ninth, tenth, and eighteenth count, as charged in the information, and not guilty on the first, second, third, fourth, fifth, sixth, seventh, and eleventh count, as charged in the information.

Geo. A. Anderson, Foreman.

It is insisted that the verdict should contain a separate finding on each count of the information, and that the court, in construing it, has no power to add thereto anything which the jury has omitted. But it is unnecessary to add anything to this verdict in order to understand definitely the jury's finding. It is plain from the language that the jury found the defendant guilty on four of the counts, and not guilty on all the others.

The judgment is affirmed.

All the Justices concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

MARY AMIS QUINLAN, Exrx., etc., of L.
G. Quinlan, Deceased, Plff. in Err.,

v.

GREEN COUNTY.

(84 C. C. A. 537, 157 Fed. 33.)

County bonds — conditions — construction.

1. The exoneration of a county from its former subscription to the stock of another corporation is a condition precedent to the issuance of bonds in aid of a subscription to railroad stock, where the order for the election contained the condition that bonds

Case Note. — *Failure of railroad to comply with conditions on which railroad aid bonds were issued as a defense to them in the hands of a bona fide holder.*

This note presupposes that the municipal corporation had authority to issue the bonds in question, apart from any question as to compliance with condition precedent on the part of the railroad company.

It will be noticed that the decision in *QUINLAN v. GREEN COUNTY*, that bonds issued by a county in aid of a railroad company are not invalidated in the hands of a bona fide holder for value by the failure of the company to comply with certain conditions on which they were issued, depended upon the question whether or not they were conditions precedent, and was reached by

in aid of the subscription should not be issued until the county was fully and completely exonerated from the payment of the capital stock voted and authorized to be issued to the former company.

Evidence — stock subscription — lapse of time.

2. The fact that several times the length of time required by the statute of limitations to bar an obligation on a contract to subscribe to the stock of a railroad company has elapsed since the contract was made, without any step being taken to perfect the subscription, may be considered in support of the presumption raised by other facts in the case, that the obligation to subscribe for the stock has been terminated.

County bonds — condition precedent — construction of road.

3. The construction of the road upon a

certain route through the county, and the expenditure of the subscription therein, is not a condition precedent to the issuance of county bonds in aid of a railroad under a vote upon a submission of the question whether or not bonds in aid of the subscription should be issued upon condition that the company so locate and construct the road and expend the money.

Same — bona fide purchaser — breach of condition.

4. Bonds issued by a county in aid of a railroad company are not invalidated in the hands of a bona fide holder for value by the failure of the company to comply with a condition on which they were issued, that the road should be located and constructed upon a certain route through the county, and that the money received from the bonds should be expended therein.

the court without resorting to the doctrine of estoppel.

In *Eagle v. Kohn*, 84 Ill. 292, a statute permitting the issuing of bonds in aid of a railroad company provided that the municipal corporation might prescribe the conditions upon which such bonds or subscriptions should be made, and that they should not be valid and binding until such conditions precedent had been complied with. Pursuant to this statute a town voted to subscribe for a certain amount of stock for which bonds were issued, to be subject, however, to several conditions in regard to the building of the railroad, imposed upon the railway company. The conditions were never complied with, and the bonds fell into the hands of bona fide purchasers. In an effort by the latter to collect the interest on these bonds, it was held that, by the wording of the statute, they were precluded from recovering, the court saying: "True, there is nothing of illegality in the bonds in question, nor does the statute declare them void. But illegality is not the circumstance which avoids negotiable securities in the hands of a bona fide holder, as it is seen that illegality of consideration, in the absence of express declaration by the legislature that the securities shall be void, will be no defense against a bona fide holder, without notice of the illegality. It is by force of the peremptory words of the statute declaring them void that they are held to be void in the hands of an innocent indorsee without notice. The words of the statute in question, though not that the bonds shall be void, are, that they shall not be valid and binding until the conditions are complied with. They are equally imperative to the degree named, as language declaring securities void. The bonds are not declared to be, to their whole extent, not valid and binding, but are declared to be, to a certain extent, not valid and binding; that is, until the conditions are complied with." It was recognized in this case that the conditions named were not prerequisite to the making of the subscription and issuing of the bonds, and that it was not necessary that they be complied

with before the subscription could be made or the bonds issued, and therefore that, aside from the statute, innocent purchasers for value would enjoy the protection accorded to bona fide holders of negotiable paper, and would not be affected by noncompliance with such conditions. A similar case and holding to the same effect is *Parker v. Smith*, 3 Ill. App. 356.

In *Green County v. Shortell*, 116 Ky. 108, 75 S. W. 251, also, a proposition in regard to the issuing of railroad bonds conditional upon the construction of the road through the county and within one mile of a certain town, and upon the further condition that the bonds should not be issued until the county should be exonerated from the payment of the capital stock subscribed to another railroad, was submitted to the inhabitants of the county for their approval. Pursuant to an election favoring the proposition, the bonds were issued and fell into the hands of bona fide purchasers. The conditions, however, were not complied with. In an action on these bonds it was urged that, although the condition in regard to the exoneration of the issue in favor of the other railroad was a condition precedent, the rest of the condition, to the effect that the road should be built in a certain place, was not, but was only an obligation imposed upon the railroad company, for the performance of which the county only looked to it. It was also insisted that it was shown by the record that the subscription to the other railroad was void. The court, after saying that it could not concur in either of these conclusions, and then, after evidently assuming that, even if the latter were true, said: "The meaning of the contract, taken as a whole, is that the subscription is upon the condition that the company shall locate and construct its railroad through Green county, and within one mile of Greensburg, and expend the amount subscribed in the limits of Green county; and the further condition is added that the bonds are not to be issued, or anything paid on account of the subscription, until the county is exonerated from its former subscription to

Same — presumption of regularity.

5. Railroad aid bonds issued by a corporation, which contain no recitals as to compliance with the conditions upon which they are to be issued, are entitled to the same presumption, in the hands of bona fide holders for value, as to compliance with such conditions, where proof is made that the proceedings were in fact regular, as though the recitals had been incorporated in them.

Trial — finding — jurisdiction.

6. A finding by a Federal court that one suing on county aid bonds was a citizen of another state and the "bona fide holder for value of the bonds sued on, and fully entitled to sue the defendant thereon in this court," is not a finding on the question of jurisdiction, but on plaintiff's right to recover on the merits.

Bonds — holder — bona fide purchaser.

7. The holder of negotiable county aid bonds lawfully issued is, by presumption, clothed with the character of a bona fide holder for value.

(Lurton, Circuit Judge, dissents.)

(December 19, 1907.)

ERROR to the Circuit Court of the United States for the Western District of Kentucky to review a judgment in defendant's favor in an action brought to enforce payment of certain bonds. Reversed.

Statement by Severens, Circuit Judge:
This is an action brought by the plain-

the Elizabethtown & Tennessee Railroad. In other words, the bonds are not to be issued until this release is made; and after the release is made the bonds may be issued, but they are to be subject to the condition that the company should locate and construct its road as above set out. The railroad authorities, in applying to the county court for a vote on this subject, intended by their petition for the people of the county to understand that, before any liability was created, the old subscription to the Elizabethtown & Tennessee Railroad was to be out of the way entirely; and that, after this was done, the promise of the county to pay was to be conditioned on the location and construction of the road through Green county, and within one mile of the town of Greensburg. . . . The railroad company intended the people to understand, and the people understood, from the paper, when they voted on the subscription, that they were to get a railroad through the county, and that, if they did not get it, their subscriptions, being 'conditioned and to be paid as above stated,' would not be binding upon the county."

In *Grattan Twp. v. Chilton*, 38 C. O. A. 84, 97 Fed. 145, although, by the recitals in the bonds, the township was estopped from denying their validity in the hands of bona fide purchasers, it was held further, that a proposition adopted by the voters of a township authorizing the issuance of bonds in aid of the construction of a railroad passing through the township and a certain city therein, the proceeds to be given to the railroad when it should complete a line and have cars running thereon to the city on or before a date named, does not require, as a condition precedent to the issuance of such bonds, that the railroad should be constructed entirely through the township, but their issuance was authorized on the completion of the road and the running of cars thereon to the city within the time prescribed.

The following cases, however, depend upon the doctrine of estoppel for their decision:

Thus, in *American L. Ins. Co. v. Bruce*, 19 L.R.A. (N.S.)

105 U. S. 323, 26 L. ed. 1121, where a city having authority to make an unconditional subscription to the stock of a railroad company delivered bonds representing on their face that they conformed to the statutory requirements, and that the city's liability thereon was complete, it was held that the city was estopped from showing that it had imposed certain conditions upon its liability, although a statute declared that, in such an event, the bonds should not be binding until such conditions were performed. The court, in distinguishing *Eagle v. Kohn*, supra, said: "Had the town of Eagle represented, in express words, upon the face of the bonds, that no conditions whatever were prescribed by the people, or that the subscription was unconditional, the state court would not, we suppose, adjudge that the town, as against a bona fide holder, could take shelter behind the statutory provision in question."

Without attempting to exhaust the cases of this nature, the following are also of that class where, by the recitals in the bonds, the municipal corporation was held estopped from asserting its nonliability on the ground that conditions precedent had not been complied with: *Oregon v. Jennings*, 119 U. S. 74, 30 L. ed. 323, 7 Sup. Ct. Rep. 124; *Graves v. Saline County*, 161 U. S. 359, 40 L. ed. 732, 16 Sup. Ct. Rep. 526; *Keane v. Ft. Scott*, Fed. Cas. No. 7,631; *Eminence v. Grasser*, 81 Ky. 52.

In *Provident Life & T. Co. v. Mercer County*, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788, an act authorizing the subscription of aid to a railroad company provided that the bonds should not be binding or valid obligations until the railway had been completed through the county and a train of cars had passed over the same. The railroad was built, but there was some question whether it had complied with the conditions upon which the bonds were issued. It was held, however, even conceding that the condition had not been complied with, the fact that the trustee with whom the bonds had been placed in escrow delivered them, believing that the conditions had been complied with, was sufficient to

tiff in error to recover the contents of certain bonds and coupons alleged to have been issued by the defendant in error in 1872, in payment, with other like bonds, for shares of stock of the Cumberland & Ohio Railroad Company. The plaintiff claims to be the holder for value and owner of the bonds and coupons which are the subject of the controversy. By stipulation, the case was tried by the court without a jury. The court made a finding of facts, and declared its conclusion of law thereon. The result of its conclusion was that the plaintiff was not entitled to recover, and judgment was entered accordingly. The plaintiff thereupon sued out this writ of error.

By an act of the legislature of Kentucky, passed February 24, 1869, the above-named railroad company was incorporated and authorized to construct a railroad from a point on the Ohio river to a point on the boundary line between Kentucky and Tennessee. Acts of Kentucky 1869, vol. 1, p.

463, chap. 1578. In the course of its authorized route was Green county, the defendant in this suit. With a view, apparently, to enable the counties along its route to aid the railroad company in the construction of its road, authority for that purpose was conferred by the act as follows: "Sec. 15. That any city, town, or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad company in any amount any such city, town, or county may desire; and that the county court of any such county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached,

make them valid in the hands of bona fide purchasers for value and before maturity, nothing appearing in the bonds to the contrary.

In *Jefferson v. Jennings Bkg. & T. Co.* 35 Tex. Civ. App. 74, 79 S. W. 876, it was held that one who purchased municipal bonds issued to aid in the construction of a railroad, and who knew nothing about the bonds except what appeared on their face, was an innocent purchaser for value, whose right to recover on the same could not be defeated by the alleged fact that land acquired by the city in exchange for the bonds, which was to be used for depot purposes, was not so used.

In *Graves v. Saline County*, supra, it was held that the issuing of funding bonds of a county in pursuance of statute, on a vote by the people of the county, to take up other bonds issued by it on a subscription to railroad stock, which were invalid because a condition of such subscription was not complied with, was a declaration by the people that there was a substantial compliance with the original condition; and such funding bonds will be valid in the hands of a bona fide holder, where the original subscription might have been unconditional.

In *Brooklyn v. Aetna L. Ins. Co.* 99 U. S. 362, 25 L. ed. 416, notices for an election in regard to the issuing of railroad aid bonds expressly stated that no bonds in payment of any subscription should be issued, draw interest, or be delivered to the company until the railroad was completed and cars running through the town; these conditions were afterwards repeated in the formal subscriptions; subsequently it was rumored that the railroad would not be built through the town, and the authorities then notified the railroad company that unless the railroad were built and completed as promised the bonds would not be issued; 19 L.R.A. (N.S.)

thereupon the railroad company assured the town and citizens that they intended to complete the railroad as promised; relying upon such promise the bonds were issued, falling finally into the hands of bona fide purchasers; the railroad, however, was never built. In an action by one of these bona fide purchasers upon certain interest coupons detached from these bonds, the court said: "These assurances were credited, and, in reliance upon them, the supervisor and clerk executed and delivered the bonds, knowing, at the time, that the conditions imposed by popular vote as well as by the terms of the subscription had not been complied with. Thus was faith in the promises of a railroad company substituted for a contract which, had the town stood upon it, would either have secured the construction of the road, as contemplated, or guarded its people against a burden which has been imposed upon them through the fraudulent conduct of railroad officials, and the violation, by its own officers, of the trust committed to them. By the act of the town's constituted authorities, who, by the statute, had the right, under certain circumstances, to execute and deliver the bonds and coupons, the railroad company was enabled to put them upon the money market in advance of the construction of the road. It is now too late for the town to claim exemption, as against bona fide purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice, either from the statute or otherwise. The remedy of the city is against the railroad company and its own unfaithful officers who, it is alleged, were in fraudulent combination with the company."

bearing any rate of interest not exceeding 6 per cent per annum, payable semiannually in the city of New York, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscription on the part of the city, town, or county shall be valid or binding on the same, the mayor and aldermen, or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the county court of any county having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town, or county in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns, or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed." And it was further provided that the application for such proceedings might be made to the judge of the county court instead of the court; whereupon he was vested with the same power. And the railroad company was authorized to "receive subscriptions of stock to their company by individuals, towns, cities, counties, or other corporations, whether payable in money or other things, with such terms and times of payment, conditions annexed, and kind of payment that may be set forth in the subscription."

On June 17, 1869, upon the request of the commissioners of the railroad company, above named, the judge of the county court entered the order following:

"Present, Thos. R. Barnett, Judge.

"Whereas the commissioners of the Cumberland & Ohio Railroad Company, by virtue of the authority delegated to them by the charter of said company, have requested the county court of Green county to order an election in the said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county, \$250,000 to the capital stock of the Cumberland & Ohio Railroad Company, and payable in the bonds of said county, having twenty years to run, and bearing 6 per cent interest from date, and upon condition that said company shall locate and construct said railroad through the said county of Green, and within one mile of 19 L.R.A. (N.S.)

the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green county; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green county, at the voting places in said county, be held and conducted by the several officers as prescribed by law for holding elections on the 3d day of July, 1869, to vote on the question as to whether or not the said county court shall, for and on behalf of said county, subscribe \$250,000 to the capital stock of the said Cumberland & Ohio Railroad, conditioned and to be paid, as above stated."

The election was held. The vote was in favor of the proposition and was so properly certified. Thereafterwards, and on June 3, 1870, the county judge made an order, wherein, after reciting the proceedings above recited, he says: "I . . . do hereby subscribe for \$250,000 of the capital stock of the said Cumberland & Ohio Railroad Company for and on behalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the conditions set out in the order of this court ordering said election and now of record in the office of this county." On October 12, 1871, the county judge ordered the bonds to be printed. The bonds, of which these in suit were a part, were issued and delivered to the railroad company during the succeeding year, 1872, the bulk of them on or about August 15th, on which day the county judge made the following order:

"Present, Thos. R. Barnett, Judge.

"Application was this day made to the presiding judge of the county court of Green county, by the president and board of directors of the Cumberland & Ohio Railroad Company, to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to said Cumberland & Ohio Railroad Company, and the court being sufficiently advised, it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, the same to be signed by the judge of said county court of Green county, and countersigned by the clerk of said

court, as required by the charter of said company."

Thereupon the \$250,000 of the capital stock of the railroad company was delivered to the county, which has since been retained and owned by it. For a time the county raised by tax and paid the interest accruing on the bonds, but thereafter it refused to recognize their validity, and refused to make further payment. The plaintiff is the bona fide holder for value of the bonds and coupons in suit, but had notice that the railroad had not been built further than from the north line of said county to Greensburg, which is about one quarter of the way through the county. As to this latter fact, it may be noted in this connection that only \$150,000 of the proceeds of the bonds had been expended by the Cumberland & Ohio Railroad Company in the construction of the road, and this was on that part of the road north of Greensburg. This expenditure did not complete that portion of the road, but it was completed by the Louisville & Nashville Railroad Company under the stipulation in a lease to it of its road by the Cumberland & Ohio Railroad Company, but at what cost does not appear. In respect to the conditions of the subscription for stock to pay which these bonds were voted, the facts were these: In 1868, at an election in Green county, it had been voted to subscribe for \$300,000 of the stock of the Elizabethtown & Tennessee Railroad Company, to be paid for in the bonds of the county. Upon making a record of this election the county court made the following order: "It is now therefore ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote, as aforesaid." But nothing further was ever done in regard to such a subscription, either by the county or the Elizabethtown & Tennessee Railroad Company. No stock was issued to the county or bonds issued to the railroad company. Some further incidental facts will be hereafter mentioned in the opinion in the discussion of the questions involved in the controversy. The bonds in suit, except the numbers given to each bond and the amount therein specified, were in the form following:

United States of America, county of Green,
\$500. State of Kentucky.

For the Cumberland & Ohio Railroad.

Twenty years after date, the county of Green, in the state of Kentucky, will pay to the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent per annum, payable semiannually upon the presentation of the 19 L.R.A. (N.S.)

proper coupons hereto attached, for the principal and interest being payable at the bank of America, in the city of New York.

In testimony whereof, the judge of said county of Green has hereunto set his hand and affixed the seal of said county, on the first day of April, A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

[Green County seal.]

T. R. Barnett, Judge.

D. T. Towles, Clerk.

The conclusion of law by the court below was "that the plaintiff is not entitled to recover, because the conditions upon which the subscription for the capital stock of the Cumberland & Ohio Railroad Company was made, and upon which the bonds sued on were issued, have not been performed or complied with."

Argued before Lurton, Severens, and Richards, Circuit Judges.

Messrs. John J. McHenry, John C. Doolan, and Attila Cox, Jr., with Messrs. Edmund F. Trabue and George DuRelle, for plaintiff in error:

The bona fide holder has a right to presume the bonds were issued under the circumstances which give the requisite authority.

Marshall County v. Schenck, 5 Wall. 772, 18 L. ed. 556; Lexington v. Butler, 14 Wall. 282, 296, 20 L. ed. 809, 812; Pendleton County v. Amy, 13 Wall. 297, 20 L. ed. 579; Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579; Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138.

Mr. Ernest Macpherson for defendant in error.

Severens, Circuit Judge, delivered the opinion of the court:

The questions to be decided upon the facts found, the substance of which has been stated, and the proper inferences to be drawn therefrom, are these: First, whether it should be held that the county of Green had been exonerated from the payment of the subscription for the capital stock of the Elizabethtown & Tennessee Railroad Company; and, second, whether these bonds are invalid in the hands of the plaintiff by reason of the fact that only \$150,000 of the proceeds of the bonds have been expended in the construction of the road in Green county, or by reason of the fact that the same has not been built through the county. These questions turn largely upon the proper interpretation of the so-called conditions upon which the county authorized these bonds to be issued.

Upon our conference after the original

argument in this court, we were in doubt upon some of the questions presented for decision, and certified them to the Supreme Court for its opinion. One,—the first of the questions,—as that court thought, involved too many points. But we requested that, if that question should be deemed too broad, then that the court should advise us whether, “assuming the facts to be as found, was a bona fide purchaser before maturity of these bonds and coupons, for value, entitled to assume in his purchase that Green county had, before their issuance, been fully and completely exonerated from the payment of the capital stock subscribed for by the county court of said county for and in behalf of said county to the Elizabethtown & Tennessee Railroad Company?” The Supreme Court answered this question as follows: “Construing the second question to inquire, not whether there is conclusive presumption, but whether, on the facts found, there is any presumption at all, that the county had been exonerated from its former subscription to another railroad, we answer it ‘Yes.’” *Quinlan v. Green County*, 205 U. S. 410, 51 L. ed. 860, 27 Sup. Ct. Rep. 505. On receiving this answer, we heard further argument upon the consequences of the opinion given by the Supreme Court as well as upon the question of the character of the other so-called conditions about which the Supreme Court expressed no opinion.

We agree that the exoneration of Green county from any liability on account of its former subscription to another railroad was a condition precedent to the issuance of the bonds, and that, without the accomplishment of this condition, the plaintiff cannot recover. We concede this, although we cannot help thinking that there is room for the belief that the legislature of Kentucky intended that the county judge should determine when and whether the condition had been accomplished, and that to hold otherwise is to suppose that these bonds, although they were, by the terms of the statute, to be negotiable coupon bonds, would, although issued and put upon the market, yet be clogged with doubt of their validity,—a doubt which even now might be and still is urged against them. Such bonds would not be marketable, and their purpose would be utterly defeated. For this reason it has sometimes been held that, although the statute does not expressly nominate any officer who is to pass upon the execution of the condition precedent to the issue of such bonds, yet that, in view of the consequences, an implication might arise that the legislature intended that the officer of the municipality in whose behalf he was acting, and who was charged

with the custody and the issuance of the bonds, should, before delivering them, ascertain and determine whether the condition had been complied with. Especially would this be so when the question whether there had been a compliance is one which calls for the exercise of judgment upon facts with which he would be most conversant. It is true that, in most of these cases, perhaps in all, there were recitals in the bonds of the regularity of the anterior proceedings or the fulfilment of conditions precedent; but it would seem that, for other reasons, if it is intended by the statute that the determination of the fact is committed to the official who issues the bonds, such determination ought to settle the fact. If, in such conditions, the bonds should be issued without such determination, the question would be open. But here the county judge acted advisedly. In the order that the bonds be issued, he recites that he was sufficiently advised,—borrowing an expression from legal procedure to denote that he had taken notice of and considered the question whether the conditions existed which authorized the issuance of the bonds; in other words, that he had exercised the function devolved upon him. Granting what must be regarded as settled by authority, that when the condition consists of a distinct and indubitable fact, and nothing is left to the judgment of the official charged with the delivery of the bonds, his delivery of them without the occurrence of the condition would be unauthorized and the bonds be void, yet it would seem, upon principle, that if the question whether the condition has been accomplished is one of doubt and uncertainty, and it is apparent that the officer who has charge of the issuance of the bonds is to determine the fact of compliance with the condition, his determination would conclude the question, and, if in the affirmative, bind the county. This is, as we understand, the doctrine on which the judgment of the Supreme Court in *Provident Life & T. Co. v. Mercer County*, 170 U. S. 593, 604, 42 L. ed. 1156, 1161, 18 Sup. Ct. Rep. 788, was finally rested. But, without pursuing that subject further, we are of opinion that, upon other grounds, the question whether Green county was exonerated from the obligations of the former vote should be determined in the affirmative. We may say in passing that there seem to be grave reasons for doubting whether Green county ever came under an obligation to the Elizabethtown & Tennessee Railroad Company. The subscription was voted, and the county court ordered its clerk to subscribe for the stock. But that was all. The clerk did not subscribe. No bonds were ever issued, and no stock was ever delivered or

tendered to the county. In *Bates County v. Winters*, 112 U. S. 325, 28 L. ed. 744, 5 Sup. Ct. Rep. 157, Chief Justice Waite, after referring to previous cases, summed up the rule as follows: "That rule may be stated thus: An actual manual subscription on the books of a railroad company is not indispensably necessary to bind a municipality as a subscriber to the capital stock. If the body or agency having authority to make such a subscription passes an ordinance or resolution to the effect that it does thereby, in the name and on behalf of the municipality, subscribe a specified amount of stock, and presents a copy of that ordinance or resolution to the company for acceptance as a subscription, and the company does, in fact, accept, and notifies the municipality, or its proper agent, to that effect, the contract of subscription is complete, and binds the parties according to its terms."

This is a careful and undoubtedly correct statement of the law upon the subject. See also *Morawetz, Priv. Corp.* §§ 61, 134; *Greene v. Sigua Iron Co.* 31 C. C. A. 458, 88 Fed. 203. The county judge might well have thought that, as there had been no complete subscription by an actual subscription, and by the acceptance and notification of the railroad company, the county was exonerated from its vote to authorize the proposed subscription. The language of the condition is that the county shall be "exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad." This does not import that a completed subscription had been made, but only that a subscription had been authorized by the former vote; and the county would be exonerated if the subscription which it had authorized was not completed so as to bind the county. These bonds were not issued until four years after the vote of the county authorizing the subscription for stock of the Elizabethtown & Tennessee Railroad Company had been taken and recorded. Meantime, this latter company had given no token of its acceptance, and the county had taken no further step after the direction of the county court to its clerk to make the subscription upon the terms specified in the order submitting the question to a vote. And the subscription was never completed. What more complete exonerated from its former vote could the county of Green have? But, to return to the line of reasoning which we were intending to pursue, we are advised by the answer of the Supreme Court that there was, upon the facts found, a presumption in favor of the bonds that the county had been exonerated from the vote to subscribe to the

other railroad stock; not a conclusive presumption, but one that might be controverted. But there is nothing in the facts found which controvert it. On the contrary, the facts confirm the presumption. A long time has elapsed since the vote of the county authorized a subscription to the Elizabethtown & Tennessee Railroad Company's stock, several times the length of time required by any statute of limitations, even supposing there had been a complete agreement for the subscription, and no step had been taken. If it be said that the condition must have existed when the bonds were issued in order to make them valid, and that the lapse of time since is immaterial, the answer is that though, in one sense, this is true, yet, in another sense, it is important, for the fact that nothing had since been done by either party upon the footing of the vote is pregnant evidence to show that, when these bonds were issued, neither the county nor the Elizabethtown & Tennessee Railroad Company regarded itself as under any contract relations with the other. It may be that, if a formal release was necessary, there might be some weight in the suggestion that the trial court has found that no such release was ever given, and that this would controvert the presumption that the county had been exonerated. But, as the Supreme Court said in its opinion, "no formal release was necessary. "It [the condition] was completely fulfilled if, from any circumstance, it should appear that the county had been effectively relieved from any liability on account of the vote in aid of the Elizabethtown & Tennessee Railroad."

We come, then, to the question whether the other provisions of the vote on which the bonds in suit were issued, namely, "that said company shall locate and construct said railroad through said county of Green . . . and shall expend the amount so subscribed within the limits of Green county," were conditions precedent to the issue of the bonds, or were stipulations imposed upon the Cumberland & Ohio Railroad Company by its acceptance of the subscription. The acceptance of a contract or an obligation which also in terms imposes obligations upon the obligee, and whereupon the latter seeks and obtains the benefit of the contract, binds the latter for their performance, although he may not have expressly undertaken to be bound. *Bishop, Contr.* 2d ed. § 203; 1 *Parsons, Contr.* 9th ed. § 13, note 1; *Storm v. United States*, 94 U. S. 76, 24 L. ed. 42.

The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipu-

lations in it depends upon the order in which the parties intend the several stipulations to be performed. The calling of a provision or stipulation a condition is not conclusive, and if, from the contract or other circumstances, it is seen that it was not the intention of the parties that its performance should be a condition precedent, it will not be held to be such. *Stanley v. Colt*, 5 Wall. 119, 18 L. ed. 502; *Union Stockyards Co. v. Nashville Packing Co.* 72 C. C. A. 195, 140 Fed. 701, 704; *Sohier v. Trinity Church*, 109 Mass. 1; *Greene v. O'Connor*, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692; *Scovill v. McMahon*, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 26 Atl. 479; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175. "Conditions have no idiom," said *Virgin*, Judge, in *Bucksport & B. R. Co. v. Brewer*, 87 Me. 295. "Whether they be precedent or subsequent is a question purely of intent, and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates." Conditions are not favored, and a provision will not be construed as such unless the intention is clear. 6 Am. & Eng. Enc. Law, p. 502; *Clapham v. Moyle*, 1 Lev. 155; *Shep. Touch.* 122; *Huff v. Nickerson*, 27 Me. 106. "Where the language of an agreement can be resolved into a covenant," said *Bell*, Judge, in *Paschall v. Passmore*, 15 Pa. 295, 307, "the judicial inclination is so to construe it; and hence it has resulted that certain features have ever been held essential to the constitution of a condition. In the absence of any of these, it is not permitted to work the destructive effect the law otherwise attributes to it."

The question we are now considering was mentioned, but not passed upon, by the Supreme Court, because it was not included in our request for its opinion. But we think it apparent, for many reasons, that the performance of these conditions, so called, was not intended to be required before the delivery of the bonds. The subscription for the stock of a railroad company by a municipality, and the issue of negotiable bonds in payment therefor for the purpose of providing means to assist in the construction of a railroad within its limits, is a transaction familiar to everyone. It is not a transaction whereby the municipality contracts with the company to build a road, but is intended to provide means to assist the company in building it, in consideration of acquiring a part of its stock, and of the expected advantages of the road to the community. The statute of Kentucky under which these bonds were 19 L.R.A. (N.S.)

issued indicates very clearly, as we think, that the bonds authorized were expected to be negotiated for the means to use in the construction of the road. It is provided that they shall be payable to the bearer, that they shall have interest coupons attached payable semiannually in the city of New York, and that the bonds shall be payable at a designated time, which may be as long as thirty years after their date. They were thus required to possess the attributes of commercial paper adapted to sale in public markets. And the proposition on which the electors of Green county voted followed in all particulars the provisions of the statute. And when it was provided that the company "shall expend the amount so subscribed within Green county," we cannot doubt that what was meant was that the proceeds of those bonds should be so used, and not, as has been suggested, that the company should have expended some other money equal in amount to the bonds. Such a construction as would lead to the result suggested would leave the company without the ready means to build the road which it was the purpose to provide for. Moreover, there is a plain distinction made in the proposition voted in the very terms employed. In regard to the requirements we have been last considering, the question was whether the county would subscribe for the stock and pay for it in county bonds, upon condition that the company should construct its road as mentioned; but where the proposition comes to the matter of the exoneration from the vote to the other railroad, that was expressly made a condition to the issuance of the bonds or the payment of any part of them. The failure to append this condition to the preceding provisions, and the introduction of the positive inhibition here employed, are persuasive evidence that a distinction was contemplated in the vote. To bear the construction that the former were intended to be conditions precedent, we should need to have the inhibition located in those clauses also. The abrupt change is significant of a difference in purpose.

Other reasons are also suggested by counsel; but we cannot doubt that, for those we have mentioned, the proper construction to be given to the proposition submitted to, and authorized by, the electors of Green county, is that the railroad company should, upon its acceptance of the subscription, and the delivery of the stock by one, and of the bonds of the other, come under an obligation to comply with those terms of the proposition voted. And we reach this conclusion without regard to the question of an estoppel arising upon the fact that the county accepted the stock, and has con-

tinued to retain it. If the question of the intention were in doubt, the interpretation given by the county to its vote by paying the interest would be persuasive of its understanding at the time of the transaction. We think the bonds were lawfully issued, and that the fact that the company has not performed the stipulations of the agreement which it made as a consideration for the bonds does not invalidate them, when, as appears, the delivery of the bonds was final, and they have passed into the hands of other parties for value, as it was the evident intention of the statute that they would do. We need not inquire whether the county could have made a partial defense against these bonds upon the ground that there had been a partial failure of consideration if the railroad company had held them and were now bringing suit upon them. The holder of negotiable paper is entitled to the benefit of the presumption *prima facie* that he or some previous holder whose title he has acquired is a purchaser in good faith and for value before maturity, in the usual course of business, and without notice of any circumstances impeaching its validity; and that he is the owner thereof, if it is payable to bearer. Dan. Neg. Inst. § 812. Nothing is here shown to contravene these presumptions. Of course, it must always appear that the obligor was competent in law to incur the obligation, and had in fact attempted to incur it. We do not understand that the absence of a recital in municipal bonds that the conditions to their issue have been complied with deprives them of their character of negotiable instruments or of the ordinary presumptions which attend such instruments. Recitals of that character relate to the regularity of the proceedings precedent to their issue, and, if the recitals cover the necessary facts, conclusively establish it. But when, in a case where there are no such recitals, proof is made that the proceedings were in fact regular, the bonds are entitled to the same presumptions in their subsequent negotiation as if they had contained such recitals.

It is suggested that the finding of the court "that the plaintiff is a citizen of the state of New York, and was so when this action was instituted on the 28th day of March, 1899, and that the plaintiff was the bona fide holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court," was intended only to say that the citizenship of the plaintiff was such as to entitle him to sue in the Federal court. But this court, in its question to the Supreme Court, construed this finding to be also a finding that the plaintiff was a bona fide holder for

value, and the Supreme Court certainly so construed it, as is shown in the statement of facts, and, we have no doubt, correctly. That part of the finding of facts had no relevancy to the question of jurisdiction. If she was a citizen of New York, and was the holder of the bonds, she was entitled to sue. The question of whether she was a bona fide holder for value was a question upon the merits of the case. The phrase which the court below employed was one peculiar to the law of negotiable instruments, and ought to be construed in the sense in which it is there employed. But it really is not material. If, as we hold, the bonds were lawfully issued, the presumptions of law would clothe the plaintiff, if she was the holder, with the character of a bona fide holder for value.

The judgment of the Circuit Court must be reversed, with directions to enter a judgment in favor of the plaintiff for the amount of the bonds and coupons, with interest on the coupons from the time they severally fell due, and interest on the principal of the bonds from the date when the latest coupons thereon severally fell due.

Lurton, Circuit Judge, dissenting:

I must in this case, and contrary to the usual practice of this court, express openly the grounds for my dissent to the conclusions reached in this case.

The county has not obtained a road constructed by the company to whose stock it proposed to subscribe. Its money has been thrown away. This suit involves its probable liability upon an issue of bonds aggregating \$250,000. This series of bonds, with interest already past due, aggregate three fourths of a million. For this the county will obtain nothing. To prevent just such a possible result the legislature provided that subscriptions by counties might be voted conditionally. The conditions which the county demanded were intended to absolutely secure the building of the road. By subtlety of construction, upon which I express no opinion, two of these conditions are said now to be only covenants, and, therefore, worthless against an insolvent and nonexistent railway company. For at least thirty years the county has denied its liability, and refused payment of interest. When this denial had been so long acquiesced in that the bonds were purchaseable for little more than the value of wall paper, as stated at the bar, they are acquired by speculators, who now urge that, during all this long, long period of repudiation, the defense of the county has been growing weaker and weaker, and that time, which usually only fortifies a defensive position, has all this time been making

bonds valid which were invalid when issued. I will not willingly aid in the destruction of the settled principles which tend to the security of commercial paper. Neither will I agree to strain a finding of facts to hold a county upon obligations which, in my judgment, were never binding either in the forum of law or conscience.

The principal grounds upon which I find myself unable to agree with the court are these:

1. The opinion and conclusion conflicts with the settled views of the Supreme Court in respect to the most important ground upon which it rests. Assuming that the mere fact of issuing these bonds by the county judge was a determination that the conditions had been complied with which authorized their issuance, that determination only raised a presumption in favor of one who should take the bonds before maturity, for value, and without actual notice of the real facts of the case at the date of issuance. This is so because the bonds were without recital. This much was the plain ruling of the Supreme Court in *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138, and *Citizens' Sav. & L. Asso. v. Perry County*, 156 U. S. 692, 39 L. ed. 585, 15 Sup. Ct. Rep. 547. In this very case we certified the question as to the presumption upon which a purchaser before maturity for value might act in purchasing bonds without recital. Referring to the tendency of some of the earlier cases to deny to bonds in the hands of innocent holders any other defense than want of power, the court said that tendency had been "arrested" by the cases I have cited above, which cases, it is said, held "that the mere facts of the subscription to stock and issue of bonds containing no recital left it open to the obligor to show that a condition precedent had not been fulfilled." "But," added the court, "these cases in no way conflict with the view expressed by Mr. Justice Strong in *Pendleton County v. Amy*, 13 Wall. 297, 20 L. ed. 579, and by Mr. Justice Bradley in *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579, that a presumption arises from the mere fact of subscription and issue, though not a conclusive one. Independent of authority such a presumption exists, and is but an instance of the broader presumption that officers charged with the performance of a public duty perform it correctly." My Brethren do not, as I read the opinion of the court, accept this as an applicable rule of law or an authoritative decision in this case. It is, in conclusion of an argument in favor of the conclusiveness of facts determined by the county judge, refusing the delivery of the bonds here in question, said: "His delivery of them without the occur-

rence of the conditions would be unauthorized and the bonds be void; yet it would seem upon principle that if the question whether the conditions had been accomplished is one of doubt and uncertainty, and it is apparent that the officers who had charge of the issuance of the bonds are to determine the fact of compliance with the condition, his determination would conclude the question, and, if in the affirmative, bind the county."

It is evident that the error of the court in the matter I have referred to is, after all, the real ground of the conclusion reached and its judgment colored by the view before expressed.

2. The conclusion is next placed upon the theory that no subscription had ever been made to the capital stock of the Elizabethtown & Tennessee Railroad Company, although one was authorized. It is stated in the opinion that, although the subscription was voted, and the county court ordered its clerk to subscribe for the stock, "the clerk did not so subscribe." It is also said, that, when the bonds here involved were issued, the said Elizabethtown & Tennessee Railroad Company had given no token of its acceptance, and the county had taken no further step after the direction of the county court to its clerk to make the subscription upon the terms specified. Both in this court and in the Supreme Court this case has proceeded upon the theory that a subscription had been made as authorized. The condition precedent presupposes a subscription had been made from which the county was to be released. The defense has been that it was invalid, because the authority had been delegated to the clerk, and that the case of *Mercer County Ct. v. Kentucky River Nav. Co.* 8 Bush, 300, was an express authority supporting the county judge's assumption that a subscription so made was void as a delegation of power which could not be delegated. The subsequent case of *Green County v. Shortell*, 116 Ky. 108, 75 S. W. 251, was an action upon some of the same series of bonds here in issue, and the Kentucky court there, assuming that the subscription had been made, distinguished the former case upon the ground that, in the former case, the clerk or commissioner had a discretion to exercise, while in the case before it he had none, the terms and conditions being settled already. There is no finding that no subscription had ever, in fact, been made by the clerk, as directed. The presumption that the clerk, as a public official, correctly discharged his duty, ought to stand as well when the presumption operates in favor of the county as it does when its effect is detrimental. The only finding of fact

which bears upon the question is the seventeenth. That reads as follows: "That no formal or express exoneration of said county from the payment of said last-named subscription was ever made or attempted, but nothing further has, up to this date, ever been done in respect to it, and neither bonds by the county nor stock by the said last-named railroad company have ever been issued or delivered in execution of said orders or under the terms of said subscription."

This finding plainly assumes that there had been a subscription, not a mere authority to subscribe. What is said as to nothing further having been done evidently refers to acts subsequent to the subscription. But it is not important that no formal subscription was made by the clerk. He was commended to do a purely administrative act, and he could have been coerced to do it by writ of mandamus. The liability of the county upon the vote and the order of the county court was the gist of the matter, and fastened a liability upon the county from which it required exoneration as a condition precedent to another liability.

3. I disagree as to the effect of the lapse of time since these bonds were issued upon their validity. I cannot agree that the liability to this plaintiff rested upon any better foundation when he started this suit in 1899 than if he had sued at date of the earliest maturing coupon. The authority to make a subscription at all depended upon the performance of the antecedent condition of exoneration from liability on account of the former subscription to a different company. Yet, within thirteen months after the order of the court, directing a subscription by its clerk to the Elizabethtown & Tennessee Railroad Company, we find the county judge making the subscription here involved. If the condition precedent had not been performed then, the act was without authority. In payment of this subscription he issued the bonds in suit in batches, beginning in January, 1872, and completing the issue in April of the same year. The bonds bear date of April 1, 1871. Now, neither at the date of the subscription, June, 1869, nor at the date of the bonds, April, 1871, nor at the date of their issuance, between January and April, 1872, had there been any compliance with the condition in respect of exoneration from the prior liability by the execution of any release, exoneration, or through the judgment of any court. The only finding of fact in respect of this condition is the seventeenth finding of fact, set out above. That there had been "no formal or express exoneration" is expressly found. Then, upon what

facts are we to predicate an exoneration? None are found except the vague statement that "nothing further up to this date [has] ever been done in respect to it, and neither bonds by the county nor stock by the last-named railroad company has ever been issued or delivered in execution of said orders or under the terms of said subscription." The plain meaning is that neither the county nor the railroad company took any further step in pursuance of the subscription. Why? Many reasons may be conjectured. After years of effort to obtain subscriptions enough to carry out the project, the promoters may have become disheartened, and, finding themselves unable to comply with the conditions, made no issue of shares and no demand of payment of this subscription. But, if the lapse of time without demand for payment or tender of stock at the date of the issuance of these bonds was not such as to raise a legal presumption of abandonment or release, the bonds when issued were illegal, as having been issued before there had been any release or exoneration, formal or informal, express or implied. If then illegal, when did they become good? If the county could not have defended itself when the bonds were issued against its liability upon the Elizabethtown & Tennessee Railroad subscription, would there have been any pretense that this condition precedent had been complied with? Twenty years went by after the Elizabethtown & Tennessee Railroad subscription was made before this suit was brought. How does it happen that, from mere lapse of time, a defense, good when these bonds were unlawfully issued and put upon the market, has become ineffectual and the bonds valid, although the applicable evidence then and now is identical? I have given attention to what is said upon this subject by Mr. Justice Moody, who, referring to the determination of the county judge when he issued these bonds that this condition of exoneration had been complied with, said that "the fact that for thirty-eight years no one has made any claim against the county on account of its supposed liability to subscribe to the stock of the Elizabethtown & Tennessee Railroad shows conclusively that he was right." But I am unable to regard this as an authoritative point of the opinion. The single question which was answered related only to whether "on the facts found" there was "any presumption" at all that the county had been exonerated. This was answered in the affirmative. It is evident that the court did not mean that a rebuttable presumption of exoneration had become conclusive by lapse of time after the fact of issuance. The effect of the fact that the

railroad company had done nothing must, in reason, be limited to the date of the issue of the bonds. If the inquiry is, indeed, whether at this date, thirty-eight years after the subscription, the county can now be regarded as relieved from liability, I should say "Yes." The lapse of time without an action brought to enforce liability would, undoubtedly, raise a presumption of a release or abandonment. Indeed, the positive statutory limitation of actions would justify a holding that there was no longer an existing liability on account of that subscription. But, if the subsequent lapse of time is to be given effect, then I insist that the conduct of the plaintiff and his predecessors in title, as well as that of the county, must be taken into account. These bonds were dated April, 1871. They matured in 1891. This suit was brought in 1899. The coupons which matured in 1878 and for each year subsequent are sued upon. Thus for more than twenty-one years the county has refused to pay interest, and for all that time this plaintiff and those from whom he took the bonds have acquiesced in the attitude of the county. Has time been steadily strengthening the claim of the holder and destroying the defense of the county?

4. The question certified assumed that the plaintiff took these bonds before maturity. But the only finding in respect to the status of the plaintiff is the first, in these words: "The court finds that the plaintiff is a citizen of the state of New York, and was so when this action was instituted on the 28th day of March, 1899, and that the plaintiff was then the bona fide holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court."

That finding, I think, should be interpreted as applying to the plea to the jurisdiction. That plea was, by agreement, submitted with the other defenses. It pleaded that the plaintiff was not the bona fide owner of these bonds when this suit was brought, March 28, 1899, but that the same bonds and coupons had before been in suit in the same court, and the suit abated because the then plaintiff, Herman H. Heaton, was a fictitious plaintiff, the real owners being citizens of Kentucky, and that Quinlan had acquired the bonds thereafter only for the purpose of giving jurisdiction to the circuit court, the beneficial plaintiffs being citizens of Kentucky. Issue was taken upon this plea as to whether the plaintiff was the real owner or only a fictitious plaintiff. The very terms of the finding indicate that the finding was a response to this plea to the jurisdiction. But, if the finding be construed as both a finding in respect to the

issue upon jurisdiction and as to the status of the plaintiff as the holder of negotiable paper, it will be most unjust to infer from that finding that the plaintiff acquired these bonds before maturity, as implied by the second interrogatory, or without notice of the defenses of the county. This finding is "that on March 28, 1899," plaintiff was the bona fide holder for value of the bonds and coupons sued upon. That date is the date of the bringing of this suit, and the finding was enough to support his claim of right to sue in a United States court, there being diversity of citizenship.

5. But, if the judgment of the circuit court, holding that the conditions precedent had not been complied with and that the bonds were invalid, is to be reversed, I think common justice requires that there should be no judgment upon these findings against the county, but a new trial awarded. The findings of fact do not cover all of the issues, and upon those to which they are a response are not definite or full enough to justify a judgment in favor of the plaintiff. If it is of any moment whether the plaintiff is constructively chargeable with knowledge of the situation when these bonds were issued, then it is important to know whether he took these bonds before maturity, or, if not, whether he has acquired the title of one who did. That he was, on March 28, 1899, the bona fide holder for value, is too indefinite to justify a judgment for him. The same is true in respect to the defense of the statute of limitations. There is no finding upon this, and it is not permissible to piece out defective findings. An examination of the pleadings will show that a large proportion of the coupons in suit matured prior to 1884. Obviously the defense of the statute of limitation was a good defense to all such coupons, unless the plaintiff can in some way show that it ought not to apply to him. But there is no finding as to this defense. Why shall the county be cut off from the benefit of this defense by refusing to award a new trial and the direction of a judgment upon the bonds and coupons in suit?

When a jury has been waived, and a judgment rendered upon a special finding of facts, this court, if it find that the judgment was erroneous, has the power to direct such judgment to be entered as the special findings require, instead of awarding a new trial. *Ft. Scott v. Hickman*, 112 U. S. 150, 28 L. ed. 636, 5 Sup. Ct. Rep. 56. But, if the findings are doubtful, obscure, or defective, it is within the power of the court, and its high duty, whenever justice seems to require such action, to reverse and remand for a new trial. *Graham v. Bayne*, 18 How. 60, 15 L. ed. 265; *Flanders v.*

Tweed, 9 Wall. 425, 19 L. ed. 678, 680; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 104, 37 L. ed. 380, 385, 13 Sup. Ct. Rep. 485; Ward v. Cochran, 150 U. S. 597, 608, 37 L. ed. 1195, 1198, 14 Sup. Ct. Rep. 230. No judgment ought to be rendered when the findings are silent as to a fact which is essential to a judgment. An imperfect finding, like an imperfect special verdict, cannot be pieced out. The burden is upon him who asks a judgment to produce a finding of every fact necessary to support it. *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307. In *Ward v. Cochran*, cited above, there was a special verdict in an action of ejectment reversed and a new trial awarded, because there was no finding that the defendant's possession was adverse and exclusive, although there was a finding that the defendant and his grantors had entered into possession of the land in controversy under a claim of ownership, and that he remained in the open, continued, notorious, and adverse possession thereof for the period of sixteen years. Without comment we adopted this course in *Anderson v. Messinger*, 7 L.R.A. (N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929. In *Barber v. Coit*, 55 C. C. A. 145, 118 Fed. 272, we remanded an appeal for further evidence, upon our own motion, "because great injustice might be done if the case is to be decided upon the present record."

When the findings of fact do not support a judgment against the plaintiff, there can be no judgment for the defendant, upon a writ of error sued out by the plaintiff, where there is an issue made by the defendant, material in character, upon which there is no finding of fact. *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 293, 28 L. ed. 722, 728, 5 Sup. Ct. Rep. 141. When the trial court makes no finding upon an issue made by the pleadings, because it was deemed unimportant, a court of review will remand for a finding upon the facts bearing upon that issue, if found to be material to a judgment, although all of the evidence relating to the question is in the record. In *Abilene v. Cornell University*, 55 C. C. A. 205, 118 Fed. 379, 382, the circuit court of appeals for the eighth circuit said of such a situation: "We might possibly look into the rejected record and the rejected depositions, and determine the issue arising on the plea, but, by so doing, we would be trying on appeal an issue that was not tried below."

Where an omission to make a specific finding of fact is due to the fact that the circuit court made a ruling upon a matter of law which rendered such a finding unimportant, it is the duty of the court, that justice may be done, to reverse and remand, 19 L.R.A. (N.S.)

under § 701, Rev. Stat., for such further proceedings to be had in the inferior court as justice may require. *Little Miami & C. & X. R. Co. v. United States*, 108 U. S. 277, 280, 27 L. ed. 724, 725, 2 Sup. Ct. Rep. 627.

Affirmed by Supreme Court of United States January 4, 1909, 211 U. S. 582, 53 L. ed.—, 29 Sup. Ct. Rep. 162, 170.

MASSACHUSETTS SUPREME JUDICIAL COURT.

C. HENRY KIMBALL

v.

POST PUBLISHING COMPANY.

WILLIAM GALLETTY

v.

SAME.

C. HENRY KIMBALL

v.

BOSTON TRANSCRIPT COMPANY.

WILLIAM GALLETTY

v.

SAME.

(199 Mass. 248, 85 N. E. 103.)

Libel — judicial proceeding — privilege.

1. The publication of a fair report of a judicial proceeding without malice is privileged if the court has acted upon the bill so far as to make a special order that defendant appear and show cause why an injunction should not be issued against him.

Same — corporate meeting.

2. The publication by a newspaper of a report of a meeting of a private corporation, which contains libelous statements made by stockholders against the officers, is not privileged.

Same — different proceedings — separation.

3. The one publishing in a newspaper a report of a meeting of a private corporation and of a bill in equity, in each of which the same libelous matter appears, cannot avoid liability for the former publication on the theory that the latter is privileged, and that it is impossible to separate the injury done by one publication from that done by the other.

(June 15, 1908.)

Case Note. — Report of meeting of private corporation as subject of privilege.

The foregoing case makes a very clear distinction between the publication of reports of meetings of private corporations and reports of public corporations and quasi corporations, such as church associations, medical societies, etc., which are in-

EXCEPTIONS by plaintiffs to rulings of the Superior Court for Suffolk County made during the trial of actions brought to recover damages for the alleged publication of certain libels which resulted in verdict in defendants' favor. Sustained.

The facts are stated in the opinion.

Messrs. H. N. Allin and Bert E. Kemp for plaintiffs.

Messrs. Elder & Whitman and James Thomas Pugh, for defendants:

Fair reports of judicial proceedings, even if preliminary or *ex parte*, are privileged if made without actual malice.

Conner v. Standard Pub. Co. 183 Mass. 474, 67 N. E. 596; Barrows v. Bell, 7 Gray, 301, 66 Am. Dec. 479; Metcalf v. Times Pub. Co. 20 R. I. 674, 78 Am. St. Rep. 900, 40 Atl. 864; Stuart v. Press Pub. Co. 83 App. Div. 467, 82 N. Y. Supp. 401; Ackerman v. Jones, 5 Jones & S. 43; Usill v. Hales, L. R. 3 C. P. Div. 319; Kimber v. Press Asso. [1893] 1 Q. B. 65.

An accurate report of a portion of a judicial proceeding will still be privileged if it does not purport to be a report of the whole.

Odgers, Libel & Slander, 2d ed. p. 258; Turner v. Sullivan, 6 L. T. N. S. 130; Millisich v. Lloyds, 46 L. J. C. P. N. S. 404.

The report of the stockholders' meeting was privileged.

Barrows v. Bell, *supra*; Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322; Connor v. Standard Pub. Co. *supra*; Lawless v. Anglo-Egyptian Cotton & Oil Co. L. R. 4 Q. B. 262; Ponsford v. Financial Times, 16 Times L. R. 248.

If either report is privileged, the action cannot be maintained.

Vicars v. Wilcocks, 8 East, 1.

Hammond, J., delivered the opinion of the court:

The articles of which the plaintiffs complain contained reports of certain proceed-

ings in court and also of a meeting of stockholders of a corporation called the Burrows Lighting & Heating Company.

So far as respects the report of the court proceedings, the articles were privileged. This case differs materially from Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318. In that case there had been no action by the court. Here the bill had been presented to the court and the court had acted upon it so far as to make a special order that the defendants therein should appear and show cause why they should not be enjoined. This act of the court was a judicial proceeding, and, whatever might formerly have been the rule, it was a subject for a privileged report, although the cause had not yet been finished. It was an act begun in a case, and in the end there must be a final decision. The words of Esher, M. R., in Kimber v. Press Asso. [1893] 1 Q. B. 65, 71, seem to us to be a true statement of the law on this subject: "I am, therefore, of opinion that, where the proceedings are such as will result in a final decision being given, a fair and accurate report, made bona fide, of those proceedings, is privileged, although it be published before the final decision." And in that case the rule was applied to the proceedings upon an *ex parte* application for the issue of a summons on a charge of perjury. If this were not so then, in the language of Lord Esher, "the ridiculous result would follow that, where the trial of a case of the greatest public interest lasted fifty days, no report could be published until the case was ended." Kimber v. Press Asso. *supra*, and cases cited; Metcalf v. Times Pub. Co. 20 R. I. 674, 78 Am. St. Rep. 900, 40 Atl. 864, and cases cited; McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465; Ackerman v. Jones, 5 Jones & S. 43; Stuart v. Press Pub. Co. 83 App. Div. 467, 82 N. Y. Supp. 401. See also the instructive case of Usill v. Hales, L. R. 3 C. P. Div. 319,

vested with certain powers and duties immediately affecting the public. As indicated in the title, this note will be confined to reports of private corporations.

There is but little authority upon this subject.

In Parsons v. Surgey, 4 Fost. & F. 247, it was held that words spoken by a shareholder in a meeting of the shareholders of a railroad corporation to which reporters and the public had been invited did not constitute a privileged communication. The court said: "The matter was certainly one of great interest and importance to the shareholders, and the discussion or publication of the results to them would have been excused. It could not, however, be a privileged communication because others besides the shareholders were invited to attend the 19 L.R.A. (N.S.)

meeting; and it was particularly stated that the representatives of the public press would be there." There would appear to be no question but that a court which held that words spoken by a shareholder to the public were not privileged would hold that a report of such a meeting was also not privileged.

In Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73, it was held that the communication by the directors of a corporation to the stockholders of evidence collected by them as to the conduct of their officers and agents and their conclusions upon the evidence was a privileged communication in the absence of malice or bad faith; but the privilege did not extend to the preservation of the report and evidence in the permanent form of a book for distribution.

for a general discussion of the law upon this matter.

The articles in question contained, among others, the following statements: "At the office of C. Henry Kimball, 97 Haverhill street, officers, stockholders, and lawyers interested in the Burrows Lighting & Heating Company met this morning. The affairs of the Burrows Lighting & Heating Company have been before the public for a considerable time, and are apparently in a badly tangled condition. An order of notice was recently issued by the superior court against C. Henry Kimball, William Galletly and the Burrows Lighting & Heating Company, ordering them to appear in court on Thursday of this week to show cause why they should not be restrained from holding any meeting. The charges were that the holders of a majority of the capital stock of the company had fraudulently secured control over 416,000 shares of stock."

By an inspection of the bill in equity and of the order of the court, it appears that the statement in the articles was a fair report of the court proceedings. And we are further of opinion that the ruling that the evidence did not warrant a finding of malice was correct. So far, therefore, as the plaintiff attempted to hold the defendants as to so much of the articles as related to the proceedings in court, they failed to make out a case.

But there was something more in the articles than the report of the proceedings in court. There was a report of the meeting of the stockholders of a private corporation; and, unless this part of the report is also privileged, the defense, so far as resting upon that ground, must fail. It is argued by the defendants that "the public is interested and concerned in a meeting of stockholders of a corporation such as is described in the" articles in question, and that reports of such meetings are privileged if fair and made without malice. But the difficulty with this argument is that, unless modified by statutory provision, the law in England and in this commonwealth always has been otherwise. It is to be noted that we are not dealing with what is said at the meeting, nor with the person who said it. No doubt a stockholder at such a meeting, speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company, provided that what he says be pertinent to the matter in hand and he speaks in good faith and without malice. His justification rests upon the fact that he is speaking to the stockholders upon a subject in which he and they have an interest.

On the contrary, we are dealing with a report in the nature of a repetition of the de-
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famatory remarks, which report is made by a stranger, having no interest in the question, to other strangers, called the public, equally without interest. It is manifest that the grounds for the privilege under which the original speaker, the stockholder, is protected cannot serve the publisher of the report. *Davidson v. Duncan*, 7 El. & Bl. 231; *De Crespigny v. Wellesley*, 5 Bing. 402. The privilege of the publisher, if any he has, must rest upon other grounds.

It is stated by some authorities that, by the common law of England, reports of judicial and parliamentary proceedings alone were privileged. While it is said by *Shaw, Ch. J.*, in *Barrows v. Bell*, 7 Gray, 301, 66 Am. Dec. 479, that this statement, unqualified, is too broad, still subsequent decisions seem to show clearly that in England the principle of privilege is confined to reports of judicial or quasi judicial bodies. No privilege was attached to the report of other public unofficial meetings. Hence, if in such a case a report containing any defamatory statement of fact was printed in a newspaper, the proprietor's only defense was that the statement was true. *Purcell v. Sowler*, L. R. 1 C. P. Div. 781, L. R. 2 C. P. Div. 215. See also *Odgers, Libel & Slander*, 4th ed. Appx. B, and the authorities therein cited. Since the decision in this last case, the law has been somewhat modified so far as respects official and other public meetings. But these statutes have been somewhat strictly construed, and even now a fair report is not always safe. *Ponsford v. Financial Times*, 16 Times L. R. 248.

The subject was quite freely discussed by *Shaw, Ch. J.*, in *Barrows v. Bell*, *ubi supra*, and the following language was used (7 Gray, 313): "Whatever may be the rule as adopted and practised on in England, we think that a somewhat larger liberty may be claimed in this country and in this commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people. So many municipal, parochial, and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business, or interest, are constantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings, and a just and proper publication of them, as far as it can be done consistently with private rights. This view of the law of libel in Massachusetts is recognized, and to some extent sanctioned, by the case of *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212, and many other cases."

And it was held that the publication by a member of the Massachusetts Medical Society of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the society and its members on account of such expulsion, is privileged.

The above language of the court, however liberal its construction, is not to be understood as applying to strictly private meetings. It applies at the most only to meetings public in their nature, or where the proceedings concern the public. In that case it was said that the charter of the Massachusetts Medical Society "invested the society, their members and licentiates, with large powers and privileges, in regulating the important public interest of the practice of medicine and surgery, enabled them to prescribe a course of studies, to examine candidates in regard to their qualifications for practice, and give letters testimonial to those who might be found duly qualified." It was also stated that it appeared by the acts incorporating this society that it was regarded by the legislature "as a public institution, by the action of which the public would be deeply affected in one of its important public interests, the health of the people." It was further said that the proceedings of which the report was made "might be rightly characterized, as in the case of *Farnsworth v. Storrs*, 5 Cush. 412, as quasi judicial." And it was upon the latter ground that the communication was adjudged to be privileged.

The case before us is entirely different. The meeting was simply that of a private corporation invested with no privileges and owing no special duties to the public. It was an ordinary business meeting. Whether any member was in fraudulent possession of stock, or had mismanaged the affairs of the corporation, or whether the plaintiffs were unfit to continue as officers, or the corporation had been made bankrupt, were matters with which the public were in no way concerned. The meeting was for the stockholders alone. Only they or their duly constituted agents were entitled to be present. The meeting was neither public nor for the public purpose. As well might it be said that a private conference between the members of a partnership on partnership matters was a public meeting. For the purposes of the meeting it might have been necessary for charges to be made by one stockholder against another stockholder or an officer, and that the charges should be discussed and their truth or falsity determined; and so far the actors were well within the privilege.

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They had a duty to perform in a matter in which all were interested. But, for obvious reasons hereinbefore stated, the mantle of protection cannot cover him who, having no interest, repeats the defamatory words to others also without interest. And in this matter the conductor of a newspaper stands no better than any other person. As was said in *Sheckell v. Jackson*, 10 Cush. 25-27, in reply to a contention that conductors of the public press are entitled to peculiar indulgence and have especial rights and privileges, "the law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more." These words, although spoken more than half a century ago, state the law as it exists to-day, except so far as it has been modified by statute, and there has been no statute material to the question before us. The result is that the articles were not privileged so far as they reported the proceedings of the corporation.

It is argued by the defendants that, inasmuch as the charge in the bill in equity was the same as that made at the meeting, namely, that the majority of the stock was in the fraudulent possession of the plaintiffs, it will be impossible for the plaintiffs to contend that any alleged damage was suffered from the one rather than from the other; and therefore if one report is privileged the action cannot be maintained. This is untenable. Even if the charge in substance is the same, it is evident that a charge made in a bill in equity filed in court may not be regarded as so serious a matter as a charge made by one's business associates in a business meeting. The difficulty of separating the damages gives no immunity to the defendants.

Exceptions sustained.

MASSACHUSETTS SUPREME JUDICIAL COURT.

J. HOWARD STILES et al., Selectmen of Amesbury,

v.

CITIZENS' ELECTRIC STREET RAILWAY COMPANY.

(199 Mass. 394, 85 N. E. 419.)

Remedy — retroactive — validity.

1. A statute giving a right to resort to the courts in case of discontinuance of the operation of a railway does not change existing rights, but applies to proceedings begun after its passage, which relate to acts done previously.

Same — application of statute.

2. A statute giving a right to resort to the courts if a railway discontinues the use of any track applies to past as well as future discontinuances.

Street railway — discontinuance.

3. A street railway company having only the right or license to operate its tracks in a public street until revoked or terminated by the public authorities may cease to use the permission granted, and discontinue the operation of the whole track covered by a particular location under which it was built, at its pleasure, in the absence of any agreement to the contrary.

Same — legislative control.

4. The legislature may make the right of a street railway company to discontinue the use of a portion of its tracks subject to control by the railroad commissioners if the public welfare requires their continued operation.

(June 16, 1908.)

Case Note. — Right of street railway company to discontinue line in absence of statutory or contractual provision to the contrary.

The decision in *STILES v. CITIZENS' ELECTRIC STREET R. Co.* would seem to throw the balance of authority in favor of the proposition that, where a street railway company has only the right or license to operate its tracks in a public street, it may, in the absence of statutory or contractual provision to the contrary, discontinue such line; and mandamus to compel its operation will not lie.

In *San Antonio Street R. Co. v. State*, 90 Tex. 520, 35 L.R.A. 662, 59 Am. St. Rep. 834, 39 S. W. 926, it was held that a street railway company cannot be compelled by mandamus to operate an abandoned portion of its line, which has been built under a mere privilege to construct and operate it, and where its charter does not in express terms or by fair implication forbid it to discontinue the enterprise. A similar case, holding to the same effect, is *State ex rel. Knight v. Helena Power & Light Co.* 22 Mont. 391, 44 L.R.A. 692, 56 Pac. 685.

In *McCann v. South Nashville Street R. Co.* 2 Tenn. Ch. 773, it was recognized that, if a street railway company has only agreed to build a track, it cannot be compelled to run cars over it.

So, where a change in the terminus of a route is demanded because of public convenience and safety, necessitating the abandonment of a short distance of the track, an action to discontinue the abandonment cannot be maintained. *Moore v. Brooklyn City R. Co.* 108 N. Y. 98, 15 N. E. 191.

However, in *State ex rel. Bridgeton v. Bridgeton & M. Traction Co.* 62 N. J. L. 592, 45 L.R.A. 837, 43 Atl. 715, it was held that a street railway company, incorporated under the laws of the state, the route of its road and the location of its tracks having been established by municipal ordinances accepted by it, and the road having been con-

RESERVATION by the Supreme Judicial Court for Essex County for the opinion of the full bench of a petition by the selectmen of Amesbury to compel the resumption of the operation of a portion of its railway tracks by the defendant company. Petition dismissed.

The facts are stated in the opinion.

Messrs. Anthony W. Reddy and Thomas H. Hoyt for petitioners.

Mr. Guy W. Cox, for respondent:

The statute was not retroactive.

Garfield v. Bemis, 2 Allen, 445.

An order of location granted by the selectmen of a town to a street railway company is not a contract.

Springfield v. Springfield Street R. Co. 182 Mass. 41, 64 N. E. 577; *French v. Jones*, 191 Mass. 522, 7 L.R.A. (N.S.) 525, 78 N. E. 118; *Sherwood v. Atlantic & D. R. Co.* 94 Va. 291, 26 S. E. 943.

structed and being in operation, cannot, at its mere will and discretion, cease and abandon the operation of any portion thereof; the court saying: "The grant being exclusive, they must be held to a good faith in the performance and fulfilment of their duties. I cannot perceive any excuse whatever by which the respondent company can be permitted to abandon the operation of any part of it. That a portion is unprofitable, or that a portion is more difficult to operate, are not valid reasons for abandonment. Its application to the city was for the location of its tracks over the whole route. The terms and conditions of the ordinance, and the ordinance, passed on the faith of the duty of the company to operate its road over the entire route located. In view of this ordinance, it must be conclusively said that, if one part was to be operated, and that another part might be abandoned at the discretion of the company, the terms and conditions of the ordinance would have been different. This must be conclusively assumed in a case of this character. It appears clear from the statute and the ordinance that it is the duty of such company organized under the statutes to operate the roads mentioned in its certificate of incorporation for the benefit of the public, in consideration that it shall have the franchise of transporting the passengers, and taking the tolls from them; and that it cannot escape the performance of this duty as a public agent."

A similar case is *State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 518, 41 L.R.A. 516, 67 Am. St. Rep. 739, 53 Pac. 719, where it was held that the operation of a street railway can be enforced by mandamus where a company which has acquired the right and commenced to perform the service attempts to discontinue the operation of a part of a line.

It will be noticed that the two cases immediately preceding are distinguished in *STILES v. CITIZENS' ELECTRIC STREET R. Co.* on the ground that they are cases in which the company sought to retain a part of its

The respondent rightfully discontinued the use of the line.

Stat. 1864, chap. 229, § 19; Rev. Laws, chap. 112, § 36; Stat. 1906, chap. 463, § 76; *French v. Jones*, supra; *State ex rel. Knight v. Helena Power & Light Co.* 22 Mont. 391, 44 L.R.A. 692, 56 Pac. 685; *Sherwood v. Atlantic & D. R. Co.* supra; *San Antonio Street R. Co. v. State*, 90 Tex. 520, 35 L.R.A. 662, 59 Am. St. Rep. 834, 39 S. W. 926; *Jack v. Williams*, 113 Fed. 823; *Ohio & M. R. Co. v. People*, 120 Ill. 200, 11 N. E. 347; *People v. Albany & V. R. Co.* 24 N. Y. 261, 82 Am. Dec. 295, 19 How. Pr. 523; *Flint & P. M. R. Co. v. Rich*, 91 Mich. 293, 51 N. W. 1001; *State ex rel. Little v. Dodge City, M. & T. R. Co.* 53 Kan. 329, 24 L.R.A. 564, 36 Pac. 755.

Mr. J. F. Bacon also for respondent.

Mr. B. W. Warren for persons not before the court.

franchise, or of some particular location, while abandoning the rest of it, while in the STILES CASE the company discontinued its use of the whole of the tracks covered by the locations under which they were built. So far as the right to a writ of mandamus to compel the operation of the road is concerned, this distinction does not seem to be recognized in *San Antonio Street R. Co. v. State*, supra, although the court does hold that for a failure on the part of the company to operate part of a line, the remedy is to forfeit the franchise to operate the whole line.

In *Potwin Place v. Topeka R. Co.* 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309, it was held that, where a street railway company, by ordinance, is granted the right to construct and operate a line along a certain avenue for a certain term of years, and the terms of the ordinance are accepted and the road constructed, it or its vendee cannot at will abandon such line, but may be compelled by mandamus to operate it in accordance with the provisions of the ordinance under which it was constructed. In reviewing this case, the court, in *San Antonio Street R. Co. v. State*, supra, said: "The court may have intended to hold broadly that a company which has accepted a mere privilege to build a street railway, and has constructed and operated it, may be compelled by the writ of mandamus to continue its operation. The opinion admits of that construction; but the important question whether the mere grant of a privilege imposes a duty is not discussed. The ordinance under which the company acted, however, contained a requirement that the 'said railway shall be so operated that a car shall pass any given point each way on the route at least every twenty minutes for twelve hours, and at least once every thirty minutes for four hours, during that part of the day the road shall be operated.' These are words of command, and may be construed as making it the duty of the company, in case it should construct and operate its road, to continue to operate every part of its line. 19 L.R.A. (N.S.)

Sheldon, J., delivered the opinion of the court:

This petition is brought under Stat. 1906, chap. 339, p. 302, now Stat. 1906, chap. 463, pt. 3, p. 614. § 76, to compel the respondent to resume the operation of a certain part of its railway, called the Pleasant Valley line. The defendant had abandoned and discontinued the operation of this line in January, 1905; and the first question is whether the petition can be maintained under a statute passed more than a year thereafter.

This statute in no way affected the rights of the parties; it expressly provided that nothing therein contained should be "deemed a legislative construction of any existing law or an impairment of any existing right of a street railway company to discontinue the use of tracks." It simply provided a new remedy for any unlawful discontinuance by giving a direct resort to the courts.

The opinion, we think, might have been safely placed upon this requirement. But whether such was or was not the intention of the court we cannot say from the opinion."

The right of a street railway company to abandon its route on a certain street without the consent of the state was also denied in *Paige v. Schenectady R. Co.* 178 N. Y. 102, 70 N. E. 213, and *Thompson v. Schenectady R. Co.* 65 C. C. A. 325, 131 Fed. 577.

In *Re Loader*, 14 Misc. 208, 35 N. Y. Supp. 996, 999, it was held that a street railroad company cannot stop part of its cars to the detriment of the public because of its inability to get employees to accept its terms. The court said: "The duty of the company now before the court is to carry passengers through certain streets of Brooklyn, and to furnish, man, and run cars enough to fully accommodate the public. It may not lawfully cease to perform that duty for even one hour. The directors of a private business company may, actuated by private greed or motives of private gain, stop business, and refuse to employ labor at all, unless labor come down to their conditions, however distressing; for such are the existing legal, industrial, and social conditions. But the directors of a railroad corporation may not do the like. . . . They have duties to the public to perform, and they must perform them. If they cannot get labor to perform such duties at what they offer to pay, then they must pay more, and as much as is necessary to get it. Likewise, if the conditions in respect of hours or otherwise which they impose repel labor, they must adopt more lenient or just conditions. They may not stop their cars for one hour, much less one week or one year, to thereby beat or coerce the price or conditions of labor down to the price or conditions they offer. For them to do so would be a defiance of law and of government, which, becoming general, would inevitably, by force of example, lead to general disquiet, to the disintegration of the social order, and even the downfall of government itself."

It furnished a new remedy; but it impaired or affected no contractual obligations and disturbed no vested rights. As it was purely remedial in its character, and did not change any existing rights, it naturally would be applicable to proceedings begun after its passage, though relating to acts done previously thereto. This is the doctrine which was declared in *Foster v. Essex Bank*, 16 Mass. 245, 273, 8 Am. Dec. 135. It has been applied in the construction of many similar statutes, so as to make a new remedy available for the protection of a prior right or for the redress of formerly existing grievances. *Bemis v. Clark*, 11 Pick. 452, 454; *Simmons v. Hanover*, 23 Pick. 188, 194; *Wood v. Westborough*, 140 Mass. 403, 409, 5 N. E. 613; *Rogers v. Nichols*, 186 Mass. 440, 71 N. E. 950. It was the plain intention of the statute to provide a remedy for a case like this by giving redress for a wrongful discontinuance already existing, as well as for any that might occur in the future. It cannot be held that the words "if a street railway . . . discontinues the use of any track" apply merely to a future discontinuance. A somewhat similar contention was considered and rejected in *Com. v. Dracut*, 8 Gray, 455, and *Brown v. Pendergast*, 7 Allen, 427. In the former case the court relied on "the long-established rule of construing statutes according to the manifest intent of the legislature, though apt words to express that intent may not be used, or though such construction may not accord with the letter of the statute." And in the latter case the court said: "We apply an old and unshaken rule in the construction of statutes, to wit, that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore, when the expression is special or particular, but the reason is general, the expression should be deemed general." The rule of cases like *Garfield v. Bemis*, 2 Allen, 445, where the giving of a new remedy would result in the revival of a former right which has absolutely lapsed, is not to be applied here. This petition can be maintained if the respondent's discontinuance of its Pleasant Valley line was without right.

When the respondent company purchased these lines of railway in 1899, it had, under Stat. 1899, chap. 304, p. 264, authority to complete the railway and its equipment, and to maintain and operate the same. But there was nothing compulsory in these provisions; and the respondent would not have lost its property rights in the rails and materials, or in any other real or personal estate which it had acquired, if it had entirely failed to operate the railroad. *French v.*

Jones, 191 Mass. 522, 7 L.R.A.(N.S.) 525, 78 N. E. 118. But it did assume control of all the routes which it had bought, including this Pleasant Valley line, and continued to operate them all until it discontinued the use of this line in January, 1905.

The respondent, like all street railway companies, and like the lighting company spoken of in *Weld v. Gas & Electric Light Comrs.* 197 Mass. 556, 84 N. E. 101, is a quasi public corporation, organized for the exercise of an important public franchise, and bound to exercise that franchise for the benefit of the public, and not merely for its own profit. *Shaw, Ch. J.*, in *Com. v. Temple*, 14 Gray, 69, 76. But it has not, like steam railroads, an exclusive control and a vested right of property in the soil upon which its tracks are laid. In the original charter given to this company's predecessor, the Newburyport & Amesbury Horse Railroad Company (Stat. 1864, chap. 53, p. 30), its right to lay its tracks upon the public streets was made subject to the determination of the mayor and aldermen or selectmen of the respective cities or towns, and those officers, after one year from the opening of its track for use, might, at their pleasure, revoke the location thereof, and the tracks thereupon must be taken up. Similar provisions were either contained in other street railway charters, or were afterwards supplied by amendments thereto. Accordingly, this court said, in *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 517, 518, 28 Am. Rep. 264, that "the peculiar privilege given [to street railway companies] is the right, not to acquire land or an easement in land, but only the right, as long as permitted by certain municipal authorities, to lay tracks in streets already appropriated to the uses of public travel." So in *Springfield v. Springfield Street R. Co.* 182 Mass. 41, 48, 64 N. E. 577, 580, it was said that grants to street railway companies of locations in the public ways are in the nature of a privilege or permit to use the public ways given by cities and towns by virtue of authority from the legislature. And the court added: "They are analogous to licenses given to run omnibuses along certain routes, although of course to make the analogy complete the omnibuses would have to be built so as to run on rails laid in the streets. . . . They convey no exclusive rights in the highways or streets in which they are granted, but are to be used in common with others having occasion to use the public ways. The public authorities retain in the main full control over the streets or ways in which they exist, and may revoke the locations or alter or discontinue the ways without liability to damages therefor,

and subject only to such limitations, if any, as the legislature may see fit to impose." See, to the same effect, *Union R. Co. v. Cambridge*, 11 Allen, 287. And, as a bare license may at any time be revoked or terminated by the licensor, so the licensee is at liberty at any time to cease wholly to avail himself of the permission given and to discontinue his action thereunder, unless there has been some agreement to the contrary. This was the doctrine maintained in *Montana* and *Texas* in cases not unlike the one before us. *State ex rel. Knight v. Helena Power & Light Co.* 22 Mont. 391, 44 L.R.A. 692, 56 Pac. 685; *San Antonio Street R. Co. v. State*, 90 Tex. 520, 35 L.R.A. 662, 59 Am. St. Rep. 834, 39 S. W. 926, reversing 10 Tex. Civ. App. 12, 30 S. W. 266, and 38 S. W. 54. To the same effect is *York & N. M. R. Co. v. R. 1 El. & Bl.* 858. But there is nothing either in the respondent's charter, or in that of its predecessor, or in any other statute before 1891, or in the grant of any location, to the effect that the line in question shall be continued in operation. And the view that, just as these locations might be revoked by the municipal authorities (*Medford & C. R. Co. v. Somerville*, 111 Mass. 232), so they might be abandoned or their use discontinued by the railway company, finds support in legislation. The first general street railway enactment was Stat. 1864, chap. 229, p. 155; and § 19 of this act provided that, "if a street railway company voluntarily discontinues the use of any part of its tracks for a period of six months, the streets or highways occupied by the same shall, upon the order of the board of aldermen of the city or the selectmen of the town forthwith, at the expense of said company, be cleared of said tracks, and put in as good condition for the public travel as they were in immediately before being so occupied." After the passage of this statute, the commissioners appointed under chapter 86, p. 333, of the resolves of 1864, in their report to the legislature of 1865 (*House Docs.* 1865, No. 15), called the attention of the legislature to this subject by saying: "It does not seem to us that any further legislative provision in regard to allowing railway corporations to discontinue the use of their track in any street is demanded. As their rights in the streets are of the most precarious nature, we suppose it cannot fairly be claimed that the companies have incurred any duty or obligation to continue the transportation of passengers longer than it proves remunerative." The fact that after the legislature had received this report the provisions of Stat. 1864, chap. 229, p. 160, § 19, were substantially re-enacted in later codifications certain

tains tends to show that the legislature considered that, subject to the provisions of their charters and other statutes, street railway companies might voluntarily discontinue in whole or in part the use of their tracks. See Stat. 1871, chap. 381, p. 735, § 25; Pub. Stat. 1882, chap. 113, § 25; Rev. Laws, chap. 112, § 36; Stat. 1906, chap. 463, pt. 3, p. 614, § 76.

Some limitations have, indeed, been put by later statutes upon the formerly unrestrained power of location by municipal officers, and the power of final action has been conferred upon other public officers. Stat. 1898, chap. 578, p. 745, § 17; Rev. Laws, chap. 112, § 32; Stat. 1906, chap. 463, pt. 3, p. 610, § 66. But it still remains true that an ordinary street railway company holds its location upon the public ways without having any estate of its own in the lands.

But this right was, of course, subject to legislative control. *Brownell v. Old Colony R. Co.* 164 Mass. 29, 29 L.R.A. 169, 49 Am. St. Rep. 442, 41 N. E. 107. In 1891 it was enacted that, "whenever, in the opinion of the railroad commissioners, additional accommodations for the traveling public are required upon any street railway, they may, after due notice to the street railway company and hearing thereon, make such order requiring additional accommodations to be provided as they think justice to all parties concerned requires, and they may alter, revoke, and renew the same. . . . Any street railway corporation which neglects to comply with any such order for more than one week after it receives notice thereof in writing shall forfeit" a sum stated. Stat. 1891, chap. 216, p. 794, re-enacted with slight verbal changes in Stat. 1906, chap. 463, pt. 3, p. 619, § 97. After the enactment of this statute, and under the provisions of Pub. Stat. 1882, chap. 112, §§ 14, 17, either the municipal officers, or twenty or more legal voters, of a city or town within which part of any street railway was located, could, if the public accommodation so required, obtain an order from the board that the railway company should furnish such additional accommodations as were needed. upon its railway, including, of course, any part thereof of which the company had chosen to discontinue the operation; for we cannot doubt that, so long at least, as the tracks remained in the street, they were still a part of the company's street railway. One effect accordingly of this statute was to make the company's discontinuance of the use of any portion of its tracks subject to the investigation and control of the board of railroad commissioners in the manner provided for; but otherwise the power of the company remained

unaffected. In this case the board has made no order.

In passing upon this question we have not found much assistance from the decisions of the courts of other states, either as to railroad or street railway companies, which have been called to our attention by the industry of the petitioners' counsel. Many of them turned upon the mandatory language of the charters or other statutes, or of the ordinances which were before the courts. *Union P. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *New York v. Dry Dock, E. B. & B. R. Co.* 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563; *Flint & P. M. R. Co. v. Rich*, 91 Mich. 293, 51 N. W. 1001; *Potwin Place v. Topeka R. Co.* 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309; *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* 176 Ill. 512, 35 L.R.A. 656, 45 N. E. 824, 52 N. E. 292. Undoubtedly a valid requirement in an order of location would be enforced (*Selectmen of Gardner v. Templeton Street R. Co.* 184 Mass. 294, 68 N. E. 340), but no such question is before us. Other cases relied on by the petitioners were decided upon the ground that the property of a railroad company is charged with the public duty and held subject to the trust to carry out the objects of its charter. *Gates v. Boston & N. Y. Air Line R. Co.* 53 Conn. 333, 5 Atl. 695; *Pierce v. Emery*, 82 N. H. 484; *State ex rel. Naylor v. Dodge City, M. & T. R. Co.* 53 Kan. 377, 42 Am. St. Rep. 295, 36 Pac. 747. Others were cases in which a company sought to retain a part of its franchise, or of some particular location, while abandoning the rest of it. *People v. Albany & V. R. Co.* 19 How. Pr. 523, and 24 N. Y. 261, 82 Am. Dec. 295; *State ex rel. Bridgeton v. Bridgeton & M. Traction Co.* 62 N. J. L. 592, 45 L.R.A. 837, 43 Atl. 715; *People ex rel. Walker v. Louisville & N. R. Co.* 120 Ill. 48, 10 N. E. 657; *State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719. But here the respondent has discontinued its use of the whole of the tracks covered by the locations under which they were built. And *San Antonio Street R. Co. v. State* (Tex. Civ. App.) 38 S. W. 54, Id. 10 Tex. Civ. App. 12, 30 S. W. 266, has, as we have already seen, been reversed in 90 Tex. 520, 35 L.R.A. 662, 59 Am. St. Rep. 834, 39 S. W. 926.

We may add that it would be difficult, in the absence of statutory requirement, to reach the conclusion that a street railway company with so small a capital and re-

sources so limited as those shown here should be required to operate a branch line which is not an integral part of its main system, and which has not sufficient patronage to meet its running expenses. If it were a steam railroad, it would not be required, under the decision in *Com. v. Fitchburg R. Co.* 12 Gray, 180, to run passenger trains on such a branch; but in the case of a street railway, which does not carry freight, this means the complete disuse of its tracks. Substantially this rule was affirmed in *Sherwood v. Atlantic & D. R. Co.* 94 Va. 291, 26 S. E. 943, and in *Jack v. Williams* (C. C.) 113 Fed. 823. See also *Ohio & M. R. Co. v. People*, 120 Ill. 200, 11 N. E. 347; *People v. Rome, W. & O. R. Co.* 103 N. Y. 95, 8 N. E. 369. The general rule for such cases was stated by Gray, J., in *Northern P. R. Co. v. Washington*, 142 U. S. 492, 499, 35 L. ed. 1092, 1095, 12 Sup. Ct. Rep. 283, 285: "If, as in *Union P. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428, the character of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So, if the charter requires the corporation to construct its road and to run its cars to a certain point on tidewater (as was held to be the case in *State v. Hartford & N. H. R. Co.* 29 Conn. 538), and it had so constructed its road and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a railroad corporation to build a bridge in compliance with an express requirement of statute. *New Orleans, M. & T. R. Co. v. Mississippi*, 112 U. S. 12, 28 L. ed. 619, 5 Sup. Ct. Rep. 19; *People ex rel. Kimball v. Boston & A. R. Co.* 70 N. Y. 569. But, if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point when it would not be remunerative. *York & N. M. R. Co. v. R. 1 El. & Bl.* 858; *Great Western R. Co. v. R. 1 El. & Bl.* 874; *Com. v. Fitchburg R. Co.* supra; *State ex rel. Atty. Gen. v. Southern Minnesota R. Co.* 18 Minn. 40, Gil. 21."

We cannot say that the respondent's discontinuance of this line was "without right or lawful excuse" within the meaning of the statute; and it is not necessary to consider the exceptions taken by the respondent to the master's report. The petition must be dismissed.

So ordered.

MASSACHUSETTS SUPREME JUDICIAL COURT.

PATRICK J. BANAGHAN, Appt.,
v.

MARY A. MALANEY.

(200 Mass. 46, 85 N. E. 839.)

Specific performance — refusal — discretion.

1. Specific performance of a contract for sale of property may be refused where it was obtained by a person of superior mental ability from an aged, inexperienced, and ignorant woman, who was persuaded to refrain from consulting an adviser, and whose racial prejudices were appealed to for present execution of the contract, while circumstances which might enhance the value of the property were not disclosed to her

Same — retention of bill — damages.

2. Upon refusal of specific performance of a contract to sell real estate because of inequitable conduct on the part of complainant, the bill need not be retained for the assessment of damages, but may be dismissed, and complainant left to his remedy at law.

(October 21, 1908.)

A PPEAL by complainant from a decree of the Superior Court for Worcester County dismissing a bill filed to secure specific performance of a contract to sell real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Burton W. Potter and Paul Potter, for appellant:

Specific performance should be ordered because the plaintiff has not a plain, adequate, and complete remedy at law.

Jones v. Newhall, 115 Mass. 248, 15 Am. Rep. 97; Old Colony R. Corp. v. Evans, 6 Gray, 25, 66 Am. Dec. 394.

The bill should be retained for the purpose of giving the plaintiff relief in damages, even if specific performance is not ordered.

Milkman v. Ordway, 106 Mass. 232; Rev. Laws, chap. 159, § 6.

Messrs. Earle Brown and Charles A. McDonough, for respondent:

Specific performance is not a matter of strict right, but is founded on the sound discretion of the court, exercised under the guidance of equitable principles.

Curran v. Holyoke Water Power Co. 116 Mass. 90; Western R. Corp. v. Babcock, 6 Met. 346; Story, Eq. Jur. § 742; St. John v. Benedict, 6 Johns. Ch. 117; Aldrich, Eq. Pl. & Pr. p. 254.

Note. — As to the right of a complainant whose claim to relief in equity is defeated by want of equity, to a money judgment, see case note to Johnston & G. Bros. v. Bunn, post, 1064.
19 L.R.A. (N.S.)

A court of equity will not decree specific performance of a contract in favor of a party merely because he is not guilty of sufficient fraud or deceit to constitute a legal defense to the contract.

Cuff v. Dorland, 50 Barb. 438.

Sheldon, J., delivered the opinion of the court:

The judge had a right, upon his findings, to refuse to give the plaintiff a decree for specific performance of his agreement with the defendant. It is true that the agreement was good and sufficient upon its face; the defendant was legally competent to make it; and it was not obtained by such fraud or misrepresentation as would give the defendant a right to avoid it. But this is not enough to entitle the plaintiff, as a matter of right, to enforce specific performance. His right to this remedy is not an absolute one. It rests in the sound discretion of the court. It may be refused to one who has been guilty of any unfair conduct, or has taken any inequitable advantage of the other party to the agreement, even though there is no sufficient ground for the rescission of the agreement. Curran v. Holyoke Water Power Co. 116 Mass. 90; Western R. Corp. v. Babcock, 6 Met. 346, 352. This rule has been recognized in the later decisions of this court. O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602; Thaxter v. Sprague, 169 Mass. 397, 34 N. E. 541. And see the cases collected in 26 Am. & Eng. Enc. Law, 2d ed. pp. 62 et seq. 67.

The defendant was an aged, inexperienced, and ignorant woman. The mental ability of the plaintiff's agent was superior to hers; he persuaded her to refrain from consulting the adviser upon whom she was disposed to rely, and wrought upon her racial prejudices to persuade her to make the agreement at once upon the terms which he offered. After having thus kept her from obtaining the independent advice which she desired, he did not disclose to her the circumstances which led him to believe that a higher price could be obtained for the property. He was not, of course, under any fiduciary obligations to her; but this conduct on his part does not entitle him to favorable consideration in a court of equity. He took an inequitable advantage of the defendant.

The plaintiff further contends that his bill, instead of being dismissed, should have been retained for the purpose of giving him relief in damages. Undoubtedly this might have been done. It was done in Rosenberg v. Heffernan, 197 Mass. 151, 83 N. E. 316. Presumably it would have been done here if the plaintiff had so requested. But the court was not bound to adopt this course;

it might leave the plaintiff wholly to his remedy at law, as was done in *Curran v. Holyoke Water Power Co.* supra. In *Milkman v. Ordway*, 106 Mass. 232, relied on by the plaintiff, as in *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340, *Lexington Print Works v. Canton*, 171 Mass. 414, 50 N. E. 931, and similar cases, the plaintiff had lost his right to purely equitable relief without fault on his part. The rule of those cases is not applicable here. The plaintiff has not asked for leave to change his bill by amendment into an action at law for damages, as in *Merrill v. Beckwith*, 168 Mass. 72, 46 N. E. 400.

Decree affirmed.

MICHIGAN SUPREME COURT.

SAMUEL MEISNER, Plff. in Err.,

v.

DETROIT, BELLE ISLE, & WINDSOR
FERRY COMPANY.

(— Mich. —, 118 N. W. 14.)

Private carrier — pleasure resort.

A ferry company which maintains a pleasure resort on its own property for a particular class of persons whose patronage it invites and for whose accommodation it runs a boat devoted exclusively to their transportation is not, so far as that enterprise is concerned, a common carrier; and it may exclude from the boat persons who will be undesirable to its patrons, or destroy the success of its undertaking.

(November 2, 1908.)

ERROR to the Circuit Court for Wayne County to review a judgment in plaintiff's favor for a less sum than was demanded in an action brought to recover damages for alleged wrongful exclusion from defendant's boat. Affirmed.

Note. — The above decision seems to be one of first impression upon the question whether an amusement company operating a boat as a means of transportation to its pleasure grounds is a public carrier or not, the answer to which would, of course, determine whether such company had the right to exclude undesirable persons from its boat, as an extensive search has failed to disclose any other case in which the question is discussed. But attention may be called to *People v. Mago*, 69 Hun, 559, 23 N. Y. Supp. 938, in which it was held that the owner of a yacht conveying passengers for hire, mainly on Sundays and holidays, to a place of public resort and back again, was not maintaining a ferry within the meaning of a criminal statute, the provisions of which do not appear in the report of the case. 19 L.R.A. (N.S.)

Statement by Grant, Ch. J.:

The defendant is organized under chapter 175, §§ 6646-6659, Comp. Laws. Its articles of association declare its purpose to be "to own and operate ferries on an island in the river, between the city of Detroit, and the towns of Walkerville, Windsor, and Sandwich, Province of Ontario, and the Belle Isle, and such other places on the Detroit river and St. Clair river as the business and interests of the public and said corporation may from time to time require." Belle Isle is a public park, comprising an island in the river, and owned by the city. Between the places mentioned it runs ferries, and, as to traffic between those places, is a public common carrier of passengers. The defendant purchased Bois Blanc island, situated in Canadian waters, near the mouth of the Detroit river, opposite to and about a quarter of a mile from Amherstburg, Canada. It owns the entire island, except a tract reserved for lighthouse purposes and three small cottage lots. Upon its property defendant has erected a café, dance hall, cottage for women, shelters and amusement buildings of various kinds, laid out walks, drives, bicycle paths, baseball and athletic grounds, bathing beaches, etc. Upon these it has expended about \$200,000. It owns and runs a boat from Detroit to its park on Bois Blanc island twice daily. This boat, the steamer *Columbia*, will carry from 3,000 to 3,500 passengers. A smaller boat, the *Papoose*, licensed to carry 160 passengers, runs between Amherstburg and Bois Blanc. The island being located in Canadian territory, defendant's boat, the *Columbia*, is required to stop at Amherstburg, going and coming, to take on a custom's inspector. It caters largely to women and children. It owns its own docks used on this route. No liquor is allowed to be sold on the island or on the boats. It provides special policemen to patrol the island, to prevent all conduct and disturbances which would annoy its patrons. Its boat, the *Columbia*, carries excursions of various societies to the island, selling tickets at a reduced rate to such societies, which make a profit by reselling them at the regular rate. During the season of 1906, there were about 176 of such special excursions. Plaintiff was refused passage from the city of Detroit to Bois Blanc on two occasions. He had purchased tickets for these trips from societies which gave these excursions. The contracts between the defendant and these organizations contained the following provision: "The party of the first part reserves the right to refuse to accept tickets sold or furnished to any persons whom they believe to be possible objectionable passengers. Tickets sold or furnished in violation of this contract will not be ac-

cepted." The tickets also contained the following provision: "This ticket is sold subject to the agreement between the Detroit, Belle Isle, & Windsor Ferry Company and the above organization, and must be exchanged for the excursion ticket at wharf on date of the excursion." On attempting to pass the gate onto the steamer, plaintiff was refused admission. The reason given on each occasion was that on a former occasion he had engaged in a disturbance upon the boat to the annoyance of passengers and crew. He brought this suit to recover damages for refusal to carry him as a passenger. The action is in tort, alleging a breach of defendant's duty as a common carrier of passengers. The court directed a verdict for the defendant, except as to the price of the ticket which plaintiff had purchased. He was permitted to recover for this amount, with interest.

Messrs. Sloman & Sloman, for plaintiff in error:

The company's object was to own and operate a ferry such as the business and interests of the public and the corporation might require, and it therefore constituted a public ferry company with duties and obligations of a common carrier.

12 Am. & Eng. Enc. Law. 2d ed. p. 1108, "Ferries"; Hutchinson, Carr. pp. 74, 75, & § 43; Bauer v. Verona Ferry Co. 33 Pa. Super. Ct. 607; Wilson v. Alexander, 115 Tenn. 125, 88 S. W. 935; Townsend v. Boston, 187 Mass. 283, 72 N. E. 991; Rosen v. Boston, 187 Mass. 245, 68 L.R.A. 153, 72 N. E. 992.

Mr. Elliott G. Stevenson, with Messrs. Gray & Gray, for defendant in error:

The ticket was a revocable license.

Wood v. Leadbitter, 13 Mees. & W. 838; McCrea v. Marsh, 12 Gray, 211, 71 Am. Dec. 745; Burton v. Scherpf, 1 Allen, 133, 79 Am. Dec. 717; Pearce v. Spalding, 12 Mo. App. 141; Purcell v. Daly, 19 Abb. N. C. 301; Collister v. Hayman, 183 N. Y. 250, 1 L.R.A. (N.S.) 1188, 111 Am. St. Rep. 740, 76 N. E. 20, 5 A. & E. Ann. Cas. 344, affirming 91 App. Div. 612, 86 N. Y. Supp. 1132; People ex rel. Burnham v. Flynn, 189 N. Y. 180, 82 N. E. 169; Beale, Innkeepers, § 316; MacGowan v. Duff, 14 Daly, 315; Horney v. Nixon, 213 Pa. 20, 1 L.R.A. (N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 A. & E. Ann. Cas. 349.

Grant, Ch. J., delivered the opinion of the court:

Is the defendant, in its business between Detroit and its park on Bois Blanc island, a public common carrier of passengers, obliged by law to accept any person who offers himself as a passenger? This is the important question in this suit. If it be answered in

the affirmative, it follows that no person or corporation can own a private park, private docks, its own means of transportation, and control its pleasure grounds, and means of transportation thereto, without becoming a common carrier, obliged to transport anyone who presents himself as a passenger. The sole business in which the defendant is engaged with these two boats is carrying passengers to and from its private pleasure grounds. It caters to a particular class of people. It desires to keep out those whom, for reasons of its own, it deems objectionable. Unless it did this, it would not secure the class of patrons it desires. If it secures the better class of people, which its managers probably believe would make the enterprise a success, beneficial financially to themselves and attractive to respectable people, it must exclude the rough, boisterous, and rowdyish element from its boats and grounds. It is not engaged in the general carriage of passengers for business and pleasure. It invites such persons and parties as it chooses, and upon such terms as it chooses to make, to visit its own grounds, provided, as above stated, with the means of entertainment, amusement, and sport. It is in all essentials as private an enterprise as that of a theater, a circus, or a race track.

Counsel do not disagree as to the law of common carriers of passengers. Anyone, no matter what his character is or has been, presenting himself for transportation to such carrier is, upon paying his fare, entitled to be transported, provided there is nothing in his condition or conduct when he presents himself to justify his exclusion. This rule does not apply to the owners of theaters, circuses, race tracks, private parks, and the like, unless there be some statute regulating their business, and providing the terms and conditions under which that company's business may be carried on. It appears to be settled by the authorities that these are private enterprises, under the control of private parties, and that they may license whomever they will to enter, and refuse admission to whomsoever they will. Their own interests prompt fair and just treatment to those whom they invite to their places of pleasure. The right given to enter such places is a mere license, and after the right to enter is granted, it may be revoked. So, also, the right to enter may be refused to anyone. People ex rel. Burnham v. Flynn, 189 N. Y. 180, 82 N. E. 169; Collister v. Hayman, 183 N. Y. 250, 1 L.R.A. (N.S.) 1188, 111 Am. St. Rep. 740, 76 N. E. 20, 5 A. & E. Ann. Cas. 344; Pearce v. Spalding, 12 Mo. App. 141; Purcell v. Daly, 19 Abb. N. C. 301; Burton v. Scherpf, 1 Allen, 133, 79 Am. Dec. 717; McCrea v. Marsh, 12 Gray, 211, 71 Am. Dec. 745; Horney v. Nix-

on, 213 Pa. 20, 1 L.R.A.(N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 A. & E. Ann. Cas. 349; Wood v. Leadbitter, 13 Mees. & W. 838. Wood v. Leadbitter, supra, is very similar in its facts to this case. It is cited with approval in several of the above-cited cases. Pleasure grounds of this character are not necessities of life, any more than are theaters and race tracks; and, unless restrained by some provisions of their charters, their owners can impose any terms of admission they choose. No such restraints are imposed upon the defendant in this case. The defendant can exact an entrance fee at the park, or it can compensate itself by charging for transportation to it and admit its patrons otherwise free to the park. The ride upon the boat and the use of the grounds are part of the same scheme for pleasure furnished by the defendant to those whom it may choose to carry. It is perhaps due to the plaintiff to say that he denies the improper conduct charged against him, but his rights in no sense depend upon the reason given for his exclusion.

The judgment is affirmed.

MICHIGAN SUPREME COURT.

THOMAS S. SPRAGUE, Plff. in Err.,

v.

JAMES R. HOSIE.

(— Mich. —, 118 N. W. 497.)

Statute of frauds — shares of stock — sale.

1. Issued shares in a corporation are goods within the meaning of the statute of frauds, and oral contracts for their sale which do not comply with the terms of that statute are invalid.

Pleading — sufficiency — valid contract.

2. A declaration in an action to recover damages for breach of contract to sell shares of stock is not insufficient because it does not allege facts to show whether or not the contract was obnoxious to the statute of frauds, if the existence of a valid contract is asserted.

Burden of proof — general issue — validity of contract.

3. The burden of proving a contract valid under the statute of frauds may be cast on plaintiff by the plea of the general issue, in an action to recover damages for breach of contract to sell shares of stock in which the declaration alleges the existence of a valid contract.

(November 30, 1908.)

ERROR to the Circuit Court for Wayne County to review a judgment in defendant's favor in an action brought to recover 19 L.R.A.(N.S.)

damages for breach of contract to sell corporate stock. Affirmed.

Statement by Ostrander, J.:

The suit is brought to recover damages alleged to have been sustained by the plaintiff by reason of the refusal of defendant to perform his contract to sell plaintiff 20 shares of bank stock at \$154 a share. The declaration contains the common counts in assumpsit and a special count in which the said contract and a breach thereof are averred. The plea is the general issue. Defendant offered no testimony. A verdict for defendant was directed by the court, and judgment on the verdict was entered. Plaintiff is a dealer in stocks and bonds. He testified, however, that he desired to purchase this stock for himself, and not for any client. In a letter written by him to defendant of date August 22, 1906, is the following: "I have a client who may purchase a limited amount of Michigan Savings Bank stock. . . . If you decide to offer the stock to me, please make the price to hold good until September 1st as my client is hard to find at times and it may take two or three days to hear from him." In reply defendant of date August 30th wrote: "Replying to above, I have only 20 shares Mich. Sav. Bank stock and will sell same for 155 or 3,100.00 net. This is the best price I can make. Have refused an offer of 150; on account of vacations your letter has been neglected

Case Note. — Contract for the sale of corporate stock as one for the sale of "goods," etc., within statute of frauds.

This note does not include cases of parol subscription to corporate stock, or of agreements of a vendor thereof to repurchase shares of stock from a vendee on certain contingencies.

The doctrine that a contract for the sale of corporate stock is one for the sale of "goods, wares, and merchandise," within the statute of fraud, is almost unanimously recognized by the courts of this country. Mayer v. Child, 47 Cal. 142; North v. Forest, 15 Conn. 400; Ayres v. French, 41 Conn. 142; Pray v. Mitchell, 60 Me. 430; Tisdale v. Harris, 20 Pick. 9; Thompson v. Alger, 12 Met. 428; Eastern R. Co. v. Benedict, 10 Gray, 212; Boardman v. Cutter, 128 Mass. 388; Meehan v. Sharp, 151 Mass. 564, 24 N. E. 907; Berwin v. Bolles, 183 Mass. 340, 67 N. E. 323; McIlroy v. Richards, 148 Mich. 604, 112 N. W. 489; Fine v. Hornsby, 2 Mo. App. 61; Bernhardt v. Walls, 29 Mo. App. 206; Orr v. Hall, 75 Neb. 548, 106 N. W. 656; Baltzen v. Nicolay, 53 N. Y. 467, reversing 3 Jones & S. 203; Tompkins v. Sheehan, 158 N. Y. 617, 53 N. E. 502; Ryers v. Tuska, 39 N. Y. S. R. 103, 14 N. Y. Supp. 926; Nichols v. Clark, 40 Misc. 107, 81 N. Y. Supp. 262; Morse v. Douglass, 112 App. Div. 798, 99 N. Y. Supp. 392; Tomlinson v. Miller, 7 Abb. Pr. N. S.

till now." Of date November 5, 1906, plaintiff again wrote to defendant, saying: "If you wish to sell your 20 shares of Michigan Savings Bank stock at this time at \$149.00 per share net to you, I think I can make sale of the same,"—concluding the letter as follows: "If you desire to let me offer the stock for sale at this price, please make price good for this week, as to-morrow is a holiday and it may take a day or two after that to accomplish anything." The reply, dated November 7th, was: "I have an offer of 160 Jan. 1, 1907. In the meantime I will get a dividend of 4 to 5 per cent. Would not sell for less than 164 net at this time." Plaintiff on November 12th again wrote defendant: "Replying to your favor of the 7th inst. regarding 20 shares of Michigan Savings Bank stock, which you offered to sell at 154 net to you, if you will sell 5 shares at 153. I will take it, if I am not supplied when I hear from you. Please advise me at once. I purchased some of this stock at a much less price since writing you and my client is willing to pay 153 for 5 shares to even up the block, if the matter is closed at once. I have no doubt I can get it for less money by looking around, but he told me to make you this offer to close the matter without delay. I do not see how you expect to get 4 to 5 per cent dividend January 1st, as the bank is only paying 7 per cent per annum, which would make the accrued dividend about 2.60 per cent at this date." To this defendant made no reply. The plaintiff testified that, on November 17th, by telephone, he advised defend-

ant that he would take 20 shares at \$154 a share, and told defendant to send the certificate with draft attached to the savings bank, and that defendant said he would send the stock, but that it might be two or three days before he could do so; that immediately thereafter, on the same day, he sent to defendant a letter confirming the offer made by telephone. This letter was not produced. A motion to strike out the testimony of the oral communication was granted, and plaintiff excepted. Later, on December 7th, plaintiff demanded the stock, saying he was ready to pay for it, but defendant refused to deliver the stock claiming he had never bargained for its sale. Later, a tender, in the form of a cashier's check for \$3,080, was made to defendant and was refused. On December 7th the market value of the stock was \$180 per share, plus a dividend of \$3.50 per share. It is claimed on the part of appellant, first, that the letters make a complete and binding contract; second, that bank stock, ownership of which is usually evidenced by certificates, is not goods, wares, or merchandise within the meaning of the statute of frauds; third, that the defense that the contract, if resting in parol, was void under the statute of frauds, was waived because no notice of such defense was given with defendant's plea.

Mr. Frederic T. Harward, for plaintiff in error:

Stock does not constitute "goods, wares,

364; *Sherwood v. Tradesman's Nat. Bank*, 16 N. Y. Week. Dig. 522; *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97; *Hinchman v. Lincoln*, 124 U. S. 38, 31 L. ed. 337, 8 Sup. Ct. Rep. 369; *Raymond v. Colton*, 43 C. C. A. 501, 104 Fed. 219; *Koewing v. Wilder*, 63 C. C. A. 186, 128 Fed. 558; *Franklin v. Matoa Gold Min. Co.* 16 L.R.A. (N.S.) 381, 86 C. C. A. 145, 158 Fed. 941.

In *Hightower v. Ansley*, 126 Ga. 8, 54 S. E. 939, 7 A. & E. Ann. Cas. 927, this doctrine was adopted, the court refusing to follow the contrary holding in *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

So, a contract for the sale of corporate stock is one for the sale of "personal property," within the Florida statute of frauds, which uses that expression instead of "goods, wares, and merchandise." *Southern Life Ins. & T. Co. v. Cole*, 4 Fla. 359.

And such rule is not affected by a by-law of a stock exchange rendering oral contracts for the sale of stock binding. *Ryers v. Tuska*, supra.

But a parol contract for the sale of shares of a proposed issue of an increase of corporate stock, which the vendor, as an original shareholder, will be entitled to, is not a contract for the sale of "goods, wares, and merchandise," as the subject-matter of the contract was not in existence when it was en-

tered into. *Gadsden v. Lance*, *McMull. Eq.* 87, 37 Am. Dec. 548.

While the cases of *Vawter v. Griffin*, 40 Ind. 593, and *Colvin v. Williams*, 3 Harr. & J. 38, 5 Am. Dec. 417, apparently hold that corporate stock is not within the statute of frauds, yet this is *dictum*. See comment upon the latter case in *Webb v. Baltimore & E. S. R. Co.* 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

According to the later English authorities, shares of corporate stock are not "goods, wares, and merchandise," within the statute of frauds. *Hibblewhite v. M'Morine*, 6 Mees. & W. 200; *Knight v. Barber*, 2 Carr. & K. 333; *Bowly v. Bell*, 3 C. B. 284; *Watson v. Spratley*, 10 Exch. 222; *Humble v. Mitchell*, 11 Ad. & El. 205; *Duncuft v. Albrecht*, 12 Sim. 189; *Heseltine v. Siggers*, 1 Exch. 856.

Although there are earlier cases to the contrary. *Crull v. Dodson*, Cas. t. King, 41; *Mussell v. Cooke*, Prec. in Ch. 533; *Colt v. Netterville*, 2 P. Wms. 304; *Pickering v. Appleby*, 1 Comyns, Rep. 354.

As to transfers of corporate stock in consideration of services, as affected by statute of frauds relating to contracts for the sale of "goods," etc., see case note to *Franklin v. Matoa Gold Min. Co.* 16 L.R.A. (N.S.) 381.

or merchandise," within the purview of the statute.

Humble v. Mitchell, 11 Ad. & El. 205; *Duncuft v. Albrecht*, 12 Sim. 192; *Hargreaves v. Parsons*, 13 Mees. & W. 561; *Heseltine v. Siggers*, 1 Exch. 856; *Bowlby v. Bell*, 3 C. B. 284; *Browne*, Stat. Fr. § 298; *Vawter v. Griffin*, 40 Ind. 600; *Webb v. Baltimore & E. S. R. Co.* 77 Md. 98, 39 Am. St. Rep. 396, 28 Atl. 113; *Thomp. Corp.* 1068; *Green v. Brookins*, 23 Mich. 54, 9 Am. Rep. 74; *Kutz v. Fleisher*, 67 Cal. 93, 7 Pac. 195; *Whittemore v. Gibbs*, 24 N. H. 484.

Defendant waived the right to rely on the statute of frauds as a defense by failing to give notice under his plea of the general issue that he would rely thereon.

29 Am. & Eng. Enc. Law, p. 811; 9 Enc. Pl. & Pr. pp. 709, 715, 716; *Eveland v. Stephenson*, 45 Mich. 397, 8 N. W. 62; *Crane v. Powell*, 139 N. Y. 387, 34 N. E. 911; *Martin v. Blanchett*, 77 Ala. 288; *Finucan v. Kendig*, 109 Ill. 198; *Lear v. Chouteau*, 23 Ill. 39; *Gardner v. Armstrong*, 31 Mo. 539; *Adams v. Patrick*, 30 Vt. 516.

Messrs. *Stellwagen & MacKay*, for defendant in error:

Stock constitutes "goods, wares, or merchandise," and is within the purview of the statute of frauds.

29 Am. & Eng. Enc. Law pp. 960, 961; *Weston v. McDowell*, 20 Mich. 353; *Tisdale v. Harris*, 20 Pick. 9; *Topliff v. McKendree*, 88 Mich. 148, 50 N. W. 109; *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97; *Fine v. Hornsby*, 2 Mo. App. 61; *Gadsden v. Lance*, *McMull. Eq.* 87, 37 Am. Dec. 548; *North v. Forest*, 15 Conn. 400; *Boardman v. Cutter*, 128 Mass. 388; *Baltzen v. Nicolay*, 53 N. Y. 467; *Johnson v. Mulvy*, 51 N. Y. 634.

If the contract is denied, the statute need not be pleaded, but may be invoked at the trial.

9 Enc. Pl. & Pr. pp. 711, 712; *Harris v. Frank*, 81 Cal. 288, 22 Pac. 856; *Meyers v. Schemp*, 67 Ill. 469; *Beard v. Converse*, 84 Ill. 512; *Lynch v. Scroth*, 50 Ill. App. 668; *Hunter v. Randall*, 62 Me. 423, 16 Am. Rep. 490; *Durant v. Rogers*, 71 Ill. 121; *McMillen v. Terrell*, 23 Ind. 163; *Suman v. Springate*, 67 Ind. 115; *Taylor v. Merrill*, 55 Ill. 52; *Force v. Dutcher*, 18 N. J. Eq. 401; *Calvert v. Schultz*, 143 Mich. 441, 106 N. W. 1123.

Ostrander, J., delivered the opinion of the court:

1. There was no continuing offer to sell the stock at the price of \$154 a share. Defendant's letter of November 7th, if it can be said to contain an offer to then sell the stock, was not a continuing offer. Moreover, whether it be treated as a present or a continuing offer to sell, it was refused and was 19 L.R.A. (N.S.)

not thereafter renewed. The bargain, if one was made, rests in parol.

2. Whether stock in an incorporated company, the shares of which have been actually issued, is goods, wares, or merchandise, within the meaning of the statute of frauds (Comp. Laws, § 9516), is a question which has been answered differently in different jurisdictions. In essentials our statute is a copy of the 17th section of the statute of Charles II., and was adopted in this jurisdiction in 1819 from the laws of the state of New York. The English courts, to a period as late as 1839, had not apparently determined conclusively that such shares were or were not within the statute. *Mussey v. Cooke*, Prec. in Ch. 533; *Crull v. Dodson*, Cas. t. King, 41. Lord Denman in *Humble v. Mitchell*, 11 Ad. & El. 205, a case decided in 1839, held with the concurrence of his associates that "shares in a joint-stock company like this [a bank] are mere choses in action, incapable of delivery, and not within the scope of the 17th section. A contract in writing was therefore unnecessary." It is stated in the opinion that no case had been found directly in point. *Humble v. Mitchell*, has apparently been since followed in England. See 29 Am. & Eng. Enc. Law, p. 961; 20 Cyc. Law & Proc. p. 244; *Beach*, Modern Law of Contr. § 558. See also note to *Weightman v. Caldwell*, 4 Wheat. 85-89, 4 L. ed. 520-522. In 1838, in *Tisdale v. Harris*, 20 Pick. 9 (*Humble v. Mitchell* not being cited by counsel), the precise converse of the modern English rule was laid down; it being decided that the words "goods" and "merchandise," are broad enough in meaning to include stocks or shares in incorporated companies. The rule is affirmed in *Boardman v. Cutter*, 128 Mass. 388. To the same effect are *North v. Forest*, 15 Conn. 400; *Pray v. Mitchell*, 60 Me. 430; *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97; *Johnson v. Mulvy*, 51 N. Y. 634. It must be admitted that at the common law shares of an incorporated company occupied much the same position as promissory notes and other mere choses in action. Indeed, it is held in *Massachusetts* that a promissory note is within the statute. *Baldwin v. Williams*, 3 Met. 365. To the contrary is *Vawter v. Griffin*, 40 Ind. 593, which approves the rule of *Humble v. Mitchell*. Such shares have, however, come to be subjects of common barter and sale, are usually evidenced by certificates which, in the absence of statute provisions, operate by assignment and delivery to transfer title to the shares as between the parties. They are in this state by statute subject to levy and sale on execution. In many other respects they are treated as something more than mere choses in action. It was said by this court in *Weston v. McDowell*, 20 Mich.

353, 357, in considering the meaning to be given the words "goods, wares, and merchandise," as employed in the common counts in assumpsit, that it has always been considered that the phrase as employed in the statute of frauds embraced animate as well as inanimate property, and that the word "goods" may well include oxen. The case is not in point here except as indicating that a broad rather than a narrow meaning should be given to the word "goods." That contracts for the sale and delivery of shares of stock are subject to the mischief aimed at by the statute must be admitted. We are of opinion that reason and the weight of authority favor the conclusion that shares of stock in an incorporated company, the shares having been issued, are goods within the meaning of the statute of frauds. It follows that the parol contract for their sale was invalid.

3. The declaration alleged no facts to show whether the contract sued upon was or was not obnoxious to the statute. It was nevertheless a good pleading. *Dayton v. Williams*, 2 Dougl. (Mich.) 31; *Harris Photographing Supply Co. v. Fisher*, 81 Mich. 136, 45 N. W. 661; *Stearns v. Lake Shore & M. S. R. Co.* 112 Mich. 651, 71 N. W. 148; *Kroll v. Diamond Match Co.* 106 Mich. 127, 63 N. W. 983. See also 9 Enc. Pl. & Pr. p. 700; *Seaman v. O'Hara*, 29 Mich. 66, 67. The language of the statute in question here is: "No contract for the sale of any goods, wares, or merchandise, for the price of \$50 or more, shall be valid, unless," etc. It is clear that such a contract may be valid and enforceable, although no note or memorandum in writing of the bargain be made and signed by the party to be charged therewith. The plaintiff in his declaration asserts the existence of a valid contract and upon the motion or objection of the defendant must prove such an one. The scope of the plea of the general issue is as a general rule a denial of every material averment of fact in the declaration. The precise question presented was answered adversely to plaintiff's contention in *Third Nat. Bank v. Steel*, 129 Mich. 434, 64 L.R.A. 119, 88 N. W. 1050.

It follows that the judgment must be, and it is, affirmed.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp.,

v.

ERNEST R. TAYLOR, Appt.

(— Minn. —, 118 N. W. 1012.)

Physician — right to practise dentistry.

A person who is licensed to "practise

Headnote by ELLIOTT, J.

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medicine and surgery" under the statutes of the state cannot, by virtue thereof, "practise dentistry" without securing a license as a dentist, as required by chap. 117, p. 127, Gen. Laws 1907.

(December 11, 1908.)

APPEAL by defendant from an order of the Municipal Court of Minneapolis denying a new trial after defendant's conviction for having practised dentistry without a license. Affirmed.

The facts are stated in the opinion.

Messrs. Mead & Robertson, for appellant:

The reason for requiring a license to practise dentistry when such license is applied for by a layman does not apply to the practice of dentistry by regular physicians and surgeons.

State v. Beck, 21 R. I. 288, 45 L.R.A. 269, 43 Atl. 366; *McCann v. State*, 40 Tex. Crim. Rep. 111, 48 S. W. 512; *State v. Vandersluis*, 42 Minn. 134, 6 L.R.A. 119, 43 N. W. 789.

Messrs. Frank Healy and Clyde R. White, for respondent:

The acts constitute a violation of the law unless physicians are exempt from the operation of the law.

State v. Sexton, 37 Wash. 110, 79 Pac. 634; *State v. Thompson*, 48 Wash. 683, 94 Pac. 667.

The statute makes no exception in favor of physicians.

Lewis's Sutherland, Stat. Constr. § 363; *Rochester v. Upman*, 19 Minn. 108, Gil. 78; *State v. Cron*, 23 Minn. 140; *State v. Orth*, 38 Minn. 150, 36 N. W. 103; *State v. Benz*, 41 Minn. 30, 42 N. W. 547; *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344; *State v. McGinnis*, 30 Minn. 48, 14 N. W. 256.

ELLIOTT, J., delivered the opinion of the court:

Dr. Taylor, the appellant, was convicted of the offense of practising dentistry without a license, in violation of chap. 117, p. 127, Gen. Laws 1907. He was at the time a licensed physician and surgeon, and claims that such license entitles him to engage in the incidental practice of dentistry on his own patients. Dr. Taylor extracted two teeth for one of his patients and took an impression in wax of the mouth and cavities. He sent this impression to a dental laboratory, where artificial teeth were made and returned to Dr. Taylor, who delivered them

Note. — *STATE v. TAYLOR* and *State v. Beck*, 21 R. I. 288, 45 L.R.A. 269, 43 Atl. 366, cited therein, apparently are the only cases passing upon the question whether a physician's license covers the practice of dentistry.

to his patient and received a fee of some \$38 for his services. It is conceded that Dr. Taylor did not hold a certificate from the state board of dental examiners authorizing him to practise dentistry in this state, and that what he did comes within the terms of the statute which defines the practice of dentistry. He was therefore properly convicted, unless protected by his license as a physician and surgeon.

The statute provides that a person shall be regarded as practising medicine "who shall append the letters 'M. D.' or 'M. B.' to his name, or for a fee prescribe, direct, or recommend for the use of any person any drug, or medicine, or other agency, for the treatment or relief of any wound, fracture, or bodily injury, infirmity, or disease: Provided that this section shall not apply to dentists." Rev. Laws 1905, § 2300. It is true, as appellant contends, that the practice of medicine and surgery in its broad and comprehensive sense includes the practice of dentistry, which "is medical, surgical, or prosthetic. In so far as it is a direction of medical science to the prevention, modification, or removal, by medicinal and hygienic remedies, of the causes and effects of disease in the dental organs, it forms part of the physician's practice, just as does the treatment of cerebral, cardiac, or pulmonary diseases. In so far as it is an application of surgical skill to the fractures or to staphylocoraphy, it is simply oral surgery, involving only such knowledge and skill in the use of instruments as every surgeon must possess." Harris, *Principles & Practice of Dentistry*, p. xxxiii.

In the absence of any legislative declaration to the contrary, a certificate authorizing the holder to practise medicine and surgery would therefore entitle him to practise dentistry. But, for reasons of public policy, with which we have no particular concern, the legislature adopted the policy of dividing the field of medicine and surgery, and making a separate profession of a part thereof. *State v. Vandersluis*, 42 Minn. 129, 6 L.R.A. 119, 43 N. W. 789. It was thought that men who engage in the treatment of diseases of the dental organs should receive special preparation and be specially licensed to practise that particular branch or department of medicine and surgery. A state board of dental examiners was created, and authorized to determine who should be licensed and entitled to practise dentistry in the state. Rev. Laws 1905, §§ 2313-19; Gen. Laws 1907, chap. 117, p. 127. A department of dental surgery was also established at the university, with a course of study, the satisfactory completion of which would entitle the student to a special degree of dental surgeon. An examination of this course shows 19 L.R.A. (N.S.)

that it includes a considerable part of the work required in the medical school, but it also includes studies which relate particularly to diseases of the dental organs and others designed to insure efficiency in the mechanical work connected with the treatment. The statute now in force provides that "no person shall practise dentistry in the state without having complied with the provisions of this subdivision. . . . Any person who shall . . . violate any provision of this subdivision shall be guilty of a misdemeanor." And: "All persons shall be said to be practising dentistry, within the meaning of this section, . . . who shall for a fee, salary, or other reward paid or to be paid either to himself or to another person . . . replace lost teeth by artificial ones." Rev. Laws 1905, §§ 2315, 2319, as amended by chap. 117, p. 127, Gen. Laws 1907.

The legislature has thus defined both the practice of medicine and the practice of dentistry, and made of them two distinct professions. This statute relating to dentistry makes no exception in favor of one who holds a certificate entitling him to practise as a physician and surgeon. We can find no implied exceptions in this statute. The words "no person," in a criminal statute, are to be given their literal meaning. From an examination of the statutes of other states relating to the practice of dentistry, we learn that many contain express exceptions in favor of physicians and surgeons. Probably the most of them permit physicians to extract teeth or perform such other comparatively simple work. In the absence of any such exceptions, we must conclude that the legislature intended to restrict the scope of the practice of the physician and surgeon, and require him, if he desires to practise dentistry, to obtain a license from the state board of dental examiners in addition to his other certificate. What was said in *State v. Vandersluis*, supra, to the effect that the statute then under consideration would not limit the right of surgeon under his license, was dicta, and is not controlling.

In *State v. Beck*, 21 R. I. 288, 45 L.R.A. 269, 43 Atl. 366, it appeared that the law regulating the practice of dentistry was passed in 1888 (Laws 1888, chap. 712, p. 1), at a time when there was no law regulating the practice of medicine. Such a law was enacted in 1895 (Laws 1895, chap. 1353, p. 25), and in 1897 (Laws 1897, chap. 470, p. 205) the dentistry act was re-enacted in substantially its original form. It was held that a person who was authorized to practise medicine under the act of 1895 was entitled to practise dentistry as a branch of surgery, without complying with the dental act of 1897. The reasoning does not carry convic-

tion to our minds, and we cannot regard the case as an authority which should be followed. The recent cases recognize the two professions, as separate and distinct. In *State ex rel. Flickinger v. Fisher*, 119 Mo. 344, 22 L.R.A. 799, 24 S. W. 167, a dentist was unsuccessful in his claim of exemption from jury duty under a statute which exempted a "practitioner of medicine," and in *People v. DeFrance*, 104 Mich. 563, 28 L.R.A. 139, 62 N. W. 709, it was held that dentists were not within a provision relating to privileged communications to one practising medicine and surgery. In *Cherokee v. Perkins*, 118 Iowa, 407, 92 N. W. 68, it was held that the power to tax "itinerant doctors, physicians, and surgeons," did not include itinerant dentists.

The order denying the defendant's motion for a new trial is affirmed.

MONTANA SUPREME COURT.

JOHN FLINNER, Appt.,

v.

W. B. McVAY, Resp't.

(37 Mont. 306, 96 Pac. 340.)

Contract — assignment — sufficiency.

1. Delivery of a power of attorney and the land contract to which it related, by the one upon whom it is conferred, to the intended assignee of the contract without executing it, is not sufficient to transfer the contract.

Same — writing.

2. An assignment of a land contract must be evidenced by writing where a writing is necessary to transfer an interest in real estate.

(June 25, 1908.)

Case Note. — *Applicability of statute of frauds to assignment or surrender of purchaser's interest under land contract.*

The doctrine that the interest of the purchaser under a land contract is an interest in lands, within the meaning of the statute of frauds, and that accordingly a transfer thereof must be evidenced by writing, seems to be thoroughly established, and finds various expression in the following cases:

In *Dougherty v. Catlett*, 129 Ill. 431, 21 N. E. 932, it is said that the purchaser's interest under a land contract was an interest in or concerning lands within the meaning of the statute, it being well settled that the statute of frauds embraces equitable as well as legal interests in land; and that therefore, where such purchaser agreed by parol to sell and surrender to his vendor a portion of said premises, such 19 L.R.A. (N.S.)

APPEAL by plaintiff from a judgment of the District Court for Gallatin County in defendant's favor and from an order denying a motion for a new trial in an action to recover the purchase price of an assignment of a contract to sell land. Affirmed.

The facts are stated in the opinion.

Messrs. B. B. Law and Walter Aitken, for appellant:

The contract assignment was an assignment of a chose in action, and a writing was unnecessary.

Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94; *Hutchings v. Low*, 13 N. J. L. 247; *Macklin v. Kinealy*, 141 Mo. 113, 41 S. W. 893; 4 Cyc. Law & Proc. pp. 37, 44; *Mitchell v. Taylor*, 27 Or. 377, 41 Pac. 119; *Pom. Code Remedies*, § 147.

The assignment of this contract was not an attempt to convey any interest in real estate, for at law an executory contract of sale is a mere agreement which does not affect the title.

28 Am. & Eng. Enc. Law, p. 105, § 8, note 2; *Chappell v. McKnight*, 108 Ill. 575; *Bispham, Eq.* § 365; *Sutherland v. Parkins*, 75 Ill. 338; *Warvelle, Vend. & P.* p. 187, § 2; 4 Cyc. Law & Proc. p. 20.

Messrs. Hartman & Hartman, for respondent:

The contract could not be assigned or transferred by parol and delivery merely.

20 Cyc. Law & Proc. p. 219.

Brantly, Ch. J., delivered the opinion of the court:

It is alleged in the complaint herein, that on August 7, 1906, the plaintiff and one W. P. Knowlton entered into a contract, of which the following is a copy:

Belgrade, Mont., Aug. 7th, 1906.

This agreement made this day and date be-

agreement furnished no basis for the recovery of the consideration therefor.

And in *Connor v. Tippet*, 57 Miss. 594, it was held that the delivery of a bond for title, without a written assignment, will not pass the interest of the vendee in the land, under the statute of frauds.

The verbal assignment of an interest in an equitable estate in lands is as much within the operation of the statute of frauds as a transfer of a legal interest. *Morgart v. Smouse*, 103 Md. 463, 115 Am. St. Rep. 367, 63 Atl. 1070, 7 A. & E. Ann. Cas. 1140.

A parol contract to assign as security a contract for a deed is within the statute of frauds. *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113.

The assignment of a purchaser's interest under a land contract must be in writing to be effectual. *Wilkie v. Womble*, 90 N. C. 254.

And it has also been held that school-land certificates are contracts for the sale

tween W. P. Knowlton, of Belgrade, Mont., party of the first part, and John Flinner, of Leav., Kans., party of the second part: W. P. Knowlton, party of the first part, agrees to sell and convey to John Flinner, party of the second part, all right and title to S. $\frac{1}{2}$ of N. E. $\frac{1}{2}$ of sec. 16, 80a; S. $\frac{1}{2}$ of N. $\frac{1}{2}$ of sec. 15, 160a; S. $\frac{1}{2}$ of sec. 15, 320a; N. W. $\frac{1}{4}$ sec. 22, 160a; and the West $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of sec. 22, 80a,—all located in Town. 2 N., R. 5 E., in Gallatin Co., Mont. Also all horses, cattle, harness, farm machinery, and all other articles (except house furniture) upon above-named land for the sum of (\$25,000) twenty-five thousand dollars. W. P. Knowlton, party of the first part, agrees to accept (\$100) one hundred dollars as part payment, balance of (\$24,900) twenty-four thousand nine hundred dollars to be paid on or before Nov. 1st, 1906, at which time W. P. Knowlton agrees to transfer to John Flinner a warranted deed and abstract with clear title to said land, also a clear title to all stock, etc.

W. P. Knowlton.

John Flinner.

It is further alleged that, upon the signing and delivery of this contract, plaintiff paid to Knowlton \$100 in cash; that thereafter, on October 29, 1906, plaintiff, with

the knowledge and consent of Knowlton, sold and delivered the contract and assigned all of his rights thereunder to defendant for a consideration of \$350, which the defendant agreed to pay; that, relying upon the said sale and assignment of the contract and the promise of defendant, the plaintiff refrained from asserting any rights thereunder; that, under and by virtue of the assignment, the land and other property to be conveyed by said Knowlton to plaintiff as in the contract specified was, by him, conveyed to defendant, who thereby received the benefits which had accrued to plaintiff under the contract; and that defendant having failed to pay the said sum of \$350, there is now due and owing to plaintiff from him said amount. Judgment is demanded for the same. The answer denies that the assignment was made as alleged, that the plaintiff by reason of it refrained from asserting his rights under the contract, that the defendant obtained a conveyance to himself of the property mentioned, and that there is due plaintiff, in consideration of the assignment, the sum of \$350 or any other sum.

At the close of plaintiff's case the defendant moved for a nonsuit, which was granted, and judgment was entered for the defendant. Plaintiff has appealed from the

of real estate, and can only be sold and transferred like any real-estate contract, by an assignment in writing. *Smith v. Clarke*, 7 Wis. 551; *Whitney v. State Bank*, 7 Wis. 620.

Where the vendee's interest has been transferred by written assignment, it is incompetent by parol evidence to show that the parties subsequently agreed to convert the assignment into a conditional one, as such an agreement would be void under the statute of frauds. *Richardson v. Johnsen*, 41 Wis. 100, 22 Am. Rep. 712.

A verbal agreement among the purchasers at a judicial sale, by which the plaintiff claimed to be considered as a joint purchaser of a fractional interest, was held to be void under the statute of frauds in *Arden v. Brown*, 4 Cranch, C. C. 121, Fed. Cas. No. 510.

A contract for the sale of an equitable estate in lands, whether it is under a contract for the conveyance by a third person, or otherwise, is clearly a sale of an interest in the lands, within the statute of frauds. *Smith v. Burnham*, 3 Sumn. 345, Fed. Cas. No. 13,019.

A parol agreement to substitute a purchaser relates to lands and an interest therein, and is within the statute of frauds. *Reams v. Thompson* (Ga. App.) 62 S. E. 1014; *Brown v. Jones*, 46 Barb. 400; *Love v. Cobb*, 63 N. C. 324.

The case of *Currier v. Howard*, 14 Gray, 511, sometimes cited as authority for the proposition that a purchaser's interest un-

der a land contract may be assigned by parol, is in fact not at variance with the doctrine of the foregoing cases, as it simply recognized such parol assignment as effectual after it had become executed by the acts of the parties thereto, holding that a contract to convey land might be specifically enforced by one to whom it had been assigned by verbal agreement. The statement therein made, that no assignment in writing is necessary, has reference to the contention that an obligation of record or under seal could only be assigned by an instrument of as solemn a nature.

The question whether the interest of a purchaser under a land contract is of such a character as to require an assignment thereof to be in writing also frequently arises where a parol rescission or surrender of the contract has been attempted; and the doctrine of the cases is that a parol contract to surrender or to rescind a contract for the sale of land, which is wholly executory and under which nothing has been done, is a contract for the sale and transfer of an interest in land within the statute of frauds, and cannot be enforced any more than any other agreement concerning an interest in real property may be. *Carr v. Williams*, 17 Kan. 575; *McEwan v. Ortman*, 34 Mich. 325; *Grover v. Buck*, 34 Mich. 519; *Grunow v. Salter*, 118 Mich. 148, 76 N. W. 325; *Stewart v. McLaughlin*, 126 Mich. 1, 85 N. W. 266, 87 N. W. 218; *McCulloch v. Tapp*, 2 Ohio Dec. Reprint, 678; *Goucher v. Martin*, 9 Watts, 106;

judgment and an order denying him a new trial. The grounds of the motion for nonsuit are, substantially: (1) That the evidence does not show that the plaintiff ever assigned his rights under the contract to defendant; (2) that the contract could not be assigned without the written consent of Knowlton, and the evidence does not show that such consent was given; (3) that, on November 2d, subsequent to the date of the alleged assignment, the plaintiff received the contract back from defendant and attempted to enforce it in his own behalf, and that the assignment, if made, was revoked; and (4) that there is no evidence tending to show that defendant obtained any conveyance from Knowlton of the property described in the contract. While the question presented by each of the grounds of the motion is submitted for decision, the principal contention is as to whether the facts show an assignment to defendant by plaintiff of his right under the contract. A solution of this question is, in our opinion, determinative of these appeals.

The plaintiff resides in the state of Kansas. The defendant and Knowlton reside in Gallatin county, some miles from Bozeman, the county seat. On October 21st, a few days before the final payment was to be made under the contract, the defendant,

having knowledge of it, approached plaintiff's son, William A. Flinner, who also resides in Gallatin county, and asked him if his father intended to take the Knowlton farm. Flinner replied that his father had not said much about the matter in his last letter, but that in a prior letter he had said that he had made arrangements for the money to enable him to do so. Then inquiry was made by defendant whether the father would sell his interest in the farm. This question Flinner could not answer. Thereupon defendant asked him to write to his father to conclude the purchase and to state to him that defendant would give him \$250 for his bargain. Flinner then said he did not think his father would be willing to send out to Montana \$24,900 to make final payment and then sell for so small a profit. An easier way, he said, would be for the defendant to buy the contract and have the conveyance made, directly to himself. To this plan the defendant assented, offering to pay \$250 besides the \$100 already paid by the plaintiff. On the evening of the same day Flinner wrote to plaintiff to ascertain his wishes, as follows:

Belgrade, Mont., October, 1906.

Dear Father:

Mr. Boyd McVay was here to day. He

Cravener v. Bowser, 4 Pa. 259, s. c. on subsequent appeal, 56 Pa. 132; Wells v. Wayman, 1 Lack. Leg. Record, 485, 3 Brightly Dig. (Pa.) p. 3880; Dial v. Crain, 10 Tex. 444; Sanborn v. Murphy, 5 Tex. Civ. App. 509, 25 S. W. 459; Cutright v. Union Sav. & Invest. Co. 33 Utah, 486, 94 Pac. 984.

An opposite conclusion seems to have been reached, however, in Proctor v. Thompson, 13 Abb. N. C. 340, where it is held that a written contract which is within the statute of frauds may be abandoned or wholly rescinded by a subsequent oral agreement, upon the ground that the statute of frauds goes no further than to require the contract to be in writing and subscribed by the party by whom the sale is made, leaving the contract after it is made to be governed by the rules which governed other written contracts, only requiring that the terms of the contract should at all times be sought within the writing. The court said: "It says nothing about its abandonment, or dissolution, or rescission. These are not required to be in writing. The statute is not concerned with the contract after it has been made, and to require an abandonment of it to be in writing would be to add to the statute a provision which it does not now contain; the contract which must be in writing is the contract for the sale. When that is put in writing and signed by the seller the statute is satisfied. A dissolution of the contract comes after this. It is no part of the original, nor does it add a new term to it. It is something sub-

sequently existing by the acts of the parties by reason of which the former contract has ceased to be enforceable as a contract, and it does not in any way come within the statute."

In Sutton v. Sears, 10 Ind. 223, it was held that a verbal agreement to rescind a contract for the sale of lands is not within the provisions of a statute which provided that parol contracts for the sale of land cannot be enforced, and omitted the clause in relation to "any interest in or concerning" lands, it not being a contract for the sale of lands, as the title is already in the person to whom the surrender is made.

But where the agreement to rescind has become executed, a parol rescission is recognized as valid by the courts, the acts of the parties operating as an estoppel *in pais* to transfer the vendee's interest "by operation of law," and in that manner satisfying the statute of frauds. See Arrington v. Porter, 47 Ala. 714; Beach v. Covillard, 4 Cal. 315; Washington v. M'Gee, 7 T. B. Mon. 131; Miller v. Pierce, 104 N. C. 389, 10 S. E. 554; Elliott v. Bozorth (Or.) 97 Pac. 632; Raffensberger v. Cullison, 28 Pa. 426; Moseley v. Witt, 79 S. C. 141, 60 S. E. 520; Bullion v. Campbell, 27 Tex. 653; Telford v. Frost, 76 Wis. 172, 44 N. W. 835; Cutright v. Union Sav. & Invest. Co. supra.

As to the validity of an oral agreement to assume a contract for the purchase of land, see Esslinger v. Pascoe, 3 L.R.A. (N.S.) 147, and case note thereto appended.

wants to buy the contract you have with Perry Knowlton for his farm. He offers \$250 and your \$100 back, making \$350 in all. Now, if you want to sell for that small amount you can send me the contract and necessary papers and I will turn them over to Mr. McVay. Now you can do as you please about this, but my advice would be not to take this, and go ahead and buy the place yourself, because you can make more money out of it. Mr. McVay is very anxious for the place, and you might sell to him later on for a better price, but you will have to act pretty quick one way or the other as the time is getting close. . . .

From Will.

To this letter the father replied:

Leavenworth, Kan., Oct. 26th 1906.

Dear Son:

Being I have sent the agreement and not signing it I hereby send power of attorney for you to execute in my place. I can get the \$10,000 from the Wulfekhuler Bank any time, but if Mr. McVay will do as you say, namely the \$100 and \$250, he may have the Knowlton farm. Yours respectfully,

John Flinner.

On receipt of this letter Flinner went to the home of the defendant, and, finding him there, went with him to see Knowlton. Flinner told Knowlton that his father had sold his interest to defendant, showing his father's letter and power of attorney. After reading them over, Knowlton said to defendant, "All right; I'll meet you at Bozeman on Thursday," that day being November 1st. After leaving Knowlton, Flinner delivered the contract, his father's letter, and power of attorney to defendant. On the morning of November 1st defendant, while on his way to Bozeman to meet Knowlton, met Flinner and inquired of him if he was going to Bozeman. Flinner told him that he was not unless it was necessary. Defendant said he did not think it necessary. Flinner then said that he would be in Belgrade (a village near by) until 5 o'clock in the afternoon, and that, if wanted, he could be reached by telephone. Flinner heard nothing from the defendant until the next morning. Defendant then informed him that Knowlton refused to make the conveyance, giving no reason other than that "he did not have to." He thereupon returned the papers to Flinner, saying to him that he had better indorse his assignment on the contract, which he did, retaining it thereafter. During the conversation and after the papers had been returned to the possession of Flinner, the defendant told Flinner that if Knowlton would make the

conveyance he would still pay the plaintiff \$350, as he had agreed.

The foregoing is the substance of the statement of William Flinner on his examination in chief. Upon his cross-examination he stated, in substance, that defendant's proposition to him was to pay for the contract, if he could get the place. Elsewhere he stated that defendant was to pay his father \$250 for his interest in the land; that he offered this for the bargain. Being asked directly: "Do you say now that you sold him the contract and it was understood distinctly between you that he was to buy the contract and paying \$350 irrespective of whether Perry Knowlton would make the deed to him or not?" he replied, "Just as I said before; he said he would pay \$350 if he got the place." The foregoing is all the testimony touching the terms of the contract.

It appears from other evidence that later in November the defendant entered into negotiations with Knowlton for a purchase of a portion of his lands. These negotiations resulted in a sale by him (Knowlton) to defendant of about 700 acres of land, including a portion of the lands described in the contract between the plaintiff and Knowlton, but no personal property. The power of attorney referred to was properly executed and acknowledged, and authorized William A. Flinner, for and on behalf of John Flinner "to sell, assign, and deliver the contract for purchase of land from Perry Knowlton." It is difficult to gather from the statements of this witness whether defendant was to take an assignment of the contract at the price of \$350, with the proviso that payment should be made only in case he obtained a conveyance from Knowlton, or whether he was to pay \$350 absolutely for an assignment of Flinner's rights under the contract. Taking the most favorable view of the evidence and adopting the latter as the understanding and purpose of the parties, it fails to make out a prima facie case in favor of the plaintiff. Assuming that Knowlton's written assent to the assignment was not necessary in order to substitute defendant to all the plaintiff's rights, still the substitution was not legally made, because William A. Flinner did not execute the power granted by his father, so as to make it effective. The interest acquired by the plaintiff under the contract was a right to have a conveyance of the land to himself. It was an equity in the land—a valuable right. The grant, assignment, or transfer of this character of interest, by whatever name the act of the parties may be called, is a act of an interest in real property, and is not valid unless made in conformity with the requirements

of the statute. Civil Code 1895, § 2185. The plaintiff, by tendering the final payment, would have been in position to demand and enforce a conveyance from Knowlton. William A. Flinner was armed with authority by the plaintiff to substitute defendant to this right, and thus clothe him with plaintiff's equity; yet, by failing to make the transfer in writing, he failed to put defendant in such a position that he could tender the payment and demand a conveyance. The verbal transfer, accompanied by a delivery of the contract, did not accomplish this purpose. Defendant, therefore, got nothing, even though it be conceded that both William A. Flinner and defendant were of the opinion—which no doubt was the fact—that the requirements of the law had been fully met.

While there is some diversity of opinion among the courts of the different states as to whether the statute applies to assignments of such contracts, it is the general rule, based, as we think, upon correct reasoning, that where the creation of an interest must be evidenced by a writing, the transfer of that interest must likewise be evidenced by writing. *Arden v. Brown*, 4 Cranch, C. C. 121, Fed. Cas. No. 510; *Smith v. Clarke*, 7 Wis. 551; *Whitney v. State Bank*, 7 Wis. 620; *Abbott v. Baldwin*, 62 N. H. 583; *Wilkie v. Womble*, 90 N. C. 254; *Love v. Cobb*, 63 N. C. 324; *Bowser v. Cravener*, 56 Pa. 132; *Connor v. Tippet*, 57 Miss. 594; 20 Cyc. Law & Proc. p. 219; *Smith, Fr.* § 367. Counsel have devoted considerable space in their brief to a discussion of the assignable character of the contract. It is argued that it was assignable, and, since this is so, it could be assigned by mere delivery. The question here is not whether such contracts are assignable. That things in action, or rights arising out of obligations, are assignable, is the general rule. Civil Code 1895, § 1351. Nonassignability is the exception. The transfer may be made without writing in every case in which a writing is not expressly required by statute. Civil Code 1895, § 1450. But § 2185, *supra*, is such express requirement, applicable to the right here involved.

We have assumed that the evidence justifies the conclusion that the result of the transaction was an attempted absolute sale, by the plaintiff to defendant, of his rights under the contract. There is a strong presumption, however, that the understanding was, that the stipulated price for the transfer was to be paid only upon the condition that the defendant secured the conveyance. This conclusion is justified by the fact that William A. Flinner stated on his cross-examination that this was the contract, and the fact that when the papers were deliv-

ered to the defendant, payment was not demanded. It also finds support in the fact that, when the defendant ascertained that Knowlton would not make the conveyance to him, he delivered the papers to William A. Flinner, who received them without objection. The fact that, after the lapse of the contract, defendant purchased from Knowlton a part of the lands covered by it is of no significance. Having failed to gain substitution to the rights of the plaintiff under the assignment, and after the contract of plaintiff with Knowlton had lapsed, defendant was at liberty to negotiate a purchase of the lands described in the contract, or any portion of them. We are of the opinion that the court's action in sustaining the motion for nonsuit is justified upon the first ground. Such being the case, it is not necessary to discuss the questions raised by the other grounds.

The judgment and order are affirmed.

Holloway and Smith, JJ., concur.

Petition for rehearing denied.

NEBRASKA SUPREME COURT.

PETER BOWHAY

v.

WILLIAM H. RICHARDS et al., Appts.

(— Neb. —, 116 N. W. 677.)

Party wall — easement — termination of rights.

1. Where a wall is entirely upon the property of one party, the right of an adjoining owner to have support therefrom, whether derived from contract or acquired by prescription, is in the nature of an ease-

Headnotes by CALKINS, C.

Case Note. — Effect of destruction of building to terminate adjoining owner's easement of support.

Where a wall is erected half upon each side of the line dividing two properties, and used as a party wall, there exists in such wall, in favor of the respective owners, an easement of support in the half of the wall on the other's land. This easement continues so long as the buildings stand, but ceases at the moment of their accidental destruction because of the termination of the necessity which gave rise to the easement.

In *Sherred v. Cisco*, 4 Sandf. 480, two buildings on adjoining lots, supported by a common wall erected half on each lot, were entirely destroyed by fire, together with the party wall. One of the owners, upon building a new wall upon the old foundation, sought contribution to its cost from the ad-

ment, which is terminated upon the destruction of the building by fire.

Same — rights of purchaser — constructive notice.

2. The fact that the owner of a building used a will upon the land of an adjoining proprietor for the support of his building before the same was destroyed by fire is not such notice as charges a purchaser of the property upon which the wall is situated with knowledge of a stipulation in an unrecorded written contract that the owner of such building might renew the use of such wall in case it should be destroyed and rebuilt.

Appeal — sufficiency of facts.

3. Where the judgment of the district court is proper upon the undisputed facts shown by the record, it will be affirmed without considering whether the reasons given by the trial judge for his conclusion were competent and adequate to support the same.

(May 21, 1908.)

APPPEAL by defendants from a judgment of the District Court for Gage County in plaintiff's favor in an action to restrain the defendants from interfering with or using the wall of a building as a party wall. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. L. M. Pemberton, W. H. Richards, and F. N. Prout for appellants.

Messrs. Sackett & Brewster for appellee.

joining owner on the theory that the new wall was likewise a party wall, but the court took the view that the casual destruction of the original party wall terminated all rights which the parties had therein.

The Cisco Case has been cited with approval in the following cases: *Duncan v. Rodecker*, 90 Wis. 1, 62 N. W. 533; *Bonney v. Greenwood*, 96 Me. 335, 52 Atl. 786; *Moore v. Shoemaker*, 10 App. D. C. 6; *Huck v. Flentye*, 80 Ill. 258.

Again, it was held in New York that the accidental destruction by fire of a party wall, as to the maintenance of which there had been no grant of a perpetual right, destroyed all right in either party to claim an easement in the property of the other for the further support of a party wall; and this notwithstanding a portion of the foundation of the old wall remained standing. *Heartt v. Kruger*, 121 N. Y. 386, 9 L.R.A. 135, 18 Am. St. Rep. 829, 24 N. E. 841.

In *Antomarchi v. Russell*, 63 Ala. 356, 35 Am. Rep. 40, contribution to the cost of reconstructing what had been a party wall was demanded from the adjoining owner, upon whose property half of the new wall was constructed as before, and recovery was denied on the authority of the holding in *Sherred v. Cisco*, supra, to the effect that the destruction of a party wall terminates

Calkins, C., filed the following opinion:

In 1894 one Fouke was the owner of lot No. 2 in the town of Liberty, upon which there was a one-story brick building. The south wall of this building practically coincided with the south line of the lot. Fouke, on October 17, 1894, made a contract with one Gifford that the latter might join this wall with a good and substantial brick or stone building on the south side of the building owned by Fouke. It was stipulated in this agreement that the floor joists should not be attached to the wall on lot 2, but that it might be used to support the roof or ceiling joists. This contract contained the following clause: "It is fully understood that, so long as the present wall stands, it may be used by said Gifford as a party wall, and, in the event of the falling or breaking down of the said wall at any time, and in the event that a wall should be rebuilt where the present wall stands, then said Gifford shall have the right to join said wall; and it shall become a party wall as is the one for which this contract is made." It appears that Gifford was the owner of lot numbered 3, which adjoined lot numbered 2 on the south; but neither the ownership of this lot by Gifford nor its location was in any manner referred to in the written contract. Soon after the making of this contract Gifford erected a building, using the south wall as stipulated. The contract was never recorded. Both buildings were destroyed by fire in March, 1906, leaving

whatever easement the adjoining owners had therein.

In *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491, fire destroyed adjoining buildings, but left standing the party wall, which had been erected partly upon the land of each owner. After citing the *Cisco* Case, supra, and *Partridge v. Gilbert*, infra, on the effect of the destruction of the wall itself, the court says: "It must be equally so where the wall alone remains. A wall is but a portion of a house, and the one is valueless without the other. To hold that, so long as the wall stands, the owner whose house has been destroyed is compelled to lose the use of his lot or to replace the destroyed building with another of exactly the same pattern is to sacrifice the greater to the less, and to impose in perpetuity a servitude which was assumed only for a specific purpose."

In *Bowhay v. Richards* it will be noted that the wall was wholly upon the land of the owner of the servient estate, and that, while both buildings were destroyed, the theory of the decision is that the easement terminated because of the destruction of the building in favor of which the right existed, viz., the dominant estate. However, in a New York case decided some years before the *Cisco* Case, it was held that the destruction of the servient estate leaving the com-

standing, however, a portion of the wall in question. On the 2d day of May, 1906, the plaintiff purchased lot 2, and afterwards erected a building thereon, in the construction of which he rebuilt and used the wall in question. After the completion of said wall and building on lot 2 by plaintiff the defendant, who had purchased lot 3, began the construction of a building thereon, and sought to use the south wall for the support of the ceiling and roof joists of such building. The plaintiff thereupon brought this action, alleging sole ownership of lot 2, and asking that defendant be restrained from interfering with or using the south wall of the building. To this petition the defendant answered, alleging ownership of lot 3, adverse possession of the wall, the making of the written contract, the assignment of the same to the defendant, and that the plaintiff bought said lot 2 with full knowledge of the existence of said written contract. There was a reply denying these allegations of the answer, and alleging the destruction of the building by fire and the consequent termination of any easement in the wall by the defendants or their grantors. Upon these issues, there was a trial to the court, who found, first, the execution of the contract; second, the construction by the defendants' grantors of a building on lot 3, and the joining the same to the wall in question in pursuance of the contract referred to; third, the destruction of the buildings by fire; fourth, that after the

fire the plaintiff purchased lot 2, and the defendant entered into a contract for the purchase of lot 3; fifth, that the contract was not filed for record nor recorded, but that plaintiff knew of the possession of the party wall and its use by the grantors of the defendants Richards, and had such notice of the rights of the defendants as to put him upon inquiry which would have disclosed full knowledge of all the terms and conditions of the contract and the rights of the parties thereunder; sixth, that the wall used by the two buildings was damaged by fire to such an extent that it could not be used again without repairs, and that the plaintiff made all such necessary repairs at his own expense, and at a cost of \$200; seventh, that the defendant claimed the right to join on said wall without paying any part of such repairs, and refused to pay or in any way be bound to contribute to such repairs made necessary by the fire of March, 1906. Upon these findings, the court concluded as a matter of law that the defendant had no right to join his building to the wall of the plaintiff until he had first paid his proportionate share of the repairs to the wall made necessary by the fire, and rendered a judgment making the temporary injunction which had been granted at the commencement of the suit perpetual. From this judgment the defendants appeal.

1. The defendant finds no fault with the first five findings of the district court, but very strongly insists that findings 6 and 7

mon wall standing and supporting the adjoining building did not put an end to the easement existing in favor of the remaining structure, although the wall was wholly upon the land of the owner of the servient estate. *Brondage v. Warner*, 2 Hill, 145.

In *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632, the doctrine of *Sherred v. Cisco*, supra, is cited with approval by Judge Denio, and, although a *dictum*, the following from his opinion is worthy of note in this discussion: "My view of the rights of these parties is this: Each had a title to the soil to the division line which was the center of the arch and wall; but this title was qualified by the easement which each owner had of supporting his building by means of the common wall. As the half of the wall, standing on the land of the owner, would not alone afford the requisite support, because the whole of the arch and the entire thickness of the wall was required for that purpose, the law gave him an interest, in the nature of an easement, in the part of the wall standing on the land of the other party. This right existed as long as the wall continued to be sufficient for that purpose and the respective buildings remained in a condition to need and to enjoy that support. . . . I do not perceive any solid distinction between 19 L.R.A. (N.S.)

a total destruction of the wall and buildings and a state of things which should require the whole to be rebuilt from the foundation. In either case there is great force in saying that the mutual easements have become inapplicable, and that each proprietor may build as he pleases upon his own land without any obligation to accommodate the other."

Odd Fellows' Asso. v. Hegele, 24 Or. 16, 32 Pac. 679, was an action for the rescission and cancelation of a party-wall agreement which contained a clause granting to each party an easement of support in the common wall "so long as it shall stand." The following from the opinion of the court, although purely in the nature of *dictum* bears directly upon the subject of this note: "The purpose of the wall is to support the timbers of the contiguous buildings. The easements are mutual and relate to the wall only, and necessarily continue no longer than the wall remains safe and fit for the purpose it was intended to serve. As long as the wall remains fit and suitable for use, the easements of support exist; when the wall becomes unfit either from age or accident, the easement in it ceases" (citing with approval and quoting from the opinion of Judge Sandford in *Sherred v. Cisco*).

are neither supported by the evidence nor within the issues joined; while the plaintiff contends that the fifth finding of the court, that the plaintiff had such knowledge of the rights of the defendant in the premises as to put him upon inquiry which would have disclosed the terms and conditions of the written contract, is erroneous; and that the easement, if any, which the owners of lot 3 had in the south wall of lot 2, was terminated by the destruction of the buildings by fire. Where a party wall is situated on both sides of the division line, each party has title to the soil to the line; but his title is qualified by the easement which the other owner has of supporting his building by the common wall. Where, as in this case, the wall is entirely upon the property of one party, the right of the other to have support therefrom is in the nature of an easement only; and the general doctrine is that such easement ceases upon the destruction of the building by fire. *Sherred v. Cisco*, 4 Sandf. 480; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Heartt v. Kruger*, 121 N. Y. 391, 9 L.R.A. 135, 18 Am. St. Rep. 829, 24 N. E. 841; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Bonney v. Greenwood*, 96 Me. 335, 52 Atl. 786. This doctrine appears to have been first enunciated in *Sherred v. Cisco*, supra, and was quoted approvingly by Judge Denio in *Partridge v. Gilbert*, supra, and it has again been enunciated by the same court in *Heartt v. Kruger*, supra. It was said by Judge Denio in the opinion above referred to that, "in the changing condition of our cities and villages, it must often happen, as it did actually happen in this case, that edifices of different dimensions and an entirely different character would be required. And it might happen, too, that the views of one of the proprietors as to the value and extent of the new buildings would essentially differ from those of the other, and the division wall which would suit one of them would be inapplicable to the objects of the other." The reasons thus given are particularly applicable to conditions in our own state, and we believe the rule adopted in these cases is sound, and should be followed.

2. In this case the written contract provides: "And in the event of the falling or breaking down of said wall at any time, and in the event that a wall should be rebuilt where the present wall stands, then the said Gifford shall have the right to join said wall, and it shall become a party wall as is the one for which this contract is made." This presents the question whether the plaintiff, in purchasing said property, was chargeable with notice of the terms and conditions of this contract. There is no dispute as to the facts. There is no evidence to overcome the

assertion of the plaintiff that he had no knowledge of the existence of any written contract. On the other hand, it is equally clear that the plaintiff knew of the use made by defendants' grantors, before the fire, of the wall in question. We think it may be conceded that notice to the plaintiff that the defendants' grantors used a portion of such wall for the support of their building charged the plaintiff with knowledge of the existence of an easement in the wall to that extent; but we doubt the soundness and justice of the doctrine that he was thereby put upon inquiry. It is the policy of the law to require parties claiming interests in real estate by virtue of written instruments to record the same, and thereby give notice of the extent and character of their claim. The place to inquire concerning titles or interest in the title of real estate is the office of the register of deeds for the county in which the same is situated. If it is demanded of a party purchasing real estate to make inquiry elsewhere, it should be clearly pointed out from whom and where he should seek such information. If it be said that in this case the plaintiff should have inquired of the owner of the adjoining property, the records disclose such owner to be a nonresident of the state, and therefore not easy of access. But, waiving that objection, the rule that requires the intending purchaser to make inquiry must assume that the person inquired of would not only be able to, but would be disposed to, give accurate and reliable information concerning the contents of the instrument in question. A person claiming an interest in realty by virtue of a written instrument can give notice to all the world of the extent of his claim by the registry of such instrument. Intending purchasers are entitled to notice given in this manner, and should not be bound to inquire for nor accept the statements of a person who refuses or neglects to record the written instrument under which he claims. When the plaintiff purchased this property, neither the defendant nor his grantor was making any actual use of the easement which they claimed in said wall. The only easement of the use of which the plaintiff had any notice was such as would, as we have seen, be terminated by the destruction of the buildings by fire; and it had not been exercised since the occurrence of the fire. It is plain that the actual use of an easement which is relied upon to take the place of the registration of the contract under which it is claimed must be an existing and continuous use. In any view of the case, we do not think the plaintiff was chargeable with notice of that clause in the contract which it is contended takes it out

of the usual rule that an easement ends with the destruction of the property by fire.

3. The judgment of the district court being a proper one upon the grounds we have hereinbefore stated, it becomes unnecessary to inquire whether the last two findings of the court were sustained by the evidence, or were within the issues made by the pleadings.

The proper result was reached, and we recommend that the judgment of the district court be affirmed.

Fawcett and Root, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALFRED NEILSON et al., Exrs., etc., of Philo Laos Mills, Deceased, Pliffs. in Err.,

v.

GEORGE E. RUSSELL, Surrogate of Essex County, et al.

(— N. J. —, 71 Atl. 286.)

Inheritance tax — property subject.

Stock in a New Jersey corporation belonging to a testator domiciled in England is not subject to the inheritance tax imposed by the act of May 15, 1894 (P. L. p. 318), 3 Gen. Stat. 1895, p. 3339.

(Pitney, C., and Bergen and Green, JJ., dissent.)

(November 16, 1908.)

Headnote by SWAYZE, J.

Case Note. — Liability to pay transfer tax in respect of stock in a domestic corporation belonging to the estate of a nonresident.

This note is confined to the single question whether the estate of a nonresident, or its beneficiaries, may, under any circumstances, be required to pay a transfer or succession tax in respect of stock in a domestic corporation, and is not concerned with questions which are common alike to corporate stock and other assets, assuming that the stock may be reached at all. The question whether corporate stock belonging to a nonresident may be subjected to a property tax in the state in which the corporation is chartered is also, of course, beyond the scope of this note.

Very little authority can be found in support of the decision in the foregoing case upon the specific question as to the liability 19 L.R.A. (N.S.)

ERROR to the Supreme Court to review a judgment affirming the imposition by the surrogate of Essex County of a collateral-inheritance tax. Reversed.

The facts are stated in the opinion.

Messrs. Frank R. Lawrence, Joseph Coult, William A. Smith, and Frank Lawrence, for plaintiffs in error:

There has been no testamentary disposition or succession under the laws of New Jersey, the succession or transmission of title being under the law of England.

Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Re Embury, 19 App. Div. 218, 79 N. Y. S. R. 881, 45 N. Y. Supp. 881; Re Sloane, 154 N. Y. 113, 47 N. E. 978; State, Potter, Prosecutor, v. Ross, 23 N. J. L. 517; State, Fish, Prosecutor, v. Branin, 23 N. J. L. 496; State, Mechanics Bank, Prosecutor, v. Thomas, 26 N. J. L. 181; Blair v. Herold, 150 Fed. 199; Re Enston (People v. Sherwood) 113 N. Y. 181, 3 L.R.A. 464, 21 N. E. 87; Re Whiting, 150 N. Y. 30, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; Thompson v. Advocate General, 12 Clark & F. 1; Wallace v. Atty. Gen. L. R. 1 Ch. 1; Re Ewin, 1 Crompt. & J. 151; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Howell v. Cassopolis, 35 Mich. 471; Ogden v. St. Joseph, 90 Mo. 522, 3 S. W. 25; 1 Cooley, Taxn. 3d ed. pp. 25-27; Helliwell, Stock & Stockholders, p. 645; Re Embury, 154 N. Y. 746, 49 N. E. 1096; Colquhoun v. Brooks, L. R. 19 Q. B. Div. 408; Re Tootal, L. R. 23 Ch. Div. 533.

Mr. John W. Griggs also for plaintiffs in error.

Messrs. Theodore Backes and Robert H. McCarter, Attorney General, for defendants in error:

Stock of a domestic corporation owned by a testator domiciled in a foreign country is subject to the inheritance tax.

to pay the transfer tax in respect of shares of stock in a domestic corporation belonging to the estate of a nonresident, though that result would, of course, follow from the general doctrine adopted in some jurisdictions that such a tax is laid exclusively in accordance with the maxim *Mobilia sequuntur personam*, and is therefore restricted, so far as concerns personal property, to property belonging to the estate of a person domiciled within the jurisdiction imposing the tax. That was the view taken of the English legacy duty act by the House of Lords in Thompson v. Advocate General, 12 Clark & F. 1, though that case did not specifically involve shares of stock in a domestic corporation or company. Relying on that case and the case of Atty. Gen. v. Napier, 6 Exch. 217, Strong, J., in Kintzing v. Hutchinson, 7 W. N. C. 226, Fed. Cas. No. 7,834, held that choses in action belong-

Andrews v. Guayaquil & Q. R. Co. 69 N. J. Eq. 214, 60 Atl. 568, affirmed in 71 N. J. Eq. 768, 71 Atl. 1133; *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; *Re Fitch*, 160 N. Y. 87, 54 N. E. 701; *Graves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Moody v. Shaw*, 173 Mass. 375, 53 N. E. 891; *Re Romaine*, 127 N. Y. 86, 12 L.R.A. 401, 27 N. E. 759; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *People ex rel. Hoyt v. Tax & A. Comrs.* 23 N. Y. 228; *Guillander v. Howell*, 35 N. Y. 657; *Graham v. First Nat. Bank*, 84 N. Y. 401, 38 Am. Rep. 528; *Catlin v. Hull*, 21 Vt. 152; *Dos Passos, Collateral Inheritance*, 37, 92; *Re Palmer*, 183

N. Y. 240, 76 N. E. 16; 27 Am. & Eng. Enc. Law, 2d ed. p. 348.

Swayze, J., delivered the opinion of the court:

In a case like this the temptation is strong to pass an opinion upon the fundamental and important questions which were exhaustively discussed at the bar. and in the able opinion of the supreme court. We prefer, however, to confine our discussion to the exact point presented by the case. which we think is the much narrower one of the proper interpretation of the statute. For that purpose, we assume that shares of stock in a New Jersey corporation have a situs in this state, and that succession thereto or transfer thereof may be taxed by our

ing to the estate of a nonresident decedent, consisting of state loans of Pennsylvania, municipal bonds of that state, bonds and stocks of its corporations, shares of stock in national banks located in that state, and various claims against Pennsylvania debtors, were not subject to the collateral inheritance tax under the Pennsylvania act of 1826 imposing such tax "upon all estates . . . passing from any person who may die seised or possessed of such estate, being within this commonwealth either by will or under the intestate laws thereof, . . ." and the declaratory act of 1850 enacting that the words in the act of 1826, "being within this commonwealth," should be construed as relating to persons as well as to estates. It should be observed that the court made no distinction between corporate stocks and corporate bonds or other indebtedness. Assuming, as the court did, that it was the intention to lay the tax in accordance with the maxim *Mobilia sequuntur personam*, the distinction was doubtless immaterial, but it is important when the statute imposing the tax by its terms or by judicial construction reaches all property within the jurisdiction without reference to the domicile of the decedent, since shares of stock in a domestic corporation, belonging to a nonresident, may be deemed to be property within the state (indeed, may be so regarded even for purposes of a property tax), whereas a mere indebtedness of a domestic corporation, whether evidenced by bonds or otherwise, belonging to the estate of a nonresident, is not generally, in the absence of special circumstances, regarded as property within the state,—at least for the purposes of a property tax. See case note to *Monongahela River Consol. Coal & Coke Co. v. Board of Assessors*, 2 L.R.A. (N.S.) 637.)

The court, in *Re Enston* (*People v. Sherwood*) 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87, held that, irrespective of the situs or location of the property, no tax was imposed on property passing by will or intestacy from a nonresident of the state by the collateral inheritance tax statute of 1885 which purported to subject to the tax "all prop-

erty which shall pass by will or by the intestate laws of the state from any person who may die seised or possessed of the same while being a resident of the state, or which property shall be within this state, or any part of such property, or any interest therein or income therefrom transferred by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor. . . ." The decision was upon the ground that the words "or which property shall be within this state" related exclusively to property transferred within the state *inter vivos*, and had no reference to property passing by will or intestacy.

This case in effect overruled the decision in *Leavitt's Estate*, 22 N. Y. S. R. 81, 4 N. Y. Supp. 179, that the act of 1885 reached stock under such circumstances.

The New York statute, however, was subsequently amended so as to impose the tax "when the transfer is by will or intestate laws of this state from a resident decedent, or when the transfer is by will or intestate law of property within the state and the decedent was a nonresident at the time of his death." Under this statute, it was held in *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707, that shares of stock of a domestic corporation, although the certificates are in another state in possession of a nonresident owner, constitute "property within the state" within the meaning of the statute, and are therefore subject to the tax.

It is to be noted that the dissent by Vann and O'Brien, JJ., in this case was not from the proposition that the stock was subject to a tax, but that the bonds of a domestic corporation belonging to the estate of a nonresident were not subject thereto.

In *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715, which also held that shares of stock in a domestic corporation belonging to the estate of a nonresident decedent were subject to the tax, it appeared that the certificates of stock were deposited in a safe-deposit vault within the state; but it is apparent from the *Bronson* Case that the stock is sub-

legislature, and that the tax imposed by the act of May 15, 1894 (P. L. p. 318) is either a legacy or a succession tax, and not a property tax, and therefore not in conflict with our constitutional provision. The question we have to decide is, then, simply whether the statute reaches the present case.

An examination of the act shows that it imposes a tax (1) upon all property which passes by will or the intestate laws of this state from any person who may die seised or possessed of the same while being a resident of the state; (2) upon all property which shall be within this state which shall be transferred by inheritance, distribution, bequest, devise, deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the intestate,

testator, grantor, or bargainor. The first class obviously affects the succession of residents of this state only. If the present tax is to be sustained, it must be because the succession sought to be taxed comes within the second class.

Our act was modeled after the New York act of 1885 (Laws 1885, chap. 483, § 1, p. 820); and, if we had made no change in that act, we should be held upon well-settled principles to have adopted with the act the construction previously placed thereon by the New York courts in the case of *Re Enston* (*People v. Sherwood*) 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87. In fact, however, we modified the language of the New York act by inserting at the beginning of the clause the words "all property" in place of

ject to the tax irrespective of the place the certificates are found.

The doctrine of the *Bronson Case* is recognized in *Re Fitch*, 160 N. Y. 87, 54 N. E. 701, which also holds that such shares belonging to the estate of a nonresident are property within the county where the property of the corporation is, so as to confer jurisdiction upon the surrogate of that county to impose the tax.

The doctrine is also followed in *Re Palmer*, 183 N. Y. 238, 76 N. E. 16, specifically holding that the assessment is properly computed on the value of the nonresident's interest in the whole of the corporate property as evidenced by the number of shares held by him, and not upon the proportion of its value which represents the proportion of the capital and assets employed in New York.

The doctrine was also recognized in *Re Cooley*, 186 N. Y. 220, 10 L.R.A.(N.S.) 1010, 78 N. E. 939, in determining the basis of apportioning the tax on the stock of a nonresident decedent in a railroad company chartered both in New York and Massachusetts.

In *Re Pullman*, 46 App. Div. 574, 62 N. Y. Supp. 395, where the doctrine of the *Bronson Case* is also recognized and applied, it appeared that the stocks in question were actually in New York at the time of the decedent's death, but their liability to pay the tax was not based on that ground. It was further held in this case that the indebtedness of the decedent to residents of New York for which stocks and bonds of a foreign corporation, of a market value exceeding the indebtedness, were pledged, should not be deducted in assessing stock in domestic corporations for the purposes of a tax, except to the extent that such stock in domestic corporations was specifically pledged to secure New York creditors.

In *Re Newcomb*, 172 N. Y. 608, 64 N. E. 1123, the equitable interest of a nonresident decedent in shares of stock in a New York corporation was held subject to the transfer tax, although the certificates were not within the state and the stock stood on the books of the corporation in the name of the brokers who purchased the same for the decedent,

they having indorsed the transfer on the back and sent the certificates to her.

In *Re Bushnell*, 172 N. Y. 649, 65 N. E. 1115, where the doctrine was applied, the specific question was as to the liability of one to whom the stock was devised subject to a bequest to another for life with power to reinvest, a point not within the scope of this note.

So, shares of stock of a nonresident in a national bank located in New York are subject to the transfer tax although the certificates are not in the state. *Re Cushing*, 40 Misc. 505, 82 N. Y. Supp. 795.

So, stock in a domestic corporation and in a national bank located within Massachusetts, belonging to the estate of a nonresident, is subject to a succession tax under the Massachusetts statute, which imposes that tax on all property within the jurisdiction of the commonwealth and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible; and it is immaterial whether the certificates are within the state or not. *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372.

And, upon the authority of the last case, it was held in *Moody v. Shaw*, 173 Mass. 375, 53 N. E. 892, that stock apparently owned by a nonresident decedent in a railroad company incorporated both in Massachusetts and New York was subject to a collateral-inheritance tax.

And to the same effect is *Kingsbury v. Chapin*, 196 Mass. 533, 82 N. E. 700, which adopts the rule of apportionment followed in *Re Cooley*, *supra* (see report of the latter case in 10 L.R.A.(N.S.) 1010).

The court, in *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939, also recognizes the liability under the New Hampshire statute, which is practically identical with the Massachusetts statute, to pay the tax in respect of shares of stock owned by the estate of a nonresident in a domestic corporation or a corporation chartered both in New Hampshire and in another state, and having but a single issue of stock; and follows the basis of apportionment adopted in *Re Cooley* and *Kingsbury v. Chapin*, *supra*.

While, as above shown, the English legacy

the mere relative "which" and by adding the words "inheritance, distribution, bequest, devise." We are not therefore concluded by that decision.

It is clear that the legislature did not intend to tax all successions of nonresidents. If it had meant that, it would have taxed all property within this state which should be transferred from a decedent by will or intestacy. (We disregard as quite inapplicable to the present case transfers by deed, grant, sale, or gift intended to take effect after death.) Instead of using this general language, which was naturally suggested by the use of the words "by will or by the intestate laws of this state," employed in the previous clause, the act limits the taxation upon transfers of the property of nonresidents to transfers by inheritance, distribution, bequest, or devise. The words "inheritance" and "distribution" are apt and proper words to designate the succession of an heir or next of kin; the words "bequest" and "devise," that of a legatee or devisee. The only one applicable to the present case is "bequest." What is to be taxed, therefore, as far as the present case is concerned, is a transfer by bequest from Mills to his legatees, or, to use the language of Mr. Justice Holmes in *Blackstone v. Miller*, 188 U. S. 189, 207, 47 L. ed. 439, 446, 23 Sup. Ct. Rep. 277, it is the singular succession of the legatee, not the universal succession of the executors. That this is the true construction of the act is indicated further by the provisions of § 6 (Gen. Stat. 1895, ¶ 268, p.

duty act does not extend to assets of a non-resident decedent, even though they are within the jurisdiction, the liability to pay the probate tax in respect of shares of stock in an English company belonging to a non-resident decedent was recognized in *Atty. Gen. v. New York Breweries Co.* [1899] A. C. 62, which also held that an English company which, upon the death of a testator domiciled in a foreign country and at the request of his executors, transferred to their names shares in the company, knowing that they had not obtained, and did not intend to obtain, probate in England, were liable as executors *de son tort* for the payment of such probate duties as would have been payable if probate had been obtained in England.

The liability to pay the tax in respect of shares in a domestic corporation belonging to the estate of a nonresident decedent is supported by an able opinion of the New Jersey supreme court, speaking through Garrison, J., in *Neilson v. Russell*, 69 Atl. 476, which was reversed by the court of errors and appeals in *NEILSON v. RUSSELL*.

The decision of the prerogative court in *Re Delano* (N. J.) 69 Atl. 482, to the same effect as the decision of the supreme court in the last case, is, of course, in effect overruled by the reversal of that decision. The 19 L.R.A. (N.S.)

3341) authorizing the executors to deduct the tax from the legacy or property for distribution. The tax is not a general charge against the estate, but a charge upon the legacies. *Wychoff v. O'Neil* (N. J. Err. & App.) 67 Atl. 32. Section 10 authorizes a refund of taxes where the legatee has been obliged to refund part of this legacy to pay debts proven after distribution. Although there seems to be no provision in the statute authorizing the deduction of debts in making appraisement we can hardly doubt, in the face of § 10, that such a deduction ought to be made. It has never been thought that an insolvent estate was liable to this tax, although no machinery can be provided in this state by which the fact of solvency or insolvency can be ascertained. Such machinery is unnecessary if it is only the value of the legacy that is to be ascertained. These considerations persuade us that it is the legacy that is taxed, and not the estate. The question recurs whether the succession of the legatees in the present case was meant to be taxed.

This succession is a succession under English law by which the validity and amount of the bequest must be determined. *Jenkins v. Guarantee Trust & S. D. Co.* 53 N. J. Eq. 194, 32 Atl. 208. By that law, as well as by her own, the title to a legacy is not complete and perfect until the executor has assented (2 Williams, Exrs. & Adms. 1372, 1373), and he ought not to assent until creditors are satisfied. This assent must of necessity be the assent of the executors

doctrine of *NEILSON v. RUSSELL* is followed in *Astor v. State* (N. J.) 72 Atl. 78, where the testatrix was domiciled in a foreign country, her will having been admitted to probate in New York as that of a nonresident.

In some of the cases it is expressly stated that the liability to pay the tax in respect of stock in a domestic corporation is not dependent upon the granting of ancillary letters; and in none of the foregoing cases is the actual granting of such probate made a condition of the liability to pay the tax in respect of the stock.

Inasmuch as the state in which the decedent is domiciled has the power,—very commonly exercised,—applying the maxim *Mobilia sequuntur personam*, to require the payment of the tax by the estate of a resident in respect of shares of stock in a foreign corporation, it follows that double taxation is inevitable if the state in which the corporation is organized asserts the right to require the payment of the tax in respect of the shares when owned by a nonresident. As shown in the case notes to *Judy v. Beekwith*, 15 L.R.A. (N.S.) 142, and *Mann v. Carter*, 15 L.R.A. (N.S.) 150, however, this species of double taxation, however objectionable from the point of logic or abstract justice, is not constitutionally objectionable.

at the domicile. They alone can ascertain whether the estate is solvent or insolvent, and it is only upon a settlement of their accounts that it can be determined whether the legatee will actually receive anything or not; and, if he is to receive only a portion of the legacy, the amount in which it shall abate can be decided by the courts of the domicile only. The succession to the legacy is complete only in a foreign jurisdiction, and it would certainly be anomalous to tax that succession here. The case differs from those arising under the New York act of 1892 (Laws 1892, chap. 399, p. 814), and statutes modeled thereon, which assume to tax the transfer of property within the jurisdiction. Under those statutes it is the situs of the property which justifies the taxation of the transfer. Our statute of 1894 does not undertake to tax all transfers of property within our jurisdiction, but only transfers by inheritance, distribution, bequest, or devise. In this respect our statute differs, also, from the Maryland act which was before the court in *State v. Dallymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82, where the act as construed by the court imposed a tax upon all estates, real, personal, and mixed, money, and public and private securities for money of every kind, being in the state. The Massachusetts cases are not in point for a like reason. There the statute imposes a tax on "all property within the jurisdiction of the commonwealth and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible." *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372. In short, our statute imposes a legacy duty, and not a transfer or succession tax. The view we take is the same that finally prevailed in the English courts. *Thompson v. Advocate General*, 12 Clark & F. 1.

We reach the same result if we disregard the technical force of the words "inheritance, distribution, bequest, and devise," and look at the tax as a succession tax. It is conceded, as it must be in view of our constitutional provision, that the tax cannot be sustained as a property tax. The ground upon which this extraordinary exaction and the exemption of small estates and the taxation by some states, and at one time by the Federal government of large estates, at a higher rate, is sustained, is, as stated in the opinion of the supreme court, that "the rights of testamentary disposition and of succession are creatures of law, upon the exercise and operation of which the law-maker may impose terms." We think it follows logically that the only law which

can impose the terms is the law that creates the right. In this case it is the English law. The title to the stock passed by virtue of the will to the executors from the moment of the testator's death, and probate was operative only as the authenticated evidence, not as the foundation of the executors' title. 1 *Williams, Exrs. & Adms.* 293, 294, 629. The English executors were authorized without probate in this state to transfer the stock (*Hutchins v. State Bank*, 12 Met. 421; *Luce v. Manchester & L. R. Co.* 63 N. H. 588, 3 Atl. 618), and to vote at a corporate election. *Re Cape May & D. B. Nav. Co.* 51 N. J. L. 78, 16 Atl. 191, in which Justice Depue cited as authority the cases just referred to. However convenient it may have been to take out letters testamentary in New Jersey, such a course was not essential under our laws to vest the title in the executor. It was only of consequence as a matter of procedure, and to put the executors in a position to compel a transfer on the books of the corporation, if the corporation was unwilling to recognize the foreign letters. It is true that the New Jersey executors have a title and a right to administer (*Banta v. Moore*, 15 N. J. Eq. 97); but the difficulties already mentioned in dealing with the tax as a legacy duty are quite as forceful when it is looked on as a succession tax. There is the additional difficulty that the New Jersey administration is ancillary only, and the provisions of the statute authorizing the executor to collect the tax from the legatee or to deduct it from the legacy cannot be enforced. After administration here, the balance of the estate would properly be transferred to the English executors for distribution in accordance with the laws of the domicile of the testator. Our view in this respect is supported by the authorities. *Wallace v. Atty. Gen. L. R.* 1 Ch. 1, 35 L. J. Ch. N. S. 124; *Re Embury*, 19 App. Div. 214, 45 N. Y. Supp. 881, affirmed in 154 N. Y. 746, 49 N. E. 1096; *Eidman v. Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515.

The claim of the state is not helped by § 11 of the act. Gen. Stat. 1895, "273, p. 3342. That applies only to the case of stock which is liable to the tax, and is intended to afford a means of collection of a tax imposed by other sections not to impose a tax.

The judgment must be reversed.

Pitney, Ch., and Bergen and Green, JJ., dissent.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

I. N. EBBS, Appt.

(— N. C. —, 63 S. E. 190.)

Attorney — disbarment.

1. Conviction in another jurisdiction is not within the provision of a statute declaring that an attorney must be disbarred upon his conviction of a crime punishable by imprisonment in the penitentiary, and permitting his disbarment if he shall have been convicted in open court of some criminal offense showing himself unfit to be trusted.

Same — inherent power.

2. Courts have no inherent power to disbar an attorney for conviction of crime in a foreign jurisdiction where the legislature has expressly provided what convictions shall result in disbarment, which do not include those in foreign jurisdictions.

(Clark, Ch. J., and Brown, J., dissent.)

(December 22, 1908.)

A PPEAL by defendant from a judgment of the Superior Court for Buncombe County disbarring him. Reversed.

Statement by Connor, J.:

Pursuant to the provisions of chapter 941,

Case Note. — Conviction or commission of crime or misconduct by attorney in another state as ground for disbarment.

Very few cases have been found on the question as to what effect on a disbarment proceeding for the commission of a crime, the fact has that the crime was committed, or for which he was convicted occurred, in another state; and none has been found where the question arose in a manner similar to that in *STATE v. EBBS*,—that is, whether or not a statute providing for the disbarment of an attorney upon his conviction of crimes punishable by imprisonment in the penitentiary necessarily includes the conviction of those crimes in other states.

In *Re Kirby*, 10 S. D. 414, 39 L.R.A. 859, 73 N. W. 907, under a statute providing for disbarment of an attorney when he has been convicted of felony or misdemeanor involving moral turpitude, the state court, without questioning the applicability of such statute, disbarred an attorney for having been convicted of such a crime in the United States district court situated in the same state.

In *People ex rel. Hamlin v. Payson*, 215 Ill. 476, 74 N. E. 383, an attorney was disbarred for various acts of unprofessional conduct. It also appeared that he had been convicted of crime in a foreign state prior to his admission to the bar in the local 19 L.R.A. (N.S.)

p. 1342. Pub. Laws 1907, the committee on grievances of the North Carolina bar association, filed with the solicitor of the fifteenth judicial district an accusation stating that, upon investigation of certain charges preferred before them against I. N. Ebbs, a licensed attorney and member of the bar of the state, residing in said district, the said committee were of the opinion that said charges should be further investigated by the court, as provided by the statute. A copy of the charges and the records upon which they were founded accompanied the report. The solicitor thereupon caused the report and the records, together with an accusation preferred by himself, embodied in the report, to be served on said attorney. Hon. R. B. Peebles, judge presiding, thereupon made an order reciting the proceedings had before the committee, directing the said I. N. Ebbs to appear before him at Asheville, North Carolina, on a day named, and answer said charges. On the return day the said I. N. Ebbs duly appeared, being represented by counsel. The committee was represented by the solicitor of the district and other counsel. The accusation was founded upon certified records from the circuit court of the United States, eastern district of Louisiana, showing a bill of indictment returned by the grand jury, charging respondent with forgery in six counts. The specific acts charged con-

state, in regard to which the court said: "We have been unwilling to hold, as a matter of law, that the mere fact of the conviction of crime in a foreign state, followed by a pardon and a long lapse of years, was sufficient, of itself and as a matter of law, upon which to predicate an order of disbarment. We have preferred to adopt the more modern view of *locus penitentiæ*. This latter view we regard as more in accord with the spirit of our institutions, as is evidenced by the various reform schools and the parole system established and obtaining in this state, on the theory that criminals may be reformed; and while, as we have said, we will not make the rule absolute upon the mere record of a conviction long anterior to the filing of the information, we do not, in the consideration of the case, ignore such conviction, but, keeping it before us, look into the life and conduct of the accused from that time on; and, if we find that there has been a reformation, and that the individual has become an honored and useful member of society, and has shown a proper regard for the duties and responsibilities of his profession, we will discharge the rule. If, on the other hand, as we are constrained to say is the case before us, it appears that the respondent is not benefited by the misfortune that his wrongful conduct brought upon him, but has persisted in his evil doing, we take into consideration the former conviction and all subsequent conduct, and attach to

sisted in unlawfully, falsely, and feloniously forging and altering certain receipts, accounts, etc., with intent to defraud the United States. Upon a trial before said court, respondent was convicted upon all of the counts except the first, and sentenced to imprisonment in the parish prison of the parish of New Orleans for the term of ninety days, and to pay a fine of \$1,000. Respondent demurred to the evidence as follows: "The respondent, I. N. Ebbs, with leave of court, objects to the sufficiency of the accusation preferred by the solicitor for the state as amended in the above-entitled proceeding, and says: (1) The said accusation contained no cause for the disbarment of respondent except on allegation of a conviction of the defendant of a crime alleged to be punishable in the penitentiary before and by the United States district court for the eastern district of Louisiana. (2) That said accusation does not charge this respondent with having been convicted of any crime since the passage of chapter 941, p. 1342, N. C. Pub. Laws, passed in the year 1907. (3) That the only conviction alleged in said accusation is a conviction for an offense not punishable in the penitentiary by the laws of North Carolina, even if the offense had been committed within the state of North Carolina." His Honor overruled the demurrer, and rendered the following judgment: "It is ordered, ad-

judged, and decreed that the said I. N. Ebbs be, and he is hereby, disbarred as an attorney at law from the practice as an attorney and counselor in the courts of this state, and that the name of the said I. N. Ebbs be stricken from the roll of the practising attorneys of the courts of this state, and that he henceforth be denied any and all the rights or privileges of an attorney and counselor in the courts of the state of North Carolina. The clerk of this court is hereby ordered to send a certified copy of this judgment to the clerk of the superior court of Madison county, North Carolina, and the clerk of Madison county will enter the same in the judgment docket of his court." Respondent excepted and appealed.

Messrs Adams & Adams and J. M. Gudger, Sr., for appellant:

The presumption is that the conviction referred to by the statute is a conviction by the courts of this state of an offense which is a crime under the laws of this state, and punishable herein.

Ex parte Quarrier, 2 W. Va. 571; Hines v. Wilmington & W. R. Co. 95 N. C. 434, 59 Am. Rep. 250; Smithwick v. Williams, 30 N. C. (8 Ired. L.) 268; Klingsmith v. Kepler, 41 Ind. 341; Bishop, Statutory Crimes, § 141; Com. v. Green, 17 Mass. 538.

The criminal conviction and judgment is

them the consequences that the law imposes."

In *Re Baum*, 10 Mont. 223, 25 Pac. 99, it was held that a decision of disbarment by a divided court in a foreign state, no order of disbarment being made, pending on appeal to a higher court, is insufficient as a ground for revocation of an attorney's license in the local state; the court saying that this did not lay down the rule that unprofessional conduct of lawyers of this court, committed without the limits of the state, might not be inquired into, but only that the circumstances of the case did not seem to warrant such inquiry.

And see *Ex parte Quarrier*, 2 W. Va. 569, sufficiently set out in *STATE v. EBBS*. It would seem, however, that there could be very little question about the right to disbar an attorney for the commission of a crime involving moral turpitude, although the crime was committed in another state.

In *Smith v. State*, 1 Yerg. 228, it was held to be a good ground for disbarment that an attorney fought a duel in another state, killing his antagonist, and was there indicted for murder.

In *Re Dornemon*, 2 Wheeler, Crim. Cas. 344, an attorney's name was stricken from the rolls for aiding and assisting the negroes of St. Domingo in outrages committed against the whites.

In *People ex rel. Deneen v. Gilmore*, 214 Ill. 569, 69 L.R.A. 703, 73 N. E. 737, it 19 L.R.A. (N.S.)

was held that a license to practise law will be revoked which is secured by a fraudulent concealment of the fact that the plaintiff has recently been convicted of embezzling funds from a client in another state,—especially if, since its issuance, the plaintiff has been guilty of professional misconduct evincing such lack of personal integrity and professional honor as to establish that he is unworthy to be allowed to hold it.

In *People ex rel. Deneen v. Coleman*, 210 Ill. 79, 71 N. E. 693, it also appeared that an attorney, previous to his application for admission to the bar, had been convicted in the courts of another state of a felonious offense involving moral turpitude, and that he had served a portion of a term of imprisonment in the penitentiary of that state, upon the expiration of which he had been pardoned. It was held, however, in an effort to have him disbarred, that, since he had lived an upright life for several years after his conviction, a motion therefor would be denied.

There are other cases in which the reason assigned for the disbarment was not so much the misconduct of the attorney, as the fact that he committed a fraud upon the court in concealing it, when asking for admission in another state; but, aside from those immediately preceding, they have been expressly excluded from this note.

not within the "full faith and credit clause" of the Constitution of the United States, and has no effect beyond the limits of the jurisdiction in which it was rendered.

16 Am. & Eng. Enc. Law, p. 250; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 18 Sup. Ct. Rep. 1370; *People ex rel. Deneen v. Coleman*, 210 Ill. 79, 71 N. E. 693.

Mr. Hayden Clement for the State.

Connor, J., delivered the opinion of the court:

Because of the novelty of the question raised by the demurrer of the respondent and the importance to the public welfare of the correct interpretation of the statute under which this proceeding was instituted, we have given the record a careful and anxious consideration. Stat. 1907 (Pub. Laws, p. 1342) chap. 941, was enacted at the instance of the state bar association for the purpose of enabling it to more effectually discharge its duty to the people of the state, the courts, and the bar by excluding from the profession unworthy members. This is the first instance in which the courts have been called upon to interpret and enforce its provisions. Section 1 provides: "That an attorney at law must be disbarred and removed for the following causes: (a) Upon his being convicted of a crime punishable by imprisonment in the penitentiary. (b) When any judgment is rendered against him for money collected by him as an attorney and retained by him without any bona fide claim thereto or any part thereof." Section 2 provides that an attorney at law may be disbarred, etc., naming two causes. The motion to disbar the respondent is based upon the first section. It will be observed that among the several causes for which an attorney must or may be disbarred this is the only one in which the court is required to act upon a record, and the respondent is not permitted to offer anything by way of defense or exculpation. The court cannot inquire into his guilt. The production of the record, showing a conviction, makes it the imperative duty of the court to disbar him. Without expressing any opinion as to the wisdom of so drastic a statute, we are not permitted to enlarge its terms by construction. The respondent says that, by a recognized canon of construction, the penalty must be confined to a conviction had in the court of this state. The case was thoroughly argued before us, and the industry of counsel has afforded us much aid. Counsel for respondent rely upon the rule laid down by Mr.

Justice Gray in *Logan v. United States*, 144 U. S. 263, 307, 36 L. ed. 429, 443, 12 Sup. Ct. Rep. 617. In that case the plaintiffs in error were indicted in the circuit court of the United States for murder and conspiracy under the provisions of an act of Congress. The indictment was found and the case tried in the state of Texas. The government introduced one Martin as a witness. It appeared that he had been convicted in the courts of North Carolina of a felony, and sentenced to imprisonment in the county jail. The Texas statute rendered a person convicted of a felony incompetent to testify in the courts of that state. In discussing the exception to the ruling of the court admitting the witness, it was said: "At common law and on general principles of jurisprudence, when not controlled by express statute, giving effect within the state which enacts it to a conviction and sentence in another state, such conviction and sentence can have no effect by way of penalty or of personal disability or disqualification beyond the limits of the state in which the judgment is rendered."

The question, as applied to the disability of a person offered as a witness to testify, arose in this state in *State v. Candler*, 10 N. C. (3 Hawks) 393, when it was held by a divided court that a witness convicted of an infamous crime in Tennessee was incompetent to testify in this state. The chief justice concedes that such was not the law in England, but was of the opinion that, by virtue of the "full faith and credit" clause of the Federal Constitution, the law in this country was otherwise. The court was not construing a statute in that case, but discussing a general principle of law. The question has been decided otherwise in many other states, and the decided weight of authority is against the decision in *Candler's Case*. *Parker, Ch. J.*, in *Com. v. Green*, 17 Mass. 515, writes a very able opinion, holding that "the conviction of an infamous crime in a foreign country, or in any other of the United States, does not render the subject of such conviction an incompetent witness in the courts of this state." He says: "To hold a person incompetent on account of such conviction, and to enforce the punishment and thus the penal laws of our state, would reach into others," violating well-settled principles. In *Sims v. Sims*, 75 N. Y. 466, it appears that, by a statute of that state, it is provided that "no person sentenced upon a conviction for felony shall be competent to testify . . . unless pardoned," etc. *Rapallo, J.*, said: "I think it quite clear that the disqualification created by this statute is consequent only upon a conviction in this state." The conviction relied

upon to exclude the witness was had in Ohio. Quoting Greenleaf on Evidence, who says that the weight of modern opinion seems to be that personal disqualifications arising, not from the laws of nature, but from positive law, especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated, he says: "I think this doctrine applicable to the question now in hand, and that there is nothing in the Constitution of the United States which prevents such application, or requires that the personal disabilities, such as incompetency to testify or to vote, which may be imposed upon a person convicted of crime in one state, should follow him and be enforced in all the others. If such were the operation of the constitutional provision, the qualifications of witnesses called in our courts and of voters at our elections might be made to depend upon the laws of other states instead of our own." The learned justice notices the decision in *Candler's Case*, and meets the argument upon which it is founded. It is insisted by the attorney general, and we think correctly, that this is not a criminal action. It is rather in the nature of a civil proceeding, and probably should be prosecuted in the name of the bar association. This, we notice, is done in several of the states, as in *Maine*,—*Sanborn v. Kimball*, 64 Me. 140. Treating it as a civil proceeding, it is clear that the record of a conviction in a criminal action in another jurisdiction would not be conclusive of guilt. Judge Rapallo says: "A record of conviction for a crime is not conclusive evidence in a civil action of the facts upon which it was based. There is a great weight of authority against its being admissible at all, except as evidence of the fact of conviction, where that fact is material." *Greenl. Ev.* § 537; *Wharton, Conf. L.* § 108; *Garitee v. Bond*, 102 Md. 379, 111 Am. St. Rep. 385, 62 Atl. 631, 5 A. & E. Ann. Cas. 915. The point was presented and decided in an interesting case in 2 W. Va. 569, *Ex parte Quarrier*. The applicant for admission to the bar was duly licensed as an attorney in another state, and, complying with the statute in the newly made state of West Virginia, he was met with the objection that he was guilty of treason, having, in his native state, voted for the ordinance of secession and voluntarily entering the army of the Confederate states. He had received a pardon from the President. The court held that he was entitled to be admitted, saying: "Indeed, it must not be forgotten that in this case no treason against the state of West Virginia, whose courts are invoked to consider the subject, has been either proved or con-

fessed, and the only acts stated that could amount to the crime of treason were perpetrated against the United States and for which the party has been pardoned by that government. Now, it would be straining the point too far to hold, as contended for, that the war being waged against the United States, of which the state of West Virginia was one, was therefore waged against her in the sense contemplated in the statute against treason, and that, therefore, the acts in question were treason against the state and felony within statute . . . for, while it is not intended to deny that the same act might constitute treason against the United States and also against the state, . . . it is not enough to wage war against the United States generally or collectively, or as component parts of the national Union, but it must be done directly against the state in particular. . . . An appeal has been made to the court to exclude attorneys, circumstanced as the applicant is, upon the ground of public policy, and the danger of baleful influence in a political light. But these are considerations better addressed to the legislature than the courts. Whatever may be the true policy of the lawmaking power to pursue is a question for that power to determine. The duty and true policy of the courts to pursue is to expound the law as it is, and, if it is not what it ought to be, to leave it to the legislature to change it."

In *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 291, 32 L. ed. 239, 243, 8 Sup. Rep. 1370, 1374, it is said: "The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself." *Kames, Eq.* 3d ed. 326. When we consider the question upon the "reason of the thing" and sound state policy, the wisdom of the law, as we find it laid down with practical uniformity, is manifest. It is the natural interpretation of all statutes creating offenses and defining conduct, the doing of which is made indictable or subject to penalties, to refer them solely to the commission of such acts within this state. In respect to punishment of crimes and imposition of penalties, the states act within their own territorial limits, and the Federal government within its own sphere. No state can administer the Federal statutes, maintain prosecutions for their violations, or impose punishments or penalties. *Parker, Ch. J.*, in *Green's Case*, *supra*, wisely says: "Whether the facts which would be here deemed an infamous crime are the same which constitute the like offense in the country from which the record comes, the court would have no means of knowing with certainty. The crime of treason is

known to be different in different countries. What is felony also in one country may not be felony in another, and it is competent for the legislature of every nation to attach disabilities to the commission of offenses which by the laws of other nations may be wholly without such consequences." We know that the Federal government punishes practically all offenses with imprisonment in the penitentiary. Violations of the revenue laws, often technical and involving no moral turpitude whatever, may be so punished. Again, acts which in our state are deemed misdemeanors, punishable by fine or a short term in the county jail or house of correction, are deemed of grave character and punished by imprisonment in the state's prison in other states. Each state makes its Penal Codes, and the Federal government does the same. If any other interpretation were put upon our statute, it would logically follow that, for violation of the Federal statutes or statutes of other states, citizens of this state would forfeit their right to vote under our Constitution. Certainly the people of North Carolina never contemplated that any such construction would be put upon their laws. Care must be had to keep clearly in mind the fact that the court, in enforcing the statute, does not and cannot inquire whether, in truth, the respondent has committed the crime charged. It is restricted to the inquiry whether he has been "convicted," and for this purpose the record of conviction, by a court having jurisdiction to hear and determine the charge, is conclusive, and the court must disbar him. No provision is made for pardon or for repentance followed by a life of probity. We are of the opinion that, upon well-settled principles and sound reason, the statute is confined to a conviction in this state. It is insisted that, however this may be in regard to the act of 1907, the respondent may be disbarred by the court under the power conferred in § 211, Revisal 1905. It is suggested that this statute is by implication repealed by the act of 1907. We incline to the opinion that the last statute is not in conflict with §§ 211 and 212 of the Revisal of 1905. It is not necessary that we should decide the question because, while the language clearly restricts the power of the courts to disbar an attorney, the exceptive language, "unless he shall have been convicted in open court or confessed himself guilty of some criminal offense showing himself unfit to be trusted," etc., is to be interpreted in the same way as the word "convicted" in the act of 1907. Hence the same obstruction is met in enforcing § 211 against respondent.

The history of this legislation may be learned, and the purpose of the legislature 19 L.R.A. (N.S.)

understood, by reference to *Re Moore*, 63 N. C. 397; *Ex parte Biggs*, 64 N. C. 202; *Ex parte Schenck*, 65 N. C. 353. The last case was argued with a wealth of learning by the most eminent members of the bar of the state. The court held that the act of 1871 (*Laws 1870-71*, chap. 216, p. 337, § 4; *Revisal 1905*, § 211) was constitutional; that it did not deprive the court of any of its "inherent powers;" that the court had no power to disbar an attorney for causes other than those prescribed by the statute. The opinion concludes: "It is a law of the land and ought to be observed." The question came before the court again in *Re Haywood*, 66 N. C. 1. *Pearson*, Ch. J., after a careful consideration of the effect of the statute upon the power of the court to disbar an attorney, said: "The act of 1871 [*Revisal 1905*, § 211] takes from the court this common-law power to purge the bar of unfit members, except in specified cases; and it fails to provide any other power to be used in its place. It is a disabling, and not an enabling, statute; the whole purpose seeming to be to tie the hands of the court, so, when our power is taken away, the court is not at liberty to fall back upon another which it had before adjudged to be ineffectual to accomplish the end proposed." This case, as *Ex parte Schenck*, was argued by Mr. Moore, Mr. Phillips, and Mr. Merrimon, counsel eminent for their learning, industry, and loyalty to their profession. The court was evidently desirous of exerting such power as had been left to it by the legislature to compel a derelict attorney to discharge a conceded duty or be disbarred. It came to the conclusion that "the legislature had tied its hand." We do not entertain any doubt that, in the absence of restrictive legislation, the courts have an inherent power to strike from their rolls names of attorneys who are found, by reason of their conduct, unfit and unworthy members. The decisions to this effect are numerous and uniform. An instructive opinion upon the question is to be found in *Sanborn v. Kimball*, 64 Me. 140. *Dickerson*, J., says: "An attorney at law is an officer of the court as appears from the terms of his oath of office, to wit: 'You will conduct yourself in the office of an attorney within the courts according to the best of your knowledge and discretion, and with all good fidelity as well to the courts as your clients.' The order of his admission to the bar is the judgment of the court that he possesses the requisite legal qualifications, and good moral character to entitle him to practise the profession of an attorney at law. From the moment of his entrance upon the duties of his office he becomes responsible to the court for his official misconduct. The tenure of his office

is during good behavior, and he can only be deprived of it for misconduct ascertained and determined by the court after opportunity to be heard has been afforded. In the absence of specific provisions to the contrary, the power of removal is commensurate with the power of appointment. . . . If 'a good moral character' is indispensable to entitle one to admission to the bar, it is obvious that the necessity for its continuance becomes enhanced by the conflicts, excitements, and temptations to which the practitioner is daily liable. For his official misconduct there is no power of removal but in the court. This power is therefore at once necessary to protect the court, preserve the purity of the administration of justice, and maintain the integrity of the bar. . . . It is a mistaken view of this subject, as the foregoing authorities show, to conclude that an attorney at law can only be disbarred for acts done 'in his office as attorney' or 'within the courts' in the term of his oath of office. On the contrary, an attorney may be guilty of disreputable practices and gross immoralities in his private capacity and without the pale of the court, which render him unfit to associate with gentlemen, disqualify him for the faithful discharge of his professional duties in or out of court, and render him unworthy to minister in the forum of justice. When such a case arises from whatever acts or causes, the cardinal condition of the attorney's admission to the bar, the possession of a 'good moral character,' is forfeited, and it will become the solemn duty of the court, upon a due presentment of the case, to revoke the authority it gave the offending member as a symbol of legal fitness and moral uprightness, lest it should be exercised for evil or tarnished with shame." Whipple, (Ch. J., in *Re Mills*, 1 Mich. 393, says: "Should this court, after being officially advised that one of its officers has forfeited the good name he possessed when permitted to assume the duties of his office, still hold him out to the world as worthy of confidence, they would, in my opinion, fail in the performance of a duty cast upon them by the law. It is a duty they owe to themselves, to the bar, and the public to see that a power which may be wielded for good or for evil is not intrusted to incompetent or dishonest hands. The extreme judgment of expulsion is not intended as a punishment inflicted upon the individual, but as a measure necessary to the protection of the public, who have a right to demand of us that no person shall be permitted to aid in the administration of justice whose character is tainted with corruption." *Ex parte Smith*, 28 Ind. 47; 19 L.R.A. (N.S.)

Fletcher v. Daingerfield, 20 Cal. 427; *Ex parte Brown*, 1 How. (Miss.) 303.

In *State ex rel. Wolf v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314, Westcott, J., writes an exhaustive opinion reviewing the statutes and decisions in England and in this country. *Re Percy*, 36 N. Y. 651; *Re Woolley*, 11 Bush, 96; *People ex rel. Moses v. Goodrich*, 79 Ill. 148; *Re Smith*, 73 Kan. 743, 85 Pac. 584. These cases all hold that for dishonesty or other conduct in his official character, showing an absence of good moral character, the court has the inherent power to disbar an attorney. Some of them, as in the case from Maine, hold that, when, without reference to his official duties or relations, he is guilty of such conduct, the court may strike his name from the roll of its attorneys. In none of the cases do the courts undertake to say how far the legislature may limit this inherent and essential power. We do not deem it proper to express any opinion upon this delicate question. This court having held in the cases cited that the act of 1871 (*Laws 1870-71*, chap. 216, p. 337, § 4), now § 211, *Revisal 1905*, did not deprive it of its essential inherent powers in this respect, we do not care to disturb or draw the question into discussion. Whatever may have been the reasons for passing that statute, they no longer exist, having passed away with the conditions which brought them into action. We are sure that in re-enacting the statute in the *Revisal of 1905* it was not the intention of the legislature to unduly "tie the hand" of the court in preserving the high standard of conduct and character of our bar which has been the pride of the people of the state. We have no doubt that, if it appears to the legislature that larger power in the courts is necessary to enable them to discharge their duty, it will be prompt to confer it or to withdraw any undue restrictions now existing. Even for so laudable an end as purging the bar of unworthy members, we should not exercise doubtful power or unnecessarily come into conflict with the legislature. We do not entertain any doubt that, notwithstanding the restrictions placed upon the courts by the statute, ample power exists to protect them and their suitors from indignity, fraud, dishonesty, or malpractice on the part of any of its officers in the discharge of their official duties. It is manifest, however, that for the commission of crimes which seriously affect their moral character, but have no direct connection with their practical and immediate relation to the courts, the power to disbar attorneys is restricted by the express language of the statutes to convictions of the class of crimes named in the statutes. To give any other construc-

tion to the statute would not only do violence to well-settled principles, but might lead to results not contemplated by the legislature. If, as the record shows, the respondent is guilty of the crime charged, his name should be stricken from the roll of attorneys in this state; but, as we have seen, no power now exists in the court to do so.

We were requested by the committee on grievances to express our opinion to this extent, to the end that such further legislation may be had as would enable the state bar association to aid the courts in removing from the bar unworthy members. How far it is wise to define the crimes or confine cases to the mode of punishment as the basis for compulsory action is for the consideration of the legislature. Like all legislation of general application, it is difficult to avoid danger of miscarriage in individual cases. We have been favorably impressed with the method of procedure followed in the Kimball Case, 64 Me. 140. There the accusation was made by the bar, and, upon a notice to show cause, a reference was ordered to take testimony and report to the court, whereupon, after argument, the case was disposed of upon its merits. The disposition made by us of this appeal will not prevent a further investigation of the fitness of respondent to continue to be a member of the bar if the restriction now imposed upon the court is removed. The action of the committee on grievances is in all respects to be commended. They have discharged their duty, and the failure to remove the respondent, who, as the record shows, has been convicted of forgery, is no fault of theirs. The case must be remanded to the superior court of Buncombe with direction to dismiss the proceeding unless the legislature shall confer the power to investigate and pass upon the motion to disbar for conduct showing that since he received his license from this court he has been guilty of dishonest and criminal conduct. In this he has violated his oath that he "will honestly demean himself in the practice of an attorney." In such investigation the record of his conviction will be competent evidence of his guilt. We do not hold that for the commission of a felony, or other infamous crime, "showing him to be unfit to be trusted in the discharge of the duties of his profession" committed in another state, he should not be disbarred by the court of this state. That question is not presented. It is obvious that a man who will commit forgery or perjury, or be otherwise dishonest in one state, is not a fit person to be a member of the bar of this state. We simply hold that the statute (chapter 941, 19 L.R.A. (N.S.)

p. 1342, Laws 1907) does not impose upon the court the duty or confer the power to disbar an attorney because he has been "convicted" in the courts of another state or the United States. We further hold that the language of § 211, Revisal. 1905, disables the court from disbaring for the conviction of crime in another jurisdiction in the exercise of its "inherent power" to deal with its attorneys. We had occasion in *Re Applicants for License*, 143 N. C. 1, 10 L.R.A. (N.S.) 288, 55 S. E. 635, 10 A. & E. Ann. Cas. 187, to consider the question of our power to refuse to license applicants who were shown to be of bad moral character and the extent to which it was subject to legislative control. The subject was carefully considered and the opinion of a majority of the court expressed in the able and exhaustive opinion of Mr. Justice Hoke. The legislature promptly amended the statute (Revisal 1905, § 207), restoring to the court the power to pass upon the moral character of applicants. Laws 1907, chap. 70, p. 81. The long and honorable history of the bar of North Carolina, distinguished by its learning, high personal and professional standards, and its patriotic service to the state, is justly regarded by the people with pride. Prior to 1868 no court, so far as our public records show, had been called upon to exercise its power to disbar an attorney. The unfortunate conflicts of the period following the Civil War called attention to the necessity for defining more clearly the relative rights and powers of the bench and the bar. The court promptly and wisely recognized the power of the legislature and the statutes enacted by it as the "state's collected will." If new conditions bringing a necessity for restoring the "inherent powers" to the courts exist, we should, in the same spirit, obey the law with the assurance that such legislation will be enacted as will enable the bar association, with the aid of the court, to remove from the roll the names of men who are guilty of forgery, whether committed in this state or elsewhere. We do not see any good reason why, if the law be so changed as to permit it, the court in this proceeding may not investigate the serious question presented by the action of the committee on grievances, and proceed, after full hearing, to dispose of it by making such order as will preserve the integrity and purity of the bar so far as respondent is concerned. While we do not construe his demurrer to the evidence as an admission of his guilt, because, under the statute, it was not open to him to deny it, we are of the opinion that, if power is conferred upon the court by the legislature, it is due to him and the bar of the state that a full

investigation be had, and that he either be relieved of the charge resting upon him, or that he be disbarred and his name stricken from the roll of attorneys. There seems to be a misconception of the plain language of the statute. In unmistakable terms it says that, upon conviction of the crime, the court must disbar. No question of the respondent's guilt is, or can be, presented. The judge did not, and could not, possibly give respondent leave to answer denying the commission of the offense. He had no power to hear or determine any such question. If the power of the court is limited, it is because the legislature has done so. The same power can remove the limitation. It is not a question whether men guilty of felony shall practise law in North Carolina, but whether the court shall exercise power of which the legislature has deprived them. It was attempted in *Re Moore, Ex parte Biggs*, and *Ex parte Schenck*, with us, and the legislature "tied the hands" of the court. *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366. We must declare the law as we find it to be without fear of criticism. The courts of this state will exhaust their power to purge the bar of unworthy members, but dare not assume power to do so.

The cause will be remanded to the Superior Court of Buncombe, with direction to set aside the order disbarring respondent and taking such further action in the premises as may be in accordance with the law. The general assembly convenes on the first Wednesday in January, 1909, and, if it see fit, a very simple amendment to § 211 of the Revisal of 1905 will clothe the court with full power to proceed.

. Remanded.

Brown, J., dissenting:

I am unable to agree with my brethren in the conclusion they have reached in this proceeding. It is brought at the instance of the bar association for the purpose of depriving the respondent of his right to practise law in the courts of this state. It is not criminal in its character, but purely civil, instituted, not for the purpose of punishment, but with the wholesome object of preserving the courts of justice from the official administration of a person unfit to practise in them. This is well settled in this country, as well as in Great Britain, where the courts have exclusive control over the admission as well as the disbarment of all practitioners before them. *Ex parte Wall*, 107 U. S. 288, 27 L. ed. 561, 2 Sup. Ct. Rep. 569; *State ex rel. McCormick v. Winton*, 11 Or. 456, 50 Am. Rep. 486, 5 Pac. 342; *State ex rel. State Bar Asso. v. Finn*, 32 Or. 519, 67 Am. St. Rep. 550, 52 Pac. 759; *Re Crum*, 7 N. D. 316, 75 N. W. 257; 19 L.R.A. (N.S.)

Scott v. State, 86 Tex. 321, 24 S. W. 789. Inasmuch as the proceeding is merely civil in its nature, the statute of 1907, under which it is brought, cannot be *ex post facto* in its character, and no such question can arise. *Watson v. Mercer*, 8 Pet. 110, 8 L. ed. 884; *Ogden v. Saunders*, 12 Wheat. 267, 6 L. ed. 624.

The charges preferred against the respondent of a most serious character are as follows: "(2) That the said I. N. Ebbs, on the 4th day of December, 1903, was convicted in the United States court for the eastern district of Louisiana upon a certain bill of indictment, a copy of which is attached hereto, and that the said Ebbs was duly sentenced by the said court to a term of imprisonment after the jury had returned a verdict of guilty. The crime of which he was so convicted was punishable by imprisonment in the penitentiary." The offenses of which the respondent was convicted, as set out in the petition, are as follows: "Unlawfully, knowingly, and feloniously uttering and publishing as true a certain receipt; (3) unlawfully, feloniously, and knowingly transmitting and presenting to the General Land Office of the Department of the Interior of the United States a certain false receipt; (4) knowingly, unlawfully, and feloniously transmitting and presenting for approval and payment a certain account and claim upon and against the government of the United States; (5) unlawfully, knowingly, and feloniously and with intent to defraud the United States, transmitting and presenting to the General Land Office a certain false and, fraudulent voucher; (6) knowingly, unlawfully, and feloniously and with intent to defraud the United States presenting a certain false claim in violation of §§ 5421 and 5438 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 3667, 3674)." The record shows that respondent was duly tried by a jury at December term, 1903, of the circuit court of the United States, at New Orleans, convicted and sentenced to pay a fine and to be imprisoned, and that he was imprisoned accordingly. The respondent, by his demurrer to the petition, admits the truth of the facts stated therein: that is, he admits that he has been convicted by a jury of the offenses charged, punishable by imprisonment in the penitentiary.

It is useless to discuss the character of the crimes of which the respondent has been convicted. It will be admitted by all that one who has committed them should not be permitted to practise in the courts of the state. I concur with my brethren that our courts have power to investigate such charges, and, if they are sustained, to

disbar the respondent. But I differ from them in holding that any investigation is now necessary. The learned judge who heard this matter in the court below, when he overruled the respondent's demurrer, gave him leave to file an answer, which he declined to do. The respondent should have availed himself of his right to answer, and deny the truth of the allegations contained in the bill of indictment, which is made a part of the petition, and should have insisted that the court here investigate the truth of the charges preferred against him. If the judge decline to give him a trial, the respondent could have appealed. Instead of doing that, when his demurrer was overruled, he stands mute and refuses to answer. What honorable attorney, fit to practise in our courts, would stand silent in the presence of such accusations? He should have courted investigation. His refusal to answer and deny the truth of the accusations in the bill and to demand a trial upon them here is sufficient to justify his disbarment. What else could the judge do but enter the judgment that was rendered? This court has, held, as I understand the opinion, that the respondent cannot be disbarred under § 1, subsec. "a," of the statute (Pub. Laws 1907, chap. 941, p. 1342), because the acts committed are not punishable by imprisonment in the penitentiary by the laws of this state; and, secondly, because the respondent has not been convicted in this state of a crime punishable in its penitentiary. I think the construction placed upon the act is too narrow entirely, and contrary to its spirit and purpose. The statute declares: "Section 1. That an attorney at law must be disbarred and removed for the following causes: (a) Upon being convicted of a crime punishable by imprisonment in the penitentiary." It must be conceded that those words are broad enough to cover a conviction and sentence to the penitentiary under the laws of any state or of the United States. That being so, I know of no canon of construction which requires a more restricted construction to be given them. One of the recognized rules of construction declares that, when possible, such construction should be given a statute as will effectuate the object sought to be accomplished. The undoubted purpose of the act was to remove from the legal profession those of its members who are unworthy of the respect and confidence of the people. The end to be attained is the protection of those who deal with members of the bar, and not punishment. The public welfare, as well as the respect due the profession of the law, requires that its practitioners enjoy the confidence of the community. "It

is not enough," says the supreme court of Connecticut, "for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practises." *Fairfield County Bar v. Taylor*, 60 Conn. 11, 13 L.R.A. 767, 22 Atl. 441. My learned brother, Justice Walker, has written most impressively of the high character which should be the standard for our profession, and of the grave consequences which must follow its debasement. I cannot hope to add anything to what he has so well said. *Re Applicants for License*, 143 N. C. 33, 10 L.R.A. (N.S.) 288, 55 S. E. 635, 10 A. & E. Ann. Cas. 187. It must be admitted that nothing can conduce more to lower and degrade the legal profession than to permit convicted felons from other states who have served terms in their penitentiaries to practise law in our courts. A term in the penitentiaries of the United States or of one of our sister states tends as much to impair a man's character and to destroy his usefulness as a legal adviser as a term in our own penal institution. Therefore I see no reason to suppose that the legislature meant to exclude only North Carolina convicts from our courts. We must bear in mind that the general assembly was not dealing with the administration of criminal law, but was declaring simply what class of persons should be excluded from a profession which is so intimately connected with the welfare of our people. I see no reason why we should not be willing to accept, under such circumstances, the judgments of the courts of other states and of the United States. In all other property matters we must extend to them the same faith and credit we give to our own. *Embry v. Palmer*, 107 U. S. 9, 27 L. ed. 346, 2 Sup. Ct. Rep. 25. We have recognized this principle of comity in this state by holding that a witness convicted of forgery in Tennessee was incompetent in the courts of North Carolina in a strong opinion by Justice Henderson. *State v. Candler*, 10 N. C. (3 Hawks) 393. What reason, then, is there to suppose that the general assembly did not intend to exclude from practice in our courts those who have been condemned as felons by the judgments and laws of other courts of our common country. It is practically impossible to try them over again in this state, or to investigate the truth of the charges, for the evidence and the witnesses are beyond our reach. We must accept the judgment of other jurisdictions, or else we must let those who carry the odor of the felon's cell about them stand up and plead in our courts.

Again, if those only are to be excluded who commit crimes against the state of North Carolina, we can never exclude those who are felons under the laws of the United States, even though they "be with treason damned." Under the construction given the statute, an attorney of this state might be convicted and sentenced for larceny in a distant state and return, and pursue his profession unmolested, as it might be impossible to bring the witnesses here upon whose evidence he was convicted.

I am convinced that the language of the statute is comprehensive enough to exclude from our courts all who have been convicted in any court of the United States or of any state thereof of a crime which, under the laws of such jurisdiction, is punishable by imprisonment in the penitentiary, a universally recognized method of punishing criminals. I feel sure such was the intent of the bar association in framing the act, and that such was the purpose of the general assembly in enacting it, and I think it should be so construed.

Clark, Ch. J., dissents upon the ground that commission of a felony anywhere makes the party an unfit member of an honorable profession, and is a ground for disbarment under our statute. Revisal 1905, § 211. If it be conceded that the "conviction" thereof in another jurisdiction is not such proof of the fact as our statute contemplates, yet, when the judge gave the respondent leave to file an answer denying the commission of the offense, he did not do so. The charge, based on a certified judgment upon conviction in the United States circuit court, not being denied, must be taken as admitted in open court (Revisal 1905, § 211), for this is a civil proceeding. Our courts could not "convict" the respondent for a felony committed elsewhere with a view to punishment for crime, but in a civil proceeding for disbarment it could inquire as to the fact whether he committed the act alleged. Offered the opportunity in open court, he did not answer the charge, and, there being no issue raised, the court properly gave judgment.

OKLAHOMA SUPREME COURT.

LAMM & COMPANY, Plff. in Err.,

v.

C. F. COLCORD.

(— Okla. —, 98 Pac. 355.)

Guaranty — parties — construction.

1. In construing the language of an instrument of guaranty for the purpose of

Headnotes by WILLIAMS, Ch. J.
19 L.R.A. (N.S.)

interpreting the same to determine the intention of the parties, it should be taken most strongly against the guarantor, and in favor of the party parting with his property upon the faith of the interpretation of such instrument most favorable to his rights.

Same — restrictions.

2. After the meaning of a contract of guaranty has been ascertained, and the actual operation thereunder been begun, the guarantor is entitled then to the application of the strict rule of construction, and cannot be held beyond the precise terms of such contract.

Guarantor — compliance with contract — release.

3. A guarantor has the right to prescribe the exact terms upon which he will enter into a guaranty obligation, and to insist upon a discharge in case those terms are not strictly observed.

Same — release — evidence.

4. A party stipulating to guarantee against the default of O. C. Scoresby, in the event credit is extended him in a certain amount for goods, wares, and merchandise to be furnished him by the plaintiff, cannot be held on such guaranty; the plaintiff having extended credit in said sum, and furnished and delivered said merchandise and wares to the Scoresby Tailoring Company, there being no proof offered to show that O. C. Scoresby solely comprised the Scoresby Tailoring Company.

(November 12, 1908.)

Case Note. — Does guaranty of credit extended for price of goods sold cover sales to successor.

It seems to be a generally accepted rule that, where a person guarantees the credit of one purchasing goods, the guarantor will be liable on his obligation only for sales made to the principal debtor, and not to his successor in the business.

A guaranty for the payment of merchandise purchased on credit cannot be extended to cover the liability of a partnership composed of the principal debtor and one whom he has taken into partnership subsequently to the making of the guaranty. *Coan v. Partridge*, 98 N. Y. Supp. 570; *Shaw v. Vandusen*, 5 U. C. Q. B. 353.

And so a guaranty that a certain firm would pay for all goods furnished them is held, in *Bill v. Barker*, 16 Gray, 62, not to extend to purchases by one of the partners succeeding to the business of the firm.

In *Manhattan Gaslight Co. v. Ely*, 39 Barb. 174, one guaranteeing that he would pay for gas and meter furnished to another if the latter should fail to pay therefor was relieved from his obligation upon the principal debtor ceasing to occupy the premises; and the guarantor was in no sense liable to pay for gas furnished to the new occupant because the gas company had received no notice of the change.

But it is held in *Re Cinque*, 109 Fed.

the said O. C. Scoresby solely comprises the Scoresby Tailoring Company, and consequently there was no necessity to affirmatively traverse the same. But there was an allegation that, upon said guaranty, and relying upon the same, plaintiff extended credit to O. C. Scoresby. The only account offered in evidence against anyone was that verified by the witness Malone in his deposition, which was against the Scoresby Tailoring Company, and was introduced over the objection and exception of the defendant on the ground that the same was irrelevant, incompetent, and immaterial; it not being shown to be an account for which the guaranty was executed, it appearing on its face that it was against the Scoresby Tailoring Company.

In the case of *Cremer v. Higginson*, 1 Mason, 323, Fed. Cas. No. 3,383, Mr. Circuit Justice Story said: "Having thus fixed the interpretation of the letter on this point, that it is a mere guaranty of the debt of third persons, the next question upon its construction is, To whom are the advances to be made? If there be anything clear in this cause, it is that the advances are to be made to Stephen Higginson, Jr., and Henry Higginson, then copartners in trade under the firm of S. & H. Higginson. It follows, therefore, that it covers only advances made to them jointly on their joint credit, and not advances made to them severally upon their several credit. Unless then it shall be completely established that the advances were made on the joint account of the firm, there is an end of the plaintiffs' case." In the case of *Crane Co. v. Specht*, 39 Neb. 123, 42 Am. St. Rep. 562, 57 N. W. 1017, Mr. Justice Harrison, in delivering the opinion of the court, said: "The question raised by the bill of exceptions and strenuously argued by counsel is, Can the Crane Company recover upon the contract of guaranty given by defendants to Crane Bros. Manufacturing Company? The attorneys for plaintiff contended that the Crane Company was organized on the 20th day of January, 1890, being the Crane Bros. Manufacturing Company under the new name, Crane Company, that it was composed of the same persons, managed by the same officers, engaged in the same business, and at the same location; that there was merely a change in the name, and no other or further change in the composition or operations of the company, and hence it was entitled to recover on this, as well as other contracts to which the Crane Bros. Manufacturing Company was a party. The defendant's attorneys claim that the Crane Company cannot recover by virtue of the guaranty given by defendant to the Crane Bros. Manufacturing Company any sum

due it for goods sold or furnished Lichtenberger after the change of its name to 'Crane Company.' The contention in the case resolves itself to the question, Did the change in the name of the corporation deprive it of the right to recover, upon the contract of guaranty given to it by the defendant in its former name, the price of goods furnished after the change in style to the party whose account was guaranteed to it under the old name? The answer to this question will be most readily obtained, it seems to me, by an examination of the nature of the contract of guaranty, and the construction to be given to it. In 1 Brandt on Suretyship and Guaranty, 2d ed. pp. 134, 135, § 93, it is said, in discussing such contracts: 'A rule never to be lost sight of in determining the liability of a surety or guarantor is that he is a favorite of the law, and has a right to stand upon the strict terms of his obligation, when such terms are ascertained. This is a rule universally recognized by the courts, and is applicable to every variety of circumstances.' Again it is said: 'A surety or guarantor usually derives no benefit from his contract. His object, generally, is to befriend the principal. . . . The guarantor is only liable because he has agreed to become so. He is bound by his agreement, and nothing else. . . . It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being, then, bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms . . . would be, not to enforce the contract made by him, but to make another for him.'" In the case of *Allison v. Rutledge*, 5 Yerg. 193, the defendant addressed a letter to "Mr. Allison," by which he became surety for the payment of the purchase price of some bacon purchased by one Cooper, under which guaranty he was sued as guarantor by John and Joseph Allison for the price of the bacon. Mr. Chief Justice Catron, in speaking for the supreme court of Tennessee, said: "Can, under any circumstances, a recovery be had in this action by force of the guaranty? It is addressed in the singular to Mr. Allison. Rutledge undertook for the debt of Cooper, and is bound by the writing, and this only. The contract cannot be varied, or its meaning explained without violating the statute of frauds. He did not address himself to two Allisons, but to one. The paper from its face could not be given in evidence to sustain the joint action, and it could not be proved by parol that two were meant." In the case of

Grant v. Naylor, 4 Cranch. 224, 2 L. ed. 603, John and Jeremiah Naylor brought an action against Daniel Grant on a letter or contract of guaranty addressed to John and Joseph Naylor. Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "That the letter was really designed for John and Jeremiah Naylor cannot be doubted, but the principles which require that a promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax, so far as to except from its operation cases within the principles. Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. . . . On examining the cases which have been cited at the bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case. This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John & Joseph Naylor & Co. to either of which this letter might have been delivered. . . . In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make it such a contract is going further than courts have ever gone, where the writing is itself the contract, . . . and where no pre-existing obligation bound the party to enter into it." The apparent weight of authority is that no one but the identical person to whom the letter of credit was addressed, or in whose favor the instrument of guaranty runs, or his or their assigns, can maintain an action thereon. *Taylor v. McClung*, 2 *Houst. (Del.)* 25; *Smith v. Montgomery*, 3 *Tex.* 199; *Walsh v. Bailie*, 10 *Johns.* 180; *Penoyer v. Watson* 16 *Johns.* 100; *Evansville Nat. Bank v. Kaufmann*, 93 *N. Y.* 273, 45 *Am. Rep.* 204; *Taylor v. Wetmore*, 10 *Ohio*, 491. The following authorities appear to support the contrary doctrine: *Michigan State Bank v. Peck*, 28 *Vt.* 200, 65 *Am. Dec.* 234; *Wadsworth v. Allen*, 8 *Gratt.* 174, 56 *Am. Dec.* 137. It is not necessary, however, to determine which announces the correct rule, these authorities being merely referred to to illuminate the doctrine of the liability of a guarantor.

In the case at bar the guarantor agreed to answer for the default of O. C. Scoresby. 19 *L.R.A. (N.S.)*

The record shows that upon this instrument of guaranty the goods were furnished the Scoresby Tailoring Company. There is no presumption that they were one and the same. A guarantor has the right to prescribe the exact terms upon which he will enter into the obligation, and to insist upon a discharge in case those terms are not observed. If the Scoresby Tailoring Company was a corporation or a partnership composed of members other than the party mentioned in this guaranty, the defendant could not be held as guarantor in this action. If it were a corporation, its business and assets would be controlled by a board of directors, and the guarantor might have refused to have been bound for its defaults, though the said O. C. Scoresby was one of the stockholders and officers. If it were a partnership composed of other members than the said Scoresby, the partnership property and assets would have been subject to the partnership control, and the other partners would have had the same control thereof as the said O. C. Scoresby, and, under such circumstances, the guarantor might have declined to have become bound. The plaintiff having failed to affirmatively show that the goods were furnished to the party named in the guaranty, the guarantor could not be held on such liability.

There appears to have been no error committed by the lower court in rendering judgment in favor of the defendant. Its judgment is affirmed.

All the Justices concur.

WASHINGTON SUPREME COURT.

JOHN E. CARNEY et al., Respts.,
v.

FRANK L. BIGHAM et al., Appts.

(— Wash. —, 99 *Pac.* 21.)

Tax — owner — certificate of delinquency.

1. Notice to the person described in a certificate of tax delinquency is not sufficient to sustain a foreclosure if he is not the person appearing on the tax roll under a statute providing that the owner of the certificate may give notice to the person described in such certificate, where the statute also provides that the name of the person appearing on the treasurer's rolls as the owner for the purpose of this act shall be considered as the owner of the property.

Note. — As to effect of summons or notice to person by wrong initial, see case note to *Illinois C. R. Co. v. Hasenwinkle*, 15 *L.R.A. (N.S.)* 129.

Name — Initials — court proceedings.

2. Since the use of initials instead of a given name before a surname has become a common practice, these initials must be all given and correctly given in court proceedings.

(January 7, 1909.)

APPEAL by defendants from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to recover possession of and quiet title to certain real property. Affirmed.

The facts are stated in the opinion.

Mr. Walter S. Fulton, for appellants:

The variance in the middle initial is not fatal as notice was given to the owner as described in the certificate.

Rowland v. Eskeland, 40 Wash. 257, 82 Pac. 599; McManus v. Morgan, 38 Wash. 534, 80 Pac. 786; Allen v. Peterson, 38 Wash. 599, 80 Pac. 849; Pyatt v. Hegquist, 45 Wash. 504, 88 Pac. 933.

Messrs. Willett & Willett for respondents.

Fullerton, J., delivered the opinion of the court:

The respondents, who were plaintiffs below, brought this action to recover possession and quiet title to certain real property situated in the city of Seattle, of which the appellants had possession and were claiming under a tax deed issued by King county in a tax-foreclosure proceeding. The facts were stipulated by the parties, and were, in substance, these: On and prior to June 3, 1901, the respondents were the owners in fee of the property in question; the title standing of record in the name of the husband, John E. Carney. The land had been listed for taxation on the assessment rolls of King county for the years 1896 to 1901, inclusive, under the name of "J. E. Carney," and the taxes thereon for the several years named were unpaid. On August 2, 1900, the county treasurer of King county issued to the appellant Frank L. Bigham a certificate of delinquency in the sum of \$4.49 for the year 1896, whereupon Bigham paid the taxes for the subsequent years of 1897, 1898, and 1899. The certificate recited the name of the person to whom the property was assessed as "J. G. Carney," instead of "J. E. Carney," as it appeared on the assessment rolls. After purchasing the certificate, the appellant Bigham inquired in the neighborhood of the lots for the J. G. Carney named in the certificate as the owner of the property, but failed to find any such person, although the real owner John E. Carney, then resided, and for ten years or more had resided, within three blocks of the property; he being a well-

known contractor and builder of the city of Seattle, having his name and address in the current city directories both individually and in connection with the contracting firm of which he was a member. June 3, 1901, the appellant Bigham, as plaintiff, began an action to foreclose the certificate of delinquency, making parties defendant J. G. Carney and Jane Doe Carney, his wife. Summons for personal service was issued and placed in the hands of the sheriff of King county, who returned the same not found. Summons was thereupon served by publication, and in due time a judgment of foreclosure was entered and a sale had thereon, under which the tax deed was issued which is sought to be canceled in the action. It is further agreed that the taxes paid by the appellants, together with interest, penalties, and costs, amount to the sum of \$65. On the foregoing facts, the court held the foreclosure invalid and entered a judgment canceling the tax deed and quieting title in the respondents, giving the appellants judgment for the sum of \$65, the amount of taxes paid by them.

It will be observed from the foregoing statement that neither the true owner of property, nor the person whose name appeared on the assessment rolls as the owner of the property, was made a party defendant to the foreclosure proceeding; but that the county treasurer, through inadvertence or otherwise, inserted a fictitious name in the certificate of delinquency which he issued to the appellant Frank L. Bigham, and that the appellant, being misled thereby, foreclosed against this fictitious person. The appellants contend, nevertheless, that the foreclosure proceeding is valid, that it is sufficient by the express terms of the statute to make the person named in the certificate of delinquency the sole party defendant, and that this court has so held. The statute relied upon is § 1 of the act of March 20, 1901. Laws 1901, chap. 178, p. 384. By that act it is provided that, at any time after the expiration of three years from the original date of delinquency of any tax included in a certificate of delinquency, "the holder of any certificate of delinquency may give notice to the owner of the property described in such certificate that he will apply to the superior court of the county in which the property is situated for a judgment foreclosing the lien," etc. It is insisted that the word "described" in the quoted portion of the statute modifies the word "owner," instead of the word "property," and hence the true construction of the statute is that the person named in the certificate of delinquency shall be deemed the true owner for the

purpose of foreclosing the tax lien. The proper interpretation of this clause of the statute might be doubtful if it stood alone, but a subsequent section definitely fixes its meaning. By § 3 of the act above cited it is provided that "the names of the person or persons appearing on the treasurer's rolls as the owner or owners of said property for the purpose of this act shall be considered and treated as the owner or owners of said property. . . ." This section makes it clear that the person to whom the property is assessed is the only person other than the true owner against whom a valid foreclosure proceeding may be had in the courts, and that the insertion by the treasurer of the name of a person different from that appearing on the assessment rolls as the owner does not authorize the holder of the certificate to foreclose the lien by making such person a party defendant unless he be the true owner. On the contrary, the holder must, at his peril, foreclose against the person named on the treasurer's rolls as the owner of the property, or he must foreclose against the true owner.

The case relied on to support the contention of the appellant are *Anderson v. Turati*, 39 Wash. 155, 81 Pac. 557, and *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599. In the first of these cases it was said that the name of the owner described in the tax rolls and certificate of delinquency should be included in the summons, and that it is defective without it. In the second case similar language was used, and the further statement made that the statute only requires notice to be given to the owner described in the certificate. But an examination of the opinions in their entirety will show that the court used these expressions on the supposition that the treasurer had complied with his duty and had inserted in the certificate of delinquency the name of the person to whom the property was assessed on the treasurer's rolls. They were not made with the view of a mistake on the part of the treasurer. Moreover, the real meaning of the court was made clear in the subsequent case of *Sherman v. Schomber*, 43 Wash. 330, 86 Pac. 509, where the statute last above cited was quoted, and this language used: "This provision [§ 3, act March 20, 1901 (Laws 1901, chap. 178, p. 385)] is clear and explicit to the effect that the person appearing as the owner on the treasurer's rolls shall be considered and treated as the owner," for the purposes of foreclosure; saying, further, that the appellants' contention to the effect that the statute quoted applied to foreclosures by the county, and not to foreclosures by an individual, was unfounded, as the provision clearly applied to both classes.

19 L.R.A. (N.S.)

Nor can the foreclosure proceedings be upheld on the theory that the middle initial is no part of a person's name, and hence no part of the name inscribed upon the assessment roll or in the certificate of delinquency. At common law it is true a legal name consisted of one given name and one surname or family name, and mistakes in a middle initial or a middle name were not regarded as of consequence. But since the use of initials, instead of a given name, before a surname, has become a common practice, the necessity that these initials be all given and correctly given in court proceedings has become of importance in every case and in many absolutely essential to a correct designation of the person intended. The present case is a good illustration of the latter class of cases. The respondent, as has been shown, was a well-known person, living close to the property in question, having his name in two places in all of the current city directories, yet neither the purchaser of the tax certificate when inquiring for the owner of the property, nor the sheriff having the process in his hand for service, thought it worth while to inquire of the respondent whether he was the owner of the property or the person intended to be named in the certificate of delinquency. Had the middle initial been correctly given, no such oversight could have been possible.

The judgment appealed from is right, and will stand affirmed.

Mount, Rudkin, and Dunbar, JJ., concur.

WISCONSIN SUPREME COURT.

ALBERT JONES, Appt.,

v.

BROADWAY ROLLER RINK COMPANY,
Respnt.

(— Wis. —, 118 N. W. 170.)

Civil rights — roller skating rink.

1. A roller skating rink which the public is invited to patronize for an admission fee is within the terms of a statute imposing a penalty for exclusion on account of color of any person from the privilege of

Case Note. — What are places of amusement within civil rights acts.

In *People v. King*, 42 Hun. 186, affirmed in 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245, it appears that the jury, under the charge of the court, found that a skating rink to which the general public was admitted on the payment of a fee was a place of amusement within a statute making it a misdemeanor to exclude a citizen by reason of race, color, or previous condition of servitude, from the equal en-

inns, restaurants, saloons, barber shops, eating houses, public conveyances on land or water, or any other place of public accommodation or amusement.

Costs — special provision.

2. A statute providing a penalty of \$5 and costs for excluding a person of color from a place of amusement prevails over a prior general statute governing the matter of costs.

Appeal — intermediate orders — costs — exception.

3. An order determining the provisions of the judgment on the subject of costs necessarily affects the judgment within the meaning of a statute requiring such orders to be included in the judgment roll, and also within the operation of a statute permitting intermediate orders to be reviewed, whether excepted to or not.

(November 10, 1908.)

A PPEAL by plaintiff from a judgment of the Superior Court for Douglas County denying him costs after recovery of the statutory penalty for wrongful exclusion from a roller rink. Reversed.

Statement by Dodge, J.:

Action for damages, alleging that the defendant, a corporation, was conducting a place of public accommodation and amusement, to wit, a roller skating rink, in the city of Superior; that plaintiff paid the price of admission and for skating and entered said rink, but was prohibited by the defendant from skating for the reason that the plaintiff was a colored man; that he was thus unjustly denied equal enjoyment and privilege by illegal discrimination based wholly upon color, to his damage. The answer admits the conduct of the roller skating rink, and denies all other allegations. After trial a jury brought in a verdict for

joyment of "theaters or other places of amusement." The court said that this finding could not be a subject of doubt, irrespective of the verdict.

In *Johnson v. Humphrey Pop Corn Co.* 24 Ohio C. C. 135, it was held that a pleasure resort with a bowling alley maintained and operated as a part thereof was a place of "public accommodation and amusement" within the meaning of a statute providing for "the full and equal enjoyment . . . of inns, restaurants, eating houses, . . . theaters, and all other places of public accommodation and amusement."

In *Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31, it was held that a saloon was not within the meaning of a statute which made the defendant liable in damages to the aggrieved party and also liable to a fine and imprisonment for denying to any person, on account of race, creed, or color, "the full and equal enjoyment of any of the accommodations, advantages, facilities, and privi-

leges of any hotel, inn, tavern, restaurant, eating house, soda water fountain, ice cream parlor, public conveyance on land or water theater, barber shop, or other place of public refreshment, amusement, instruction, accommodation, or entertainment." In *Com. v. Sylvester*, 13 Allen. 247, it was held that an unlicensed billiard room was not within the meaning of a civil rights act limited in terms to public places of amusement "licensed under the laws of this commonwealth."

As to what are places of public accommodation within the meaning of civil rights acts, see case note to *Faulkner v. Solazzi*, 9 L.R.A.(N.S.) 601. It appears in two of the cases cited in that note, and therefore omitted from this, that a saloon and a soda water fountain have been held not to come within the meaning of the phrase "and all other places of public accommodation and amusement."

the plaintiff for \$25. The clerk entered judgment, and taxed plaintiff's costs. Upon motion for review of the clerk's action, the court entered an order that the clerk strike out and disallow all costs to the plaintiff, and that he tax and allow costs to the defendant. Whereupon judgment was entered reciting such original taxation by the clerk, and said order on review thereof, and the off-setting of defendant's costs against plaintiff's damages, and ordering recovery by the defendant of the balance of \$5.56. From this judgment, the plaintiff appeals, but settled no bill of exceptions.

Mr. Archibald McKay, for appellant:

Where costs are given by statute, a party's right thereto is absolute, and the court has no discretion in the matter.

St. Charles v. O'Malley, 18 Ill. 407; *Lutgor v. Walters*, 64 Barb. 417; *Hotaling v. McKenzie*, 7 N. Y. Civ. Proc. Rep. 320; *Furman v. Cunningham*, 34 Hun. 606.

Mr. W. P. Crawford, for respondent:

Defendant's roller rink was not a place of public accommodation and amusement within the meaning of the statute, and plaintiff cannot recover costs within the statute.

Cecil v. Green, 161 Ill. 265, 32 L.R.A. 566, 43 N. E. 1105; *Kellar v. Koerber*, 61 Ohio St. 388, 55 N. E. 1002; *Faulkner v. Solazzi*, 79 Conn. 541, 9 L.R.A.(N.S.) 601, 65 Atl. 947, 9 A. & E. Ann. Cas. 67.

Dodge, J., delivered the opinion of the court:

We cannot doubt that the action attempted to be stated in the complaint and met by the answer was the action expressly authorized by § 4398c, Stat. 1898: "Any person who shall deny to any other person, in whole or in part, the full and equal enjoyment of the accommodations, advantages,

leges of any hotel, inn, tavern, restaurant, eating house, soda water fountain, ice cream parlor, public conveyance on land or water theater, barber shop, or other place of public refreshment, amusement, instruction, accommodation, or entertainment."

In *Com. v. Sylvester*, 13 Allen. 247, it was held that an unlicensed billiard room was not within the meaning of a civil rights act limited in terms to public places of amusement "licensed under the laws of this commonwealth."

facilities, and privileges of inns, restaurants, saloons, barber shops, eating houses, public conveyances on land or water, or any other place of public accommodation or amusement, except for reasons applicable alike to all persons of every race or color, or who shall aid or incite such denial, or require any person to pay a larger sum than the regular rate charged other persons for such accommodations . . . shall be liable to the person aggrieved thereby in damages not less than \$5 with costs," etc. The complainant alleges that the defendant's skating rink was a place of public accommodation or amusement, and that the exclusion was on the ground of plaintiff's color, neither of which allegations is of any materiality or significance to an action either of tort or contract independent of such statute. We think, also, that nothing in the record shows that the roller skating rink maintained by the defendant was not a place of accommodation or amusement within the terms of the statute. It is alleged to have been such place, and presumably the evidence went as far as possible in support of such allegation. A public roller skating rink is undoubtedly a public place of amusement. This, however, probably would not suffice to bring it within the statute if it were entirely different in character from the places of accommodation or amusement specifically named therein, for, by reason of the context, the rule *noscitur a sociis* applies, and the other places of accommodation and amusement intended by the statute are only such as bear some resemblance to those specifically named. Our statute is quite exhaustive in its specifications, much more so than the statutes of some of the other states. Thus it includes in the specifications both saloons and barber shops, which have been held in other states not to be included in a statute omitting to specifically name them, but containing the words "other places of accommodation and amusement." *Faulkner v. Sollazzi*, 79 Conn. 541, 9 L.R.A.(N.S.) 601, 65 Atl. 947, 9 A. & E. Ann. Cas. 67; *Kellar v. Koerber*, 61 Ohio St. 388, 55 N. E. 1002. By their specification in the Wisconsin statute the genus or class to which resemblance must be found is, of course, enlarged. Appellant's counsel has given us no aid whatever by citation of authorities or reference to the construction of similar statutes in other states. We find ourselves unable, however, to conceive any class of places of public accommodation or amusement which would not include a roller skating rink to which the public were generally invited upon no condition but the payment of a fixed charge,—public in as broad a sense as is the common carrier or the innkeeper, the

exclusion from which of an individual or a class must infer discrimination and denial of privileges which all other persons enjoy by virtue merely of their membership in the public or general community. Public accommodation and amusement is the test prescribed by our statute. The amusement offered by the usual skating rink is to the public as such and generally. It differs radically from the tender of accommodation offered by the ordinary merchant or professional man, who, while he impliedly, by opening the door of his shop or office, invites everyone to enter, does so only for the purpose of selling to each individually either service or merchandise. This distinction has been often noted. We append a few illustrated cases: *Public eating house*, *Humburd v. Crawford*, 128 Iowa, 743, 105 N. W. 330; *boot-blackening stand*, *Burks v. Boso*, 81 App. Div. 530, 81 N. Y. Supp. 384, Id. 180 N. Y. 341, 105 Am. St. Rep. 762, 73 N. E. 58; *theater*, *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102; *bowling alley*, *Johnson v. Humphrey* Pop Corn Co. 24 Ohio C. C. 135; *billiard room*, *Com. v. Sylvestor*, 13 Allen, 247; *skating rink*, *People v. King*, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245. From reason and authority, we are convinced that a roller rink may fall within § 4398c, Stat. 1898, and therefore that the complaint attempts to state a cause of action based upon that statute.

This being, then, an action specially authorized by § 4398c, enacted in 1895, and the minimum amount of the recovery being therein prescribed, we can see no escape from the conclusion that that section must control upon the subject of costs specifically treated therein, over the general statute (§ 2918, Stat. 1898), enacted long previous, wherever the two conflict. There is nothing to obstruct the presumption of an intention to legislate according to the words used in 1895 when the legislature provided that plaintiff's recovery, though as low as \$5, should entitle him to costs. Where statutes conflict in terms, ordinarily the later prevails over the earlier and the specific over the general. *Blabon v. Gilchrist*, 67 Wis. 45, 29 N. W. 220; *State ex rel. Donnelly v. Hobe*, 106 Wis. 411, 423, 82 N. W. 336; *Cotzhausen v. H. W. Johns. Mfg. Co.* 107 Wis. 59, 82 N. W. 716; *Gymnastic Asso. v. Milwaukee*, 129 Wis. 429, 100 N. W. 109.

But respondent urges that we cannot review the order awarding costs, for the reason that no exception thereto appears upon the record, and the judgment roll or record is not enlarged by bill of exceptions. An order determining the provisions of the judgment on the subject of costs is an order prior to

judgment, and it is, within the terms of § 3070, Stat. 1898, an order "which involves the merits and necessarily affects the judgment," and which therefore is a part of the record and must be included in the judgment roll by virtue of § 2898, Stat. 1898. *Hoey v. Pierron*, 67 Wis. 267, 30 N. W. 692; *Morris v. National Protective Soc.* 106 Wis. 92, 81 N. W. 1036; *Hildebrand v. American Fine Art Co.* 109 Wis. 171, 53 L.R.A. 826, 85 N. W. 268. It therefore is an intermediate order, which may be reviewed on appeal "whether the same were excepted to or not" by virtue of § 3070. It is true that general language was used indicating the necessity of exception, and perhaps of bill of exceptions, in *Cord v. Southwell*, 15 Wis. 211, and *Perkins v. Davis*, 16 Wis. 470. But it was after the decision in those cases that § 3070 in its present form was enacted, containing as new matter with reference to the review on appeal of such orders the words: "Whether the same were excepted to or not; nor shall it be necessary in any case to take any exception or settle any bill of exceptions to enable the supreme court to review any alleged error which would, without a bill of exceptions, appear upon the face of the record." It was a mistake, therefore, to assume that the rule of those early cases still persists, as this court apparently did in *Fowler v. Metzger Seed & Oil Co.* 131 Wis. 633, 111 N. W. 677. The broad language in the last case: "But an order allowing or disallowing costs is not reviewable by this court, unless the evidence upon which it is based and the exceptions thereto are preserved in a bill of exceptions (*Cord v. Southwell* and *Perkins v. Davis*, *supra*)" according to its words is incorrect. Such an order is part of the record, and may be reviewed to the extent that any error thereby committed appears of record. That language, however, read in its application to the situation then before the court, was entirely correct. That situation was a review of the taxation of certain items by the clerk, depending for its correctness upon proceedings and evidence had before the clerk and before the court, which could have no place in the record except by means of a bill of exceptions. As to such action, it has uniformly been held that the errors do not appear upon the record without a bill of exceptions, and therefore cannot be reviewed. *State v. Wertzel*, 84 Wis. 347, 54 N. W. 579; *Lauterbach v. Netzo*, 111 Wis. 322, 87 N. W. 230; *Dunbar v. Montreal River Lumber Co.* 127 Wis. 131, 106 N. W. 389.

Judgment reversed, and cause remanded, with directions to enter judgment in favor of plaintiff for \$25 damages and \$27.27 costs as of August 22, 1907.
19 L.R.A. (N.S.)

ALABAMA SUPREME COURT.

WINDHAM et al., Appts.,
v.
STEPHENSON et al.

(— Ala. —, 47 So. 280.)

Lien — purchase — conversion.

1. The mere purchase of a crop upon which another has a lien is not of itself destructive of the lien so as to give the lienor a right of action against the purchaser for the wrongful conversion of the property.

Mortgage — crops — change of premises.

2. A mortgage by a renter of crops to be grown during the year, and also of crops to be raised "each successive year," until the debt is paid, will not attach to crops grown in a subsequent year on land rented by him from a different landlord, in which he had no interest when the mortgage was executed.

(June 30, 1908.)

Case Note. — *Validity of chattel mortgage on crops to be grown on land in which mortgagor has no present interest.*

There is much authority upon the question of the validity of mortgages upon property to be thereafter acquired and of mortgages upon property not yet in existence (5 Am. & Eng. Enc. Law, 2d ed. p. 979); but the cases are few which treat of the question of the validity of a mortgage upon crops where the property is not in existence, and the source of potential existence is in no manner connected with the mortgagor at the time of the giving of the mortgage.

A few cases follow the doctrine of *WINDHAM v. STEPHENSON*, and hold that a chattel mortgage on crops to be raised on lands in which the mortgagor has no present interest is invalid.

Thus, in *Weil v. Flowers*, 109 N. C. 212, 13 S. E. 761, the chattel mortgage or agricultural lien described the crop as "all my entire crop now growing or to be grown the present year on my land or on any other land." The court held that the words "or on any other land" were too indefinite, because they pointed out no particular lands. The court said: "The lands of the maker of the lien at the time he executed it could be seen and known,—those that he might cultivate could not." And to the same general effect were the decisions in *Woodlief v. Harris*, 95 N. C. 211; *Gwathney v. Etheridge*, 99 N. C. 571, 6 S. E. 411; *Crinkley v. Eger-ton*, 113 N. C. 142, 18 S. E. 341.

And in *Paden v. Bellenger*, 87 Ala. 575, 6 So. 351, where a mortgage in terms conveyed the entire crop of the mortgagor to be raised in a certain year on his "own land or on any other land," the court, in holding the mortgage void for uncertainty, said:

APPEAL by plaintiffs from a judgment of the Circuit Court for Lawrence County in defendants' favor in an action brought to recover damages for the alleged conversion of certain crops upon which plaintiffs claimed a lien. Affirmed.

The facts are stated in the opinion.

Messrs. D. C. Amon and J. M. Irwin for appellants.

Mr. G. O. Chenault, for appellees:

The corn and cotton were not owned by the mortgagor when the mortgage was issued, and no lien can attach thereto.

Burns v. Campbell, 71 Ala. 288; *Christian & C. Grocery Co. v. Michael*, 121 Ala. 87, 77 Am. St. Rep. 30, 25 So. 571; *Karter v. Fields*, 140 Ala. 364, 37 So. 204.

Haralson, J., delivered the opinion of the court:

The plaintiffs, Windham & Company, sued the defendants, Stephenson & Alexander, in an action on the case, to recover

\$100 damages for an alleged wrongful removal and disposition of 2 bales of cotton and 50 bushels of corn, upon which plaintiffs claimed to have a lien by virtue of a mortgage executed on the 18th of February, 1903, by Charles Daugherty to Tollie Hodges, and which was by the latter, for value received, transferred, on the 19th of February, 1903, to the plaintiffs. The mortgage was, to repeat its language, on "the entire crop of cotton and corn, fodder, grain, or other articles of any kind, raised or to be raised by me and family during the year 1903, also the crops raised each successive year until the debt hereby secured is paid in full."

The undisputed evidence shows that Charles Daugherty was farming in 1903, on land rented by him from said Hodges; and on February 18th of that year he executed to said Hodges a note for \$100, payable on the 15th of October following; and to secure said note, he, at the same time, executed a mort-

"According to the unbroken current of our decisions, as well as by the weight of authority in other states it is essential to the creation of such an encumbrance that its subject-matter should have a potential existence, as distinguishable from a mere possibility, or expectancy on the part of the contracting parties, that it will come into being. While the thing itself need not have identity or separate entity, yet it must at least be the product, or growth, or increase of property which has, at the time, a corporal existence, and in which the mortgagor has a present interest, not a mere belief, hope, or expectation that he will in future acquire such an interest." And to the same effect are several other Alabama cases sufficiently set out in the opinion.

In *Reeves v. Sheets*, 16 Okla. 342, 82 Pac. 847, it was held that while a mortgage upon crops to be grown in the future might be valid, a mortgagor cannot create a lien upon property which he does not own at the time and in which he afterwards acquires no interest.

Some cases hold that while such a mortgage is void at law, the parties contemplated that the mortgagor would acquire the land and would produce the crop, and therefore the instrument created an equitable lien which would attach to the crop when it came into existence.

Thus, in *Booker v. Jones*, 55 Ala. 266, where a mortgage was executed upon crops to be grown upon premises not yet leased, the court said: "If no other relation existed between the parties than that of mortgagor and mortgagee, we incline to the opinion that if, at law, the mortgage would be invalid, as a conveyance of things not in existence, unless ratified by some act done by the mortgagor after their acquisition, in equity it would attach to the crop as it came into existence, transferring the beneficial interest against the mortgagor and all 19 L.R.A. (N.S.)

others than a bona fide purchaser without notice." And to the same effect was the decision in *Hurst v. Bell*, 72 Ala. 336.

And in *Richardson v. Washington*, 88 Tex. 339, 31 S. W. 614, it was held that an interest in the land upon which the crop was to be raised was unimportant to the validity of the mortgage, and it was enough that the particular land and the crop of a particular year were described; the agreement attached to the crop and became a lien upon it which equity would enforce. This decision was distinguished in *McDavid v. Phillips* (Tex. Civ. App.) 94 S. W. 1129 (affirmed in 100 Tex. 73, 94 S. W. 1131), the court holding that the rule there laid down was not applicable to an instrument purporting to give a lien upon "crops to be raised by the mortgagor for future years until the mortgage is discharged." The court said: "The description in the mortgage, if valid, is broad enough to include in its general terms all the crops which the mortgagor might thereafter grow in any year upon any land on the face of the earth."

Other cases, adopting the rule in equity, have held such mortgages valid even at law.

Thus, in *Hogan v. Atlantic Elevator Co.* 66 Minn. 344, 69 N. W. 1, it was held that a chattel mortgage upon a crop to be raised on land to be acquired thereafter was valid, the court relying upon the case of *Ludlum v. Rothschild*, 41 Minn. 218, 43 N. W. 137, in which the court went entirely beyond the doctrine of potential existence, and adopted the rule in equity holding that, where parties by their contract in clear terms express an intention to create a mortgage lien upon personal property not then owned, but to be subsequently acquired, by the mortgagor, whether then in being or not, the mortgage attaches as a lien upon the property as soon as the mortgagor acquires it.

And in *Iverson v. Soo Elevator Co.* (S.

gage on his crop of that year, which note and mortgage, as stated, were for value transferred the day after their execution, to the plaintiffs, and it is under this mortgage they claim to be entitled to prosecute this suit.

As stated, said mortgage, besides conveying his crop of that year, contained the clause—"Also the crops raised each successive year, until the debt hereby secured is paid in full." It is under the latter clause that the plaintiffs claim a lien upon the cotton and corn in controversy.

This clause, *prima facie* and presumptively, upon its face, in connection with the other facts of said mortgage conveying the crops of that year, would refer to the crop in after years grown on the same premises that the crop of 1903 was raised upon.

At the date of the execution of said mortgage Daugherty owned no land of his own, and was renting land upon which he was then cropping from said Hodges.

The cotton and corn to which the suit relates were raised by Daugherty in the year 1906,—three years after the crop which he was raising, in 1903, on land rented from Hodges,—and on land rented in 1906 from one W. C. Wallace. At the time of the execution of said mortgage,—February 18, 1903,—as appears and as stated, Daugherty not only owned no lands of his own, and had no others rented, but had no interest in the lands, by lease or otherwise, on which he farmed in 1906, which lands he afterwards rented from said Wallace, and on which the cotton and corn in controversy were raised. The defendant bought from said Daugherty, as is shown without conflict in evidence, the said 2 bales of cotton and 50 bushels of corn, part of the crop raised

by him in 1906, on the Wallace lands, shown to be worth \$100.

It may be stated in passing, that plaintiffs aver, "which said cotton and corn defendants sold and removed, or caused to be removed, beyond plaintiffs' reach, or caused the same to be so mixed with other corn and cotton as to be indistinguishable therefrom, by reason of which said unlawful acts of the defendants, plaintiff is prevented from enforcing his said lien thereon under his said mortgage."

Waiving, for the present, consideration of the question as to whether plaintiffs had a lien on said crops, it would seem that they were bound to make the truth of this averment in their complaint reasonably to appear. There is, however, an absence of any evidence in support of this averment; and from aught appearing, defendants had said cotton and corn, separate from any other, in the same condition as when they bought it, at the time this suit was brought and at the time of the trial of this case. No reason is shown for making it appear that plaintiffs' lien, if they had one, had been destroyed and could not be enforced. No facts or circumstances are proven, further than that they bought said property from Daugherty, which tend to show that defendants have done any acts with reference to the property in question; and the mere fact of their purchase, without more, was not wrongful as destructive of plaintiffs' alleged lien.

As to said alleged lien, in order to establish it, it is held that "while the thing itself need not have identity, or separate entity, yet it must, at least, be the product, or growth, or increase of property, which has at the time a corporal existence, and in

D.) 119 N. W. 1006, it was held that, under a statute which provided for the validity of mortgages upon property not yet acquired by the mortgagor, a mortgage given by a tenant upon crops to be raised by him upon land not yet leased would be valid if the mortgagor thereafter leased the land and raised the crop. While this decision is made to turn upon the statute, nevertheless, the language of the court indicates that it was more or less influenced by the fact that such mortgages have been upheld in equity.

In the following Alabama cases, the mortgages were upheld as being sufficiently definite; the language used in the instruments, however, clearly distinguishes these cases from the Alabama cases cited above.

Thus, in *Keith v. Ham*, 89 Ala. 590, 7 So. 234, the court said: "A valid contract for the rental of a given quantity of land out of a larger tract, or for the rental of one or another of several tracts, the particular tract or place to be thereafter selected

by the tenant, or determined upon in any practical way, would carry such a present interest in the land, afterwards segregated and subjected to the contract, as would give vitality and validity, in equity, to a mortgage of the crops to be planted and grown thereon."

And in *Cobb v. Daniel*, 105 Ala. 335, 16 So. 882, it was held that a mortgage which conveyed the "entire crop grown by me the present year, or which I may aid in or cause to be grown, on my lands, or any other lands that I may cultivate, or aid in or cause to be cultivated," was sufficient to give the mortgagee a lien upon crops grown on lands which the mortgagor had previously rented.

Upon validity of chattel mortgages upon after-acquired property, see case note to *Burrill v. Whitcomb*, 1 L.R.A. (N.S.) 451.

Upon the general question of sale or mortgage of future crops, see note to *Dickey v. Waldo*, 23 L.R.A. 449.

which the mortgagor has a present interest, not a mere belief, hope, or expectation that he will in the future acquire such an interest." *Paden v. Bellenger*, 87 Ala. 576, 6 So. 351; *Alabama State Bank v. Barnes*, 82 Ala. 619, 2 So. 349; *Varnum v. State*, 78 Ala. 30; *Burns v. Campbell*, 71 Ala. 278; *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522; *Grant v. Steiner*, 65 Ala. 499.

"If a tenant should mortgage such crops as might be raised or grown by him on some indefinite place which he expected to rent, the conveyance would, we apprehend, be inoperative and void, as an attempted conveyance of a mere possibility or expectancy, not coupled with any interest in, or growing out of, property." *Burns v. Campbell*, 71 Ala. 288.

"A mortgage of subsequently-acquired property, especially by general terms of description, which is not the product, increase, or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give a further mortgage. It confers no specific lien on such after-acquired property." *Christian & C. Grocery Co. v. Michael*, 121 Ala. 87, 77 Am. St. Rep. 30, 25 So. 573.

In *Karter v. Fields*, 140 Ala. 364, 37 So. 207, in reference to the facts in that case, similar to the ones here, it was held: "Whether the mortgage of 1890 from Persall to Fields vested the latter with a lien on crops grown in 1893 depended upon whether Persall was the owner of the land on which the crops were grown in 1893, when he executed the mortgage in 1890."

Applying these principles to the case in hand, it would seem that, to create a lien on crops to be grown, the mortgagor must have owned or had some interest in the lands on which the crops were grown; and if Daugherty, in February, 1903, had no interest in the lands upon which the crops of 1906 were grown, at the time he executed the plaintiffs' mortgage,—and it is not pretended he had any such interest,—these plaintiffs had no lien on the crops grown in 1906, and would have no grievance against defendants, no matter what they did with the crops purchased by them from Daugherty. As to these crops, as was said in *Burns v. Campbell*, supra, the mortgage was "inoperative and void, as an attempted conveyance of a mere possibility or expectancy, not coupled with any interest in, or growing out of, property."

We find no error in the charge given for the defendants, nor in refusing the one requested by plaintiffs, which are the only errors assigned.

Affirmed.

Tyson, Ch. J., and Dowdell and Simpson, J.J., concur.
19 L.R.A. (N.S.)

ARKANSAS SUPREME COURT.

STATE OF ARKANSAS, Appt.,
v.

J. F. SANDERS.

(86 Ark. 353, 111 S. W. 454.)

Gambling — pool game — payment by loser.

1. A pool game in which a certain price per cue is charged for the use of the table, all of which is to be paid by the loser of the game, is within the statutes against gambling.

Gambling device — pool table.

2. A pool table for the use of which the loser of the game is, to the knowledge of the keeper, to pay, is a gambling device within the meaning of statutes providing punishment for one who exhibits such devices.

(June 1, 1908.)

Case Note. — Effect of understanding that the loser is to pay for game to bring it within statutes against gambling.

The numerical weight of authority supports the conclusion reached in the above case that it is sufficient to bring a game within the statutes against gambling that the price therefor be paid by the loser. Accordingly, in the following cases, it was held that evidence that the loser of a game of billiards paid for the use of the table was sufficient to show the proprietor of the place guilty of keeping a gaming house: *Crawford v. State*, 33 Ind. 304; *Hamilton v. State*, 75 Ind. 586; *State v. Book*, 41 Iowa, 550, 20 Am. Rep. 609; *State v. Miller*, 53 Iowa, 154, 4 N. W. 900; *State v. Leighton*, 23 N. H. 167; *Ward v. State*, 17 Ohio St. 32.

So, in the following cases, it was held sufficient to convict one of gaming if it was shown that he and others played a game of pool, billiards, or ten pins, with the understanding that the loser should pay for the game: *Hopkins v. State*, 122 Ga. 583, 69 L.R.A. 117, 50 S. E. 351, 2 A. & E. Ann. Cas. 617; *Mount v. State*, 7 Ind. 654; *Alexander v. State*, 99 Ind. 450; *Middaugh v. State*, 103 Ind. 78, 2 N. E. 292.

So, in *State v. Records*, 4 Harr. (Del.) 554, the defendant was held to be guilty of suffering a game of chance on which money was wagered to be played in his house, where it was shown that the compensation for the use of his bowling alley was made to depend upon the result of the game.

And in *Blanton v. State*, 5 Blackf. 560, it was held that the defendant was properly convicted of keeping a billiard table for the purpose of winning or gaining money or other property of value, where it appeared that he was a keeper of a billiard table which was rented to persons for a stipulated compensation per game, though he did not play on it himself for money nor allow others to do so.

So, in Texas one may be convicted of the offense of keeping a gaming table within the

APPEAL by the state from a judgment of the Circuit Court for Sebastian County acquitting defendant of exhibiting a gambling device. Reversed.

Statement by Hill, Ch. J..

Sanders was indicted by the grand jury of the Ft. Smith district of Sebastian county for exhibiting a gambling device, contrary to § 1732 of Kirby's Digest. He was tried before the court without a jury, upon the following agreed statement of facts: "Kelley pool is a game played on an ordinary pool table, with 15 pool balls, numbered from 1 to 15, inclusively, the players using ordinary pool or billiard cues, for driving the balls into pockets with a cue ball which is not numbered. Before the game is started, each player is given a small ball on which is a number, all such balls supposed to be numbered from 1 to 15, inclusively, just the same as the pool balls. The object of the game is for the player to pocket the ball on the table which corresponds in number with the small ball which he holds in secret, until he pockets his ball. If he pockets such ball, he wins the game. If some other player pockets the ball with this number, he is 'dead' and cannot win, and the only consolation which remains to him is to remain in the game with the prospect of killing some other person. Defendant has a license from the city of Ft. Smith to run or operate a pool room in the city limits, and does run and operate pool tables as set forth above, and that Kelley pool is played on said tables at times, and that other pool is played and the loser pays for the cues." The court found the defendant not guilty. The state moved for a new trial, and, upon its denial, brought the case here.

Messrs. William F. Kirby, Attorney

General, A. A. McDonald, William H. Rector, and Dan Taylor for the State.

Hill, Ch. J., delivered the opinion of the court:

The question to be determined is whether, under the facts, the game of Kelley pool is a game at which money or property may be won or lost; and, if so, if the table kept for it to be played on is a "gambling device" within the meaning of § 1732 of Kirby's Digest.

1. Similar games and similar statutes have been before the courts, and what has been said by them is pertinent here. In the case of *State v. Book*, 41 Iowa, 550, 20 Am. Rep. 609, it was said: "The defendant kept certain tables on which divers persons were in the habit of playing at what is called the game of 'pin pool.' That this play is a 'game' there is no dispute, and there is no controversy about the fact that, for the use of the tables and other instruments of the game, the defendant charged and required the players to pay a certain sum of money for each cue (whatever that is). When, therefore, two or more persons played this game, they became jointly or severally bound to pay the sum or sums of money chargeable therefor. It is plain that, if they play the game or games in order to determine which of the players shall pay the entire sum or sums which they would be jointly or severally bound to pay, they play for the sum each one would be bound to pay, and it does not change the matter that they play the game in advance of paying therefor. The principle is the same as if the money had been staked or put up before the game was played. It is gambling in the one case as well as in the other. Nor is it any less gambling that the

meaning of the statutes of that state if it appear that he permitted others to play thereon and to bet the table fees. *State v. Howery*, 41 Tex. 506; *Vanwey v. State*, 41 Tex. 639; *Tuttle v. State*, 1 Tex. App. 364; *Stone v. State*, 3 Tex. App. 675; *Hall v. State* (Tex. Crim. App.) 34 S. W. 122; *Mayo v. State* (Tex. Crim. App.) 82 S. W. 515. And the result would be the same though he had paid the occupation tax on his table (*Reeves v. State*, 12 Tex. App. 199); but not if he did not know, or, by the use of reasonable diligence, might not have known, that the table was used by the players for gaming purposes (*Wells v. State*, 22 Tex. App. 18, 2 S. W. 609; *Smith v. State*, 28 Tex. App. 102, 12 S. W. 412; *Berry v. State*, 49 Tex. Crim. Rep. 376, 92 S. W. 1081).

This principle finds further support in *Murphy v. Rogers*, 151 Mass. 118, 24 N. E. 35, in which a note given in part for the price of the use of a billiard table was held 19 L.R.A. (N.S.)

to be void because given in part for money won by gaming.

On the other hand, the opposite conclusion was reached in the following cases, holding that the mere fact that the loser of a game paid the charges therefor does not show gaming within the meaning of the statutes against gaming: *Harbaugh v. People*, 40 Ill. 294; *Wakefield v. Com.* 7 Ky. L. Rep. 295; *State v. Quaid*, 43 La. Ann. 1076, 26 Am. St. Rep. 207, 10 So. 183; *Blewett v. State*, 34 Miss. 606; *State v. Hall*, 32 N. J. L. 158; *State, Breninger, Prosecutor, v. Belvidere*, 44 N. J. L. 350; *People v. Sergeant*, 8 Cow. 139, *People ex rel. Healey v. Forbes*, 52 Hun. 30, 4 N. Y. Supp. 757; *Steuer v. Royal Cigar Co.* 17 Ohio C. C. 82.

In *State v. Bishel*, 39 Iowa, 42; *Carr v. State*, 50 Ind. 178; *People v. Harrison*, 28 How. Pr. 247, sometimes cited upon this question, the court expressly refrained from giving any opinion.

sum of money played for is small. To 'play at any game for any sum of money,' however small, comes within the statute." This was followed by *State v. Miller*, 53 Iowa, 154, 4 N. W. 900. In *State v. Leighton*, 23 N. H. 167, the court said: "The defendants in this case made a profit from the use of the billiard tables. For the 'hire' of them they were paid a shilling a game. The persons who resorted there played for the hire. In substance, they played for a shilling a game. The loser paid and the winner received the sum. By an understanding among the players the money won was to be applied towards defraying the expenses of the tables, but still it was money won at play, and upon the chance of the play." "Where a party keeps a billiard table, and permits persons to play upon it for 20 cents a game, to be paid by the loser of the game, he is guilty of keeping such table for gain within the meaning of § 8 of the act of March 12, 1831 [29 Ohio Laws, p. 443], 'for the prevention of gaming' . . . although such keeper of the table does not permit the players, as between themselves, to bet, and neither they nor other persons do bet on the issue of the game or games in any other manner than that the loser of the game should pay the 20 cents for the use of the table." *Ward v. State*, 17 Ohio St. 32. These cases were followed in *Hamilton v. State*, 75 Ind. 586; and the Missouri court reached the same conclusion in *State v. Jackson*, 39 Mo. 420. This is the general rule. See 20 Cyc. Law & Proc. p. 889, and cases cited in note 1. There are some decisions to the contrary: *People ex rel. Healey v. Forbes*, 52 Hun, 30, 4 N. Y. Supp. 757; *People v. Sergeant*, 8 Cow. 139. The great weight of authority and the sounder reasoning, however, declare such games to be within the gambling statutes.

2. Therefore only the inquiry remains whether the keeping of this pool table was the keeping of a gambling device within the meaning of § 1732 of Kirby's Digest. This exact question was raised in Texas, and the court held that the keeping of such a table would not be keeping a gambling device unless the keeper of the table had knowledge, or might, by reasonable diligence, have known, that the table was used by the players for gaming purposes. *Smith v. State*, 28 Tex. App. 102, 12 S. W. 412. It is apparent from the statement of facts here that it was a part of the game, understood by the proprietor as well as the players, that the loser was to pay the tolls of the participants of the game. This made it a gambling game, and implicated all parties concerned. A gambling device is an instrumentality for the playing of a game

upon which money may be lost or won; and the instrumentality is not necessarily intended solely for gambling purposes. 14 Am. & Eng. Enc. Law, pp. 684, 685; 20 Cyc. Law & Proc. pp. 882-884. Certain gambling devices cannot be used for any other purpose, and, when designed for that purpose alone, they may be destroyed under the "burning statutes." *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S. W. 257. But there may be gambling devices that are no less such, although not always so used, but which, from their nature, may be used for other purposes. *State v. Lewis*, 12 Wis. 435. Under a kindred statute the Alabama court said: "The statute is aimed at the use to which the table is appropriated. Any table used for gaming, without regard to its appliances or adaptation to any particular game, is included in the statute; and, if the defendant had the possession or custody of the table, authority over its use, and supervised the gaming, he was the keeper, or interested or concerned in keeping it." *Bibb v. State*, 84 Ala. 13, 4 So. 275. The pool table in question was adapted for games that were not within the statute, or for games within the statute depending upon the use to which it was put. In this case it was put to a use contrary to the statute, and, being exhibited for that purpose and maintained for his profit by the defendant, he is within the statute.

Judgment reversed, and cause remanded.

KANSAS SUPREME COURT.

R. F. FLEMING

v.

FRED THORP, Plff. in Err.

(— Kan. —, 96 Pac. 470.)

Chattel mortgages — construction — taking possession.

1. Under a clause in a chattel mortgage providing that the mortgagee may take possession of the property if he deem himself

Headnotes by BENSON, J.

Case Note. — Effect of "danger," "safety," or "insecurity" clause in chattel mortgage.

As shown by the cases cited in the note appended to *Robison v. Gray*, 23 L.R.A. 780, to which this note is supplemental, the courts are not in harmony as to the effect of a power conferred upon a mortgagee to take possession of mortgaged chattels when he deems his security impaired or in danger of being impaired; some cases holding it to be an absolute right, to be exercised at pleasure; but the weight of authority requires that such right shall be exercised in

insecure, it is immaterial whether the mortgagee has good cause to believe that he is insecure, if he in fact deems himself to be so.

Appeal — errors warranting review.

2. Erroneous rulings, if not prejudicial to the rights of a party, may be disregarded; but were the findings are contrary to the evidence, and such errors may have misled the jury, they are material.

(June 6, 1908.)

ERROR to the District Court for Reno County to review a judgment for plaintiff in an action to recover for the conversion of certain grain. Reversed.

Statement by Benson, J.:

R. F. Fleming cultivated wheat on lands rented from Dailey upon an agreement to deliver to the owner one third of the wheat when harvested and threshed, for the use of the land. Late in the fall of 1904, after the wheat was sown, he removed from the farm, leaving it vacant, to a place 12 miles distant. In December of the same year he gave his promissory note to the Citizens' State Bank for \$213, secured by a mortgage

on his share of the growing wheat, to be paid August 7, 1905. Fred Thorp was the cashier of that bank, and the land upon which the wheat was growing was conveyed to him by Fleming's lessor in November, 1904. On June 27, 1905, the wheat was ripe, and Thorp caused it to be cut and stacked, threshed a part of it and marketed two loads, about 114 bushels. Threshing was then suspended because of rain. Two weeks later, Fleming, after paying the note at the bank, demanded of Thorp two thirds of the money for the wheat so marketed, and was informed that the amount received was not sufficient to pay the expenses incurred in harvesting. He then told Thorp "to let the rest of the wheat alone," and Thorp promised to do so. No further demand was made for the wheat or its proceeds, and neither party did anything with the remainder of the wheat until the last of the threshing season. Then, when most of the machines had been "pulled in," Mr. Thorp caused it to be threshed, and placed in a bin with that remaining from the first threshing. Fleming then commenced this action for conversion of his two thirds of the wheat. In his answer the defendant pleaded

good faith, based upon such reasonable apprehension of danger as would cause a reasonable man to act. The same conflict is noticeable in the later cases.

Thus, the mortgagee's right to take possession under a clause authorizing him to do so whenever he shall "deem it necessary for his more complete security" does not depend upon the fact whether or not he has reasonable grounds to believe himself insecure. *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045.

But, on the other hand, it has been held that the discretion vested in a mortgagee of chattels by an "insecurity" or "danger" clause is not an arbitrary power, but one which must be exercised in good faith, with sufficient reason for so doing. *Hogan v. Akin*, 181 Ill. 448, 55 N. E. 137, reversing 81 Ill. App. 62; *Nash v. Larson*, 80 Minn. 458, 81 Am. St. Rep. 272, 83 N. W. 451; *Feller v. McKillip*, 109 Mo. App. 61, 81 S. W. 641; *Brown v. Hogan*, 49 Neb. 746, 60 N. W. 100; *Allen v. Cerny*, 68 Neb. 211, 94 N. W. 151; *Meyer v. Michaela*, 95 Neb. 138, 95 N. W. 63, 97 N. W. 817; *Hawver v. Bell*, 46 N. Y. S. R. 447, 19 N. Y. Supp. 612, affirmed in 141 N. Y. 140, 36 N. E. 6.

The right of a mortgagee to take possession of chattels at any time he shall "deem himself insecure" depends upon some act of the mortgagor done or threatened, tending to impair the value of his security. *Brown v. Hogan*, supra.

So, authority to take possession of encumbered chattels if he feels insecure, "with or without apparent cause," may not be arbitrarily exercised by a mortgagee, but must be based upon probable cause or reasonable 19 L.R.A. (N.S.)

grounds for apprehension. *Tanton v. Boomgaarden*, 111 Ill. App. 37.

And the doctrine just stated was applied in *First Nat. Bank v. Teat*, 4 Okla. 454, 46 Pac. 474, to authority to take possession of mortgaged chattels at any time the mortgagee "deems himself insecure," without assigning any reason therefor.

And *First Nat. Bank v. Teat*, supra, was followed and applied in *Brook v. Bayless*, 6 Okla. 568, 52 Pac. 738, where a mortgagee was empowered, if at any time he considered the debt secured unsafe, or, from any cause, in his opinion, the security should become inadequate, to take possession of encumbered chattels.

But it was said in *Sills v. Hawes*, 14 Colo. App. 157, 59 Pac. 422, that the court would not go to the extent of saying that the mortgagee of chattels should be required to show there was actual danger of his security being impaired, but must show there was apparent danger, or that he had good reason to believe there were such grounds as a reasonable man might in good faith act upon.

So the reasonable grounds that will justify the exercise of such power need not consist of actual danger to the security. *Hogan v. Akin*, supra.

As it is incumbent upon the mortgagee, in order to justify taking possession under an insecurity clause, to show some ground for claiming he deemed himself insecure, when there is any evidence upon the subject, it is for the jury to determine whether he did in reality feel insecure, or whether it was a mere pretense, for the purpose of enforcing payment before maturity of the debt. *Hawver v. Bell* and *Nash v. Larson*, supra; *Op-*

his right to one third as the owner of the land, alleged that the wheat was ripe and falling down, that the plaintiff neglected to cut and care for it, and that to preserve his interest as such owner, and to collect the amount due the bank under the lien of the mortgage, he had rightfully harvested the wheat. A copy of the mortgage was attached to the answer. After the suit was commenced, Thorp sold the wheat and deposited the proceeds in the bank. The wheat measured 508 bushels at the machine, and 489 bushels when marketed, amounting to \$339.86. The expense of harvesting was \$140, to which \$13 was added for marketing the wheat, which was done after the suit was commenced. On the trial the defendant testified that he entered and cut the wheat to secure his own share, and to collect for the bank the amount due upon the mortgage. The evidence tended to show that it was then ripe and falling down, that the officers of the bank felt insecure, and that the president directed the harvesting to be done. The evidence for the plaintiff tended to show that he had made arrangements to have the harvesting done, but that he was informed by telephone that it was too wet

to cut, and hence the delay. Both parties agree that when he made the demand, Thorp promised to let the remaining wheat alone. No reason was given why Fleming did not then proceed to thresh and market it, although he testified that, under his contract with the former owner, it was his duty to do so. The jury found for the plaintiff, and returned the following special findings: "(1) Did Thorp, at the time he entered upon the land and harvested the wheat in question, intend to convert the wheat to his own use, and to deprive the plaintiff of any interest therein? Answer. Yes. (2) Has the defendant, Thorp, at all times been willing to have an accounting between himself and plaintiff regarding said wheat, and to pay to plaintiff such sum or amount as would be found due him upon such settlement or accounting? Answer. No. (4) Did the witness, Soper, as president of the bank, caution Thorp, as cashier of the bank, to look after this wheat so as to protect the bank's interest? Answer. Yes. (5) Was Thorp, at the time he entered upon the land, and had the wheat cut, acting for and in the interest of himself as the landlord, or was he acting not only for himself, but also in

penheimer v. Moore, 107 App. Div. 303, 95 N. Y. Supp. 138.

And it was said in *Crowley v. Langdon*, 127 Mich. 51, 86 N. W. 391, that the question of the mortgagee's good faith in taking possession under an insecurity clause is for the jury, where his security was not inadequate.

The following grounds have been held sufficient to justify the exercise of a danger or insecurity clause of a chattel mortgage: Absconding of a mortgagor, leaving the property unprotected (*O'Neil v. Patterson*, 52 Ill. App. 26); seizure of mortgaged chattels upon a distress warrant against the mortgagor (*McCarthy v. Hetzner*, 70 Ill. App. 480); refusal of an officer who had levied an execution upon encumbered chattels in opposition to the mortgagor's right, to let the latter into possession with him (*Rosenfield v. Case*, 87 Mich. 295, 49 N. W. 630); sale of a stock of groceries at the rate of ten to fifteen dollars' worth per day, where the margin of value of the stock above the mortgage is not great, if any at all (*Stage v. Van Leuven*, 77 App. Div. 646, 78 N. Y. Supp. 960); sale of a portion of the encumbered property by the mortgagor (*Allen v. Cerny*, supra).

So, the consumption of encumbered hay, corn, and oats by a mortgagor is a sufficient justification for the mortgagee taking possession when authorized so to do if the mortgagor should, upon any pretense, conceal, make away with, or in any manner dispose of the encumbered chattels. *Mathews v. Granger*, 66 Ill. App. 121.

Where, by statute, an execution against a mortgagor may be levied upon encumbered chattels, subject, however, to the mortga-

gee's rights, a seizure and removal from the town in which the mortgage is of record, standing alone, will not justify taking possession by virtue of an insecurity clause, such facts not amounting to "just cause" based upon actual existence of facts constituting reasonable ground for believing himself insecure. *Galde v. Forsyth*, 72 Minn. 248, 75 N. W. 219.

But the grounds which will justify the exercise of an insecurity clause must arise subsequent to the date of the mortgage. *Meyer v. Michaels*, supra; *Campbell v. Doggett* (Miss.) 23 So. 371.

So, an attachment levy upon exempt chattels, which is released immediately after a mortgage is given thereon, is not sufficient cause to justify a seizure thereof by the mortgagee under an insecurity clause. *Slingo v. Steele-Wedeles Co.* 82 Ill. App. 139.

Although a mortgagee is authorized to take possession and sell mortgaged chattels at any time he deems himself insecure, yet he must exercise reasonable diligence; and, if he retains perishable property until maturity of the debt secured, he will be liable to the mortgagor for any depreciation in the value thereof between the date of taking possession and making the sale. *Lomax v. Walk*, 33 Or. 385, 54 Pac. 199.

The right of a mortgagee to sell before maturity of the debt, when possession is taken under a danger or insecurity clause, is frequently stipulated for in the mortgage, as in *Schmittiel v. Moore*, 101 Mich. 590, 60 N. W. 279, and *Cole v. Shaw*, 103 Mich. 505, 61 N. W. 869.

the interest of and for the protection of the bank, for which he was cashier, under the chattel mortgage which it held? Answer. For himself. (6) Did Thorp, at the time he entered upon the land and harvested the wheat in question, act in good faith, and believe that it was necessary for him to do so in order to protect his interests as a landlord? Answer. No. (7) Did the president of the bank (Soper) tell Thorp, cashier, before the wheat was cut, for him (Thorp) to protect the interests of the bank under the chattel mortgage, and to not let that wheat get away? Answer. Yes."

Messrs. Vandever & Martin for plaintiff in error.

Mr. W. H. Lewis for defendant in error.

Benson, J., delivered the opinion of the court:

The defendant claims that the findings are not supported by the evidence. There was abundant evidence that the wheat was ripe and falling down when defendant commenced to cut it. The defendant testified that he took possession and cut it for the bank as well as to secure his own interest. The justice before whom the case was first tried testified that Thorp swore that he took it under his lien, and the plaintiff's attorney testified that the defendant said he took it under the lease, but he also testified that he knew that the defendant had set up both claims in his answer, which were not withdrawn. In the light of this evidence, and the finding that the president of the bank cautioned the defendant to protect its interest in the wheat, it is difficult to discover any warrant for finding that the defendant intended wrongfully to convert the wheat to his own use. It is also difficult to see how the finding that he did not harvest the wheat for the bank as well as for himself is supported. His statement that the quantity sold was insufficient to cover the expenses appeared to be true, and no further disposition of the wheat was made until after the suit was brought. The plaintiff might have proceeded to market the remainder of the wheat, and take out his interest, and this we must presume was his purpose when he exacted from the defendant the promise to let the rest of it alone; or he might have allowed the defendant to complete the marketing, and then demanded an accounting; but, instead of doing either, he sued for conversion. The findings challenge a careful scrutiny of the instructions to ascertain if there was any error that would lead the jury to find as they did. The court fairly instructed the jury upon the right of the defendant to harvest the

wheat, giving in substance the following instruction, requested by the defendant, excepting however, the words in italics: "If you find from the evidence that, at the time he entered and had the wheat cut, he was acting in the interest of and for and on behalf of the bank, as well as for himself, and that the bank deemed itself insecure, then his actions were rightful under the chattel mortgage, and the plaintiff cannot recover in this action, and your verdict should be for the defendant. *In determining this last question it is wholly immaterial whether the bank had good cause to deem itself insecure or not.*" The proposition so refused was a correct statement of the law. *Werner v. Bergman*, 28 Kan. 60, 42 Am. Rep. 152. The mortgage contained the clause that if "the party of the second part shall deem itself insecure, then and thenceforth it shall be lawful for the said party of the second part, or its authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein the said goods and chattels aforesaid may be, to remove and dispose of the same, and all the equity of redemption of the said party of the first part at public auction or private sale. . . ." Under this clause the defendant had the right to take possession if the proper officers deemed the bank insecure, and whether they had just cause for such belief was not an issue to be tried.

In the cross-examination of the defendant he was asked whether he had proceeded to advertise the wheat for sale by written or printed handbills. An objection to this question was overruled, and the defendant answered that he had not. This was an erroneous ruling. No demand had been made for such proceedings (Gen. Stat. 1901, § 4253), and the mortgagee had consented to a private sale by provision in the mortgage. The finding of the jury that the defendant did not act in good faith in harvesting the wheat may have been, and probably was, influenced by this admission. The ruling of the court would naturally lead the jury to suppose that the failure to advertise was evidence of a wrongful purpose. In this erroneous ruling, in connection with the failure to give the instruction referred to, may, perhaps, be found the reason why the jury found, apparently against the evidence, that the defendant, in harvesting this wheat, intended thereby to convert it to his own use in violation of the plaintiff's rights, and not for the protection of the bank, or to protect his own interests as landlord. Errors not prejudicial to the rights of the defendant should be disregarded; but the reasonable inference from the findings, in view of

the fact that there was little if any evidence so support them, is that the jury was misled thereby.

The judgment is reversed, with directions to grant a new trial.

MICHIGAN SUPREME COURT.

JOHN QUINCY ADAMS, Plff. in Err.,
v.

HARRINGTON HOTEL COMPANY.

(— Mich. —, 117 N. W. 551.)

Contract — mutuality — statute of frauds.

Shipping a display cabinet which an hotel proprietor has contracted in writing to place on the counter does not make the contract mutual, so that it can be enforced against him, when not signed by the other party, where it was to run for six years, with a change of cabinet every two years, since the undertaking of the shipper is void under the statute of frauds.

(September 10, 1908.)

ERROR to the Circuit Court for St. Clair County to review a judgment in defendant's favor in an action brought to recover damages for breach of contract to display an advertising cabinet. Affirmed.

The facts are stated in the opinion.

Messrs. Avery & Walsh, for plaintiff in error:

The proposal was accepted by furnishing the cabinet, and the defendant then became bound.

Welch v. Whelpley, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744; Employers' Liability Assur. Corp. v. Grand Rapids Bridge Co. 139 Mich. 355, 102 N. W. 975; Cooper v. Lansing Wheel Co. 94 Mich. 276, 34 Am. St. Rep. 341, 54 N. W. 39; People v. Taylor, 2 Mich. 254; Old Colony R. Corp. v. Evans, 6 Gray, 25, 66 Am. Dec. 394.

Under the statute of frauds, where the contract is not in writing, if one party, relying on the agreement, and induced thereby, has executed his part of the contract, the other party may be compelled to perform, or to respond in damages if specific performance is withheld.

Moayon v. Moayon. 114 Ky. 855, 60 L.R.A. 421, 102 Am. St. Rep. 303, 72 S. W. 33; 7 Am. & Eng. Enc. Law, p. 115; Cooper v.

Note. — Search fails to disclose any other cases passing on the question whether a contract involving a bailment with a substitution of subject of bailment at intervals of more than one year is a contract not to be performed within one year, within the meaning of the statute of frauds.
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Lansing Wheel Co. 94 Mich. 272, 34 Am. St. Rep. 341, 54 N. W. 39; Miller v. Smith, 140 Mich. 524, 103 N. W. 872; Orr v. Kenny, 150 Mich. 159, 114 N. W. 228; Mull v. Smith, 132 Mich. 618, 94 N. W. 183; Employers' Liability Assur. Corp. v. Grand Rapids Bridge Co. supra.

Messrs. Phillips & Jenks, for defendant in error:

The contract was unilateral and unenforceable.

Wilkinson v. Heavenrich, 58 Mich. 577, 55 Am. Rep. 708, 26 N. W. 139; Co-Operative Teleph. Co. v. Katus, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814; Dietrich v. Hoefelmeir, 128 Mich. 145, 87 N. W. 111; Davis v. Michigan Mut. L. Ins. Co. 127 Mich. 559, 86 N. W. 1021; McIlroy v. Richards, 148 Mich. 694, 112 N. W. 489.

Moore, J., delivered the opinion of the court:

This case was tried before the circuit judge without a jury. At the request of the plaintiff the judge made findings of fact and law. The court rendered judgment for defendant. Exceptions were taken to his findings. The case is brought here by writ of error. The facts are not in dispute. The defendant delivered to the plaintiff a paper reading as follows:

Port Huron, 6-16, 1903.

In consideration of the Adams Advertising Agency of Omaha, Neb., supplying us with one of their ink well and stationary counter cabinets, like photo of Los Angeles, Mexican onyx & silver holding, etc., light, free of charge, we agree to place same upon our office counter and make it a permanent fixture thereon for a term of two years. We agree to keep said cabinet in good order, and refer our guests seeking purchases or professional services to the cards thereon whenever opportunity affords. This contract is made for a term of six years, with a change of cabinet each two years.

A. C. Stuart,

Manager, Harrington Hotel.

This paper was not signed by plaintiff, nor did he sign any other paper relating thereto. He solicited advertisements from the business men at Port Huron, which he expected to place in the cabinet, for which they were to pay him \$318. The cabinet was shipped to the defendant, who notified plaintiff that it would not be received, and was subject to his order, and it was returned to plaintiff. Plaintiff claims he is entitled to a judgment for \$318, the amount he would have received for the advertisements.

The court found that the cabinet was

suitable in workmanship and in material, and was in full performance of the requirements of the agreement, but held that the agreement was unilateral, and the plaintiff was not bound by its terms. Counsel for plaintiff in error insist that "a promise upon a condition to be performed by the other party is a valid contract when the condition is performed. It is then clothed with a valid consideration which relates back to the promise, and it then becomes valid as an express promise. *People v. Taylor*, 2 Mich. 254. Want of mutuality in the inception of a contract may be remedied by subsequent conduct of the parties or by the execution of the agreement. 7 Am. & Eng. Enc. of Law, p. 115. . . . It is now generally held that if a proposition be made, to be accepted within a given time, it constitutes a continuing offer, which, however, may be retracted at any time. But if, at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract. *Cooper v. Lansing Wheel Co.* 94 Mich. 272, 34 Am. St. Rep. 341, 54 N. W. 39; *Miller v. Smith*, 140 Mich. 524, 103 N. W. 872; *Orr v. Kenny*, 150 Mich. 159, 114 N. W. 228. . . . Where vendee accepts the proposal and pays money on it, the element of mutuality is supplied and the contract is binding. *Mull v. Smith*, 132 Mich. 618, 94 N. W. 183. In our case the expenditure of money on the cabinet and sending it to defendant supplies the element of mutuality." One trouble with this contention is that it overlooks some of the conditions stated in the paper signed by the defendant. It is stated therein that the cabinet shall be placed upon the office counter and made a permanent fixture thereon for two years. It is also stated therein, "this contract is made for a term of six years, with a change of cabinet each two years." It is apparent that the contract, if it is to be regarded as a contract, cannot by its terms be completed in one year. It is also evident that the change of cabinet each two years must be made by plaintiff, and yet he has signed no agreement to make said change. It is clear, we think, that the contract is void under the provisions of § 9515, Comp. Laws. 1897, because the agreement which is to be performed by the plaintiff cannot be performed in one year from the making of the agreement. See *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139, where there is a full discussion of the principle involved. See also *Davis v. Michigan Mut. L. Ins. Co.* 127 Mich. 559, 86 N. W. 1021; *Co-Operative Teleph. Co. v. Katus*, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814; *McIlroy v. Richards*, 148 Mich. 694, 112 N. W. 489.

Judgment is affirmed.

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NEW HAMPSHIRE SUPREME COURT.

DELIA V. MORAN

v.

DOVER, SOMERSWORTH, & ROCHESTER STREET RAILWAY COMPANY.

(74 N. H. 500, 69 Atl. 884.)

Damages — negligent injuries — physician's services.

Direct evidence of the value of a physician's services in treating one injured by another's negligence is not necessary to authorize an allowance therefore against the person responsible for the injury, where the fact of his employment and the nature and extent of the treatment are shown, but the jury may fix the value from their own knowledge and experience.

(May 5, 1908.)

Case Note. — Allowance for physician's services in action for personal injuries, without evidence of the value thereof.

It is agreed that in personal injury cases, if plaintiff is entitled to recover at all, an element of his damages is the necessary and reasonable expense incurred by him for medical treatment for the injury suffered. 8 Am. & Eng. Enc. Law, p. 645. But there is a conflict as to whether such expenses should be considered by the jury in the absence of any evidence as to the value thereof.

A rule identical with that in the headnote to the above case was announced by the court in a short opinion, and without citing any authorities, in the recent case of *St. Louis, I. M. & S. R. Co. v. Stell* (Ark.) 112 S. W. 876.

In *Western Gas Constr. Co. v. Danner*, 38 C. C. A. 528, 97 Fed. 882, the evidence tended to show that plaintiff's physician would charge \$100 for his services, but there was no direct evidence as to the value of such services or the reasonableness of such sum. It was held that it was proper to submit this to the jury as an item of the damages for their consideration.

In *Scullane v. Kellogg*, 109 Mass. 544, 48 N. E. 622, it was held that although there was no distinct proof of the amount of the expenses for medical attendance, yet, in view of the evidence showing the exact number of times plaintiff was treated by the physician, the jury might allow a reasonable sum.

In *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 50 N. E. 610, it was held not erroneous to charge the jury that: "There is evidence in the case as to medical attendance. Dr. Coxwell told you the number of visits he had made to the plaintiff for the purpose of treating him. There is no evidence as to what the ordinary charge for such a visit is. There is no evidence as to what the charges of Dr. Coxwell ordinarily are. . . . I must assume that you have some knowledge, in common with men in general, as to the charges ordinarily

EXCEPTIONS by defendant to rulings of the Superior Court of Strafford County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in plaintiff's favor. Overruled.

Among other evidence offered by plaintiff, she proved that she had employed physicians to treat her for the injuries, and she also showed the nature and extent of the treatment, but no evidence was offered as to the value or cost of the services. Upon this state of the record defendant requested an instruction that there could be no recovery for medical attendance and services of physicians.

Further facts appear in the opinion.

made by physicians for attendance and services such as you find, upon the evidence in this case, have been rendered, and you may avail yourselves of that knowledge for the purpose of determining what sum the plaintiff should have by reason of the expense he has properly and reasonably incurred in endeavoring to effect a cure."

In *Farley v. Charleston Basket & Veneer Co.* 51 S. C. 222, 28 S. E. 193, 401, the court said: "There was testimony to the effect that the plaintiff employed physicians who rendered him professional services for which the law implied a liability on his part for reasonable compensation;" and held that it was proper to instruct the jury that he was entitled to recover compensation for medical expenses.

A great majority of the cases have held, however, that there could be no recovery for such services without proof of their value and their reasonableness.

Thus, in *Brown v. White*, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962, the court said that "the average jurymen is not a professional man, and is not presumed to know the value of such services;" and held that, in the absence of any evidence of the value of a physician's services rendered necessary because of a personal injury, or of what such services were reasonably worth, the plaintiff was not entitled to recover anything on account thereof.

In *Cudahy Packing Co. v. Broadbent*, 70 Kan. 535, 79 Pac. 126, it was held to be a matter of mere speculation, entirely unwarranted, to permit the jury to find the value of a physician's services, in a personal injury case, from the statement that they were rendered, accompanied by a statement, somewhat detailed, of their value and extent.

In *Carter v. Nunda*, 55 App. Div. 501, 66 N. Y. Supp. 1059, it appeared that from the time of the accident plaintiff was visited thirty-one times by a physician, but no evidence was offered as to the value of these services. It was held error for the trial court to call the attention of the jury to the number of visits made by the physician, and to state that the value of these services was a question for them to decide. The 19 L.R.A. (N.S.)

Mr. Samuel W. Emery for defendant. Messrs. Kivel & Hughes, for plaintiff.

It is not necessary for a plaintiff to put in testimony as to the actual charges made for medical attendance.

Scullane v. Kellogg, 169 Mass. 544, 48 N. E. 622; *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 50 N. E. 610; *Hopkins v. Atlantic & St. L. R. Co.* 36 N. H. 9, 72 Am. Dec. 287; *Holyoke v. Grand Trunk R. Co.* 48 N. H. 541; *Turner v. Boston & M. R. Co.* 158 Mass. 261, 33 N. E. 520; *Cornell v. Putnam*, 58 N. H. 534; *Parks v. Boston*, 15 Pick. 199; *Bradford v. Cunard S. S. Co.* 147 Mass. 55, 16 N. E. 719; *Murdock v. Sumner*, 22 Pick. 156; *Clark v. Manchester*, 64 N. H. 471, 13 Atl. 867; *Huntress v. Boston & M. R. Co.* 66 N. H. 185, 49 Am.

appellate court said: "There is no fixed and definite schedule of charges of which a jury make take judicial notice by which the value of professional services may be determined, and their value is not a matter of such common knowledge that jurors may be permitted to appraise the same unaided by other evidence."

In *Gibler v. Terminal R. Asso.* 203 Mo. 208, 101 S. W. 37, 11 A. & E. Ann. Cas. 1194, where there was no evidence that plaintiff paid anything for his physicians' services, and he testified that he did not know the amount of his doctors' bills, it was held that, although the evidence showed the number of professional visits made by the physicians, it was error to charge the jury that, if they found for plaintiff, they could allow him for any expenses incurred by him for medical attention.

In *Nelson v. Metropolitan Street R. Co.* 113 Mo. App. 659, 88 S. W. 781, it was held that where the evidence failed to show either the amount of a physician's charge or the reasonable value of his services, there was an entire failure of proof of this item, and the jury should not have been permitted to speculate in an effort to award full compensation for actual damages suffered.

Where it is shown that services were rendered by physicians, but there is no evidence showing the value of the services or the amount of the expenses incurred therefor, it is error to instruct the jury that, in determining the damages, they can or should take into consideration such expenses. *Chicago, St. L. & P. R. Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1; *Reed v. Chicago, R. I. & P. R. Co.* 57 Iowa, 23, 10 N. W. 285; *Duke v. Missouri P. R. Co.* 99 Mo. 347, 12 S. W. 636.

Where there is no testimony tending to show the amount of the charges made by the attending physician, or what such services were reasonably worth, it is error to submit this item to the jury, although it is shown that, on account of the injuries, the physician attended the plaintiff. *Houston & T. C. R. Co. v. Garcia* (Tex. Civ. App.) 90 S. W. 713; *Gulf, C. & S. F. R. Co. v. Craft* (Tex. Civ. App.) 102 S. W. 170.

St. Rep. 600, 34 Atl. 154; *Head v. Hargrave*, 105 U. S. 45, 26 L. ed. 1028; *Low v. Connecticut & P. R. Co.* 45 N. H. 370.

Peaslee, J., delivered the opinion of the court:

So far as a fact in issue is one upon which men in general have "a common fund of experience and knowledge," the jury may use this information in making up their minds. 4 Wigmore, Ev. § 2570. Such knowledge dispenses with the necessity for introducing evidence on the subject. It is also said that "the scope of this doctrine is narrow. It is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life." *Ibid.*

It is apparent that the rule laid down cannot be applied with mathematical exactness. Upon the particular question involved in this case the courts are divided. A considerable number hold with more or less strictness to the theory that the value of the services of a physician must be shown by evidence. *Brown v. White*, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962; *Hobbs v. Marion*, 123 Iowa, 726, 99 N. W. 577; *Nelson v. Metropolitan Street R. Co.* 113 Mo. App. 659, 88 S. W. 781; *Houston & T. C. R. Co. v. Garcia* (Tex. Civ. App.) 90 S. W. 713. Compare with these cases the following: *Kelley v. Mayberry Twp.* 154 Pa. 440, 26 Atl. 595 (jurors allowed to estimate the value of a wife's services to her husband); *Northern Texas Traction Co. v. Mullins*, 44 Tex. Civ. App. 566, 99 S. W. 433 (jurors allowed to take into consideration the fact that future medical attendance would probably be necessary); *Murray v. Missouri P. R. Co.* 101 Mo. 236, 20 Am. St. Rep. 601, 13 S. W. 817 (jurors allowed

to find the value of the services of a nurse, the measure being "their own knowledge and experience"). In other jurisdictions the rule is that jurors "have some knowledge in common with men in general as to the charges ordinarily made by physicians for attendance and services," and that they may avail themselves of that knowledge "for the purpose of determining what sum the plaintiff should have by reason of the expense he has properly and reasonably incurred in endeavoring to effect a cure." *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 217, 220, 50 N. E. 610, 611; *Scullane v. Kellogg*, 169 Mass. 544, 48 N. E. 622; *Feeney v. Long Island R. Co.* 116 N. Y. 375, 5 L.R.A. 544, 22 N. E. 402; *Western Gas. Constr. Co. v. Danner*, 38 C. C. A. 528, 97 Fed. 882. The latter ruling appears the more reasonable, and is in accordance with the practice at *nisi prius* in this state. It would be difficult to conceive of a matter with which all men are more certainly called upon to deal than the employment and payment of a physician. Knowledge on the subject of doctors' bills is as general as upon almost any question of everyday life. If more satisfactory proof was available, it might have been produced by the defendant, had it not preferred to allow the case to rest here; and the fact that other evidence was not introduced by the plaintiff was legitimate ground for argument that probably the bills were of small amount. *Boucher v. Larochele*, 74 N. H. 433, 15 L.R.A.(N.S.) 416, 68 Atl. 870.

Exception overruled.

All concur.

And so it has been held although the evidence showed the amount charged by the physician, but did not show the reasonable value of such services. *Bowsher v. Chicago, B. & Q. R. Co.* 113 Iowa, 16, 84 N. W. 958; *Houston & T. C. R. Co. v. Pereira* (Tex. Civ. App.) 45 S. W. 767.

In *International & G. N. R. Co. v. Sampson* (Tex. Civ. App.) 64 S. W. 692, it was held that proof that doctors' bills were incurred and paid would not authorize their submission as elements of damages to the jury in the absence of evidence that the bills were reasonable in amount.

In *Schmitt v. Dry Dock, E. B. & B. R. Co.* 3 N. Y. S. R. 257, it was held error to admit the physician's bill in evidence, there being no proof that the bill had been paid or that the services were worth the amount charged.

In *Schimpf v. Sliter*, 64 Hun, 463, 19 N. Y. Supp. 644, it was held error to allow proof of the amount paid by plaintiff to his physician without showing the value of the services.
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In *Clarke v. Westcott*, 2 App. Div. 503, 37 N. Y. Supp. 1111, affirmed without opinion in 158 N. Y. 736, 53 N. E. 1124, it was held that plaintiff could show the amount actually paid his physicians, but the court intimated that, in the absence of any other evidence as to the value of the services, a motion at the end of the case to strike out the evidence as to the bills and their payment should be granted.

In *Wheeler v. Tyler Southwestern R. Co.* 91 Tex. 356, 43 S. W. 876, it was held that where there was no proof of the value of the medical services rendered, or that the amount of the bill paid by plaintiff was reasonable compensation for such services, it was error to submit to the jury the question of the medical bill.

In *Houston & T. C. R. Co. v. Kimbell* (Tex. Civ. App.) 43 S. W. 1049, it was held that where there was no evidence as to the expense incurred by plaintiff for medical attention, it was error to charge the jury that, if they found for plaintiff, they should assess such damages as would compensate

him for the expenses incurred in procuring medical attention.

In *Houston E. & W. T. R. Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687, it was held that no recovery for medical expenses was allowable where there was no proof of the amount of the outlay.

In *Galveston, H. & S. A. R. Co. v. Thornsberry* (Tex. Civ. App.) 17 S. W. 521, it was held error to instruct the jury that they could award damages for expenses incurred, when there was evidence of protracted medical treatment, but no proof of any expenses incurred therefor.

In *Dallas Consol. Electric Street R. Co. v. Ison*, 37 Tex. Civ. App. 219, 83 S. W. 408, it was held that where plaintiff had the services of several physicians, and the value of the services of one was shown, but the value of the services rendered by the others was not shown, it was error to instruct the jury, without qualification, to allow for medical attention.

In *Fry v. Hillan* (Tex. Civ. App.) 37 S. W. 359, it was held that where the evidence showed that plaintiff had employed doctors for a long time, but there was no evidence as to the amount expended for such services, it was error to instruct the jury that they might find for the amount expended for medical attention.

In *Scott v. Banks*, 44 App. Div. 28, 60 N. Y. Supp. 397, it was held that where the evidence showed that plaintiff was attended by two physicians for a considerable period of time, but there was no evidence of the value of such services, the jury was not warranted in awarding damages for the same; and the court should so charge.

In *St. Louis Southwestern R. Co. v. Haynes* (Tex. Civ. App.) 86 S. W. 934, it was held that where there was no proof whatever of the amount contracted to be paid for medical services, and no evidence as to the reasonable value of such services, the jury should have been instructed not to allow any sum for such services.

In *Joliet v. Henry*, 11 Ill. App. 154, it was held that although it was proved that services were rendered by a surgeon, instructions given for plaintiff in relation to damages recoverable, which included "expenses incurred in being cured, if any," were erroneous, there being no evidence tending to show what amount was charged, agreed on, or reasonably deserved for such services.

In *Bedford v. Woody*, 23 Ind. App. 401, 55 N. E. 499, where but a small part of a physician's bill had been paid, and there was no evidence of the reasonable value of the physician's services, it was held not allowable to ask the physician, while testifying as a witness, to state the amount of plaintiff's indebtedness to him on account of medical services rendered because of the injury.

In *Gumb v. Twenty-third Street R. Co.* 114 N. Y. 411, 21 N. E. 993, it was held error to permit plaintiff to show how much his physician charged him, without giving evidence of payment, or any evidence of the value of the services except the incidental 19 L.R.A. (N.S.)

remark of the physician, on the witness stand, that his bill was very small.

In *Heater v. Delaware, L. & W. R. Co.* 90 App. Div. 495, 85 N. Y. Supp. 524, it was held that an estimate made by a country physician without accurate knowledge of the nature or extent of the services rendered was not adequate proof of the value of such services upon which to base a judgment for liability incurred therefor.

In *Sotebier v. St. Louis Transit Co.* 203 Mo. 702, 102 S. W. 651, it was held that where the injury is permanent, and the evidence shows that the character of the injury is such that plaintiff will probably need medical attention in the future, the jury may be instructed to allow such sum therefor as the evidence and facts in the case show would be just and reasonable for such services, although there is no evidence of the reasonable value thereof.

In *Feeney v. Long Island R. Co.* 116 N. Y. 375, 5 L.R.A. 544, 22 N. E. 402, where recovery was not complete at the time of the trial, the court said: "The nature and extent of the medical services having been proved, it was competent for the jury to consider the evidence in assessing the damages, and to award at least a nominal sum for professional treatment."

But in *Page v. Delaware & H. Canal Co.* 34 App. Div. 618, 54 N. Y. Supp. 442, it was held that there could be no recovery for future medical services in the absence of evidence showing the character, probable duration, and value of such services.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SARA V. TOMLINSON, Plff. in Err.,
v.

ARMOUR & COMPANY.

(75 N. J. L. 748, 70 Atl. 314.)

Appeal — demurrer — judgment.

1. A judgment in favor of either party, upon demurrer to a declaration, is a final judgment, reviewable on error.

Same — informal judgment.

2. The record returned to a writ of error, besides reciting the plaintiff's declaration and the demurrer thereto, set forth simply that the court below, having heard argument upon the demurrer and duly considered the

Headnotes by PITNEY, C.

Case Note. — *Liability of manufacturer, packer, or vendor to persons not in privity of contract, for injury from defects in article sold.*

This note is confined strictly to contracts of sale, and therefore does not include cases involving the liability of those who have contracted to construct buildings, elevators, and the like, for injuries resulting to third persons from the contractor's negligence in

same, did order that the demurrer be sustained, with costs; there being no more formal entry of judgment nor any award of a specific sum for costs. After joinder in error and argument of the cause upon the merits,—Held, that, for purposes of review, the judgment as returned was sufficient in substance, and would be treated as if amended in the court of review with respect to matters of form.

Same — joinder in error — effect.

3. The common joinder in error amounts to an admission by defendant in error that what is returned as the record of the judgment below is, in truth, the record thereof; so that, after joinder in error, neither party can of right allege diminution, or have a certiorari.

Same — *ideo consideratum* est.

4. The technical phrase *ideo consideratum est* is not necessary to constitute such a judgment as will support a writ of error. The want of this technical phrase, being a defect of form merely, may be amended, if necessary, in the court of review.

fulfilling his contract of construction. It also excludes cases involving the liability of druggists to strangers for injuries resulting from drugs or poisons sold by them, that question being discussed in the case note to *McKibbin v. Bax*, 13 L.R.A. (N.S.) 646.

As to the specific branch of this general question presented in *TOMLINSON v. ARMOUR & Co.* the liability of a packer or manufacturer of food to the ultimate consumer who purchased the same from a middleman, there is but little authority, as an extensive search has disclosed but three other cases involving that particular problem, and these are not in accord.

In *Salmon v. Libby, McNeil & Libby*, 219 Ill. 421, 76 N. E. 573, reversing 114 Ill. App. 258, a declaration was held to be good which set out a statute permitting a recovery for the death of a person caused by the wrongful act or omission of another, and which alleged that defendant negligently and improperly prepared and manufactured mince-meat so that the same became poisonous and destructive to human life when used as food; and that the plaintiff's testator, while lawfully partaking of the same, was poisoned and died in consequence thereof; though it also showed that the plaintiff's testator did not purchase the mince-meat directly from the defendant. The question of the liability of a packer to persons not in privity of contract with him was not discussed, as the specific objection to the declaration was that it failed to state the particular negligence complained of.

To the same effect is *Craft v. Parker, W. & Co.* 96 Mich. 245, 21 L.R.A. 139, 55 N. W. 812, which was an action to recover for injuries caused by eating spoiled bacon sold by the defendant to the plaintiff's brother, and in which the court, in reversing a judgment for the defendant, said that, if the defendant was negligent in selling meats that were dan-

Poisoned food — injury to consumer — liability.

5. A declaration setting forth that defendant was engaged in the business of putting up in tin cans or vessels, and vending, meats for food and domestic use, and did put up a certain can of ham for food and domestic use, which was sold by the defendant to a retail dealer, to be sold to customers and patrons; that plaintiff purchased said can of ham from said retailer for food and domestic use; that the defendant negligently put up in said can of ham diseased, unfit, and unwholesome ham, which was deleterious and poisonous to the human body and health; and that the plaintiff, without fault or negligence on her part, ate a piece of ham taken from said can, and in consequence thereof became poisoned and sick with ptomaine poison,—Held, to set forth a good cause of action, notwithstanding the absence of *scienter*.

Food — canned goods — duty of manufacturer.

6. Irrespective of the presence, or absence,

gerous to those who ate them, he would be liable for the consequences of his act if he knew the meats to be dangerous or by proper care on his part could have known their condition. Here, too, the court refrained from any discussion of the question of the manufacturer's liability to third persons.

There is, however, a *dictum* in *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154, that a caterer who furnished improper and unwholesome food, by which the guests of his customer were made sick, would be liable to such guests though he had no direct contractual relations with them. Upon the authority of this case, there is a *dictum* to the same effect in *Lebourdais v. Vittrified Wheel Co.* 194 Mass. 341, 80 N. E. 482. The first-mentioned case was, indeed, an action by a guest at an entertainment, but the guest purchased his ticket direct from the caterer, so there was, as a matter of fact, privity of contract between the two.

But in *Nelson v. Armour Packing Co.* 76 Ark. 352, 90 S. W. 288, 6 A. & E. Ann. Cas. 237, recovery was refused to a purchaser from a retailer of canned meat against the packer of the same, upon the ground that, as the goods were purchased from a middleman, there was no privity of contract between the consumer and the packer, and that therefore no warranty of wholesomeness passed to the property from the packer to the consumer through the latter's vendor. The question of the packer's liability for negligence in the preparation of the stuff was altogether ignored by the court, though the plaintiff's complaint contained an averment of such negligence.

Passing now to the general question of the liability of a manufacturer or seller to persons other than his immediate purchaser, it may be laid down as a general rule, subject, however, to not a few exceptions, as will hereafter be seen, that a manufacturer or seller is not liable to those who have no

of contractual obligations arising out of the dealings between manufacturer and retailer, and between retailer and consumer, the manufacturer of canned goods is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer, to exercise care that the goods which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison.

(June 15, 1908.)

ERROR to the Supreme Court to review a judgment sustaining a demurrer to the declaration in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Carrow & Kraft, for plaintiff in error:

The defendant owed a general duty to

contractual relations with him, for injuries to persons or property resulting from negligence in the manufacture or sale of the articles handled.

A leading case upon this question is *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 381, 55 L.R.A. 822, 91 Am. St. Rep. 637, 50 Atl. 651, in which it was held that the manufacturer of a drop press was not liable for an injury to an employee of his purchaser caused by the breaking of a part of the machine. The court divided into three classes, those cases involving the liability of a manufacturer to parties with whom he had no privity of contract, as follows: First, where the thing causing the injury was of a noxious or dangerous kind, upon the principle that one who dealt with an imminently dangerous article owed a public duty to all to whom it might come, and whose lives might be endangered thereby, to exercise caution adequate to the peril involved. This principle the court said could be supported on two grounds. (1) that of an illegal act, when, as in most states, there were statutory provisions imposing a public duty upon those who dealt with poisons and other dangerous substances like gun-powder, naphtha, etc.; (2) that of the duty which the law imposed upon everyone to avoid acts which in their nature were dangerous to the lives of others. The second class of cases was said to embrace those where the manufacturer had been guilty of fraud or deceit in selling the article, in which class the degree of danger in the thing itself might be less than in the first class, but where the seller actually knew the danger of the article and put it forth by some fraud or deceit. In such cases the breach of duty arose out of the fraud or deceit in the sale, and extended to persons injured thereby who might reasonably be deemed to be within the contemplation of the parties to the transaction. The third class of cases included those where there was no

the public, or a special duty to the plaintiff, not to put up in its cans diseased or poisonous meat.

Salmon v. Libby, McNeill & Libby, 219 Ill. 421, 76 N. E. 573, reversing 114 Ill. App. 258; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Watson v. Augusta Brewing Co.* 124 Ga. 121, 1 L.R.A. (N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152; *Bishop v. Weber*, 139 Mass. 418, 52 Am. Rep. 715, 1 N. E. 154; *Craft v. Parker, W. & Co.* 96 Mich. 245, 21 L.R.A. 139, 55 N. W. 812; 1 *Thomp. Neg.* § 823; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; *Styles v. F. R. Long Co.* 70 N. J. L. 302, 57 Atl. 448.

Messrs. Gaskill & Gaskill for defendant in error.

Pitney, C., delivered the opinion of the court:

This writ of error is brought to review a

liability upon the manufacturer to third persons with reference to the sale or manufacture of a thing not in itself imminently or necessarily dangerous, though he had been guilty of negligence in regard thereto, upon the principle that as to such things there was no general or public duty, but only a duty which arose from contract out of which no duty could be owing to strangers. The court deemed the rule to be clearly established by the weight of authority that, where the cause of injury was not in itself imminently dangerous, or where it did not depend upon fraud, concealment, or implied invitation, or where the plaintiff was not in privity of contract with the defendant, no action of negligence could be maintained.

To the same effect is *Davidson v. Nichols*, 11 Allen, 514, in which the court said that it knew of no principle of law by which the seller of an article could be held liable for mistakes in the nature or quality of the article sold, arising from his carelessness or negligence, which causes injury to others than the immediate purchaser, where such article was in itself harmless, and there were no false or fraudulent representations on the part of the seller,—especially where he had no knowledge that the article was bought for a third person, or was to be used in such a way as might make it dangerous or injurious to persons or property.

And in *Standard Oil Co. v. Murray*, 57 C. C. A. 1, 119 Fed. 572, where recovery was refused to an engineer against the seller of oil purchased by his employer, for injuries caused by the oil not being of the quality represented, upon the ground that a breach of contract of sale could not be taken advantage of by a stranger to it, it was also held that the acceptance by the vendee of the thing sold, except under special circumstances, relieved the vendor from liability to a stranger for an injury resulting to the latter from the negligent manufacture or con-

decision of the supreme court sustaining defendant's demurrer to plaintiff's declaration. The record returned by that court to the writ of error, besides reciting the declaration and the demurrer thereto, sets forth simply that the court, having heard the argument of counsel upon the demurrer, and having duly considered the same, did order that the demurrer be sustained, with costs. There is no more formal entry of judgment, nor any award of a specific sum for costs. Upon this record the plaintiff in error assigns error, in that the supreme court ordered that the demurrer be sustained, with costs, and decided that judgment should be given for the defendant, whereas judgment should have been given for the plaintiff. The defendant in error filed the common

joinder in error, averring "that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid;" and praying "that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed," etc. The case has been submitted upon arguments addressed to the merits, without suggestion of a motion to quash, or other objection, based upon the want of a proper judgment returned. The question suggests itself, however, whether the record manifests a definitive adjudication against the plaintiff in error, which ought to be reviewed here.

The general rule is laid down in 2 Tidd's Pr. (3d Am. from 9th London ed.) 1141, as follows: "No writ of error can be brought but on a judgment, or an award in nature

struction of the thing sold. The court laid down the rule that the duty owing to the public for a breach of which anyone injured might recover had respect to and was limited to instruments and articles in their nature calculated to do injury, such as were essentially dangerous; and that, if the wrongful act complained of was not imminently dangerous to life and limb, the negligent vendor was liable only to the party with whom he had contracted.

So, in *Marquardt v. Ball Engine Co.* 58 C. C. A. 462, 122 Fed. 374, recovery was refused for the death of an employee of the purchaser of a steam engine caused by the bursting of the fly wheel thereof, which was alleged to have been due to a defect in a valve. The court refused to accede to that doctrine which, applied to such circumstances, would impose upon the manufacturer or vendor the duty of ordinary care to make an article safe, and create a liability for an injury to a stranger due to the lack of such ordinary care and skill.

And in *Loosee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, the manufacturer of a steam boiler was held to be liable only to the purchaser for defective materials, or for any want of care or skill in its construction, and, if the boiler, after having been tested by the purchaser to his satisfaction, and accepted by him, exploded in consequence of its defective construction, injuring a third person, the latter had no cause of action against the manufacturer because of such injury.

Attention should here be called to *Winterbottom v. Wright*, 10 Mees. & W. 109, though it is not strictly in point in this note as it was an action against one who had contracted to supply and maintain mail coaches for the use of the Postmaster General, for injuries caused to a driver by a breakdown of one of the coaches. It is, however, a leading case upon the liability for negligence to those with whom the negligent person had no contractual relations, and one much relied upon by the courts in dealing with the liability of manufacturers or vendors to persons not in privity of contract with them. It was held that the driver could not recover, upon the ground that there was no privity

of contract, though the declaration alleged negligence on the part of the defendant, and that there was a breach of its duty to keep the coach in a safe condition. But, since the negligence and the breach of duty were alleged to have arisen under and by virtue of the contract, the case was treated altogether as one arising out of the contract.

Upon this principle, recovery was refused against manufacturers or vendors in the following cases, for injuries to others than their immediate purchasers, caused by defects in the articles sold, the nature of which is parenthetically stated: *Bragdon v. Perkins-Campbell Co.* 66 L.R.A. 924, 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109 (saddle, though the seller knew it to have been purchased for the buyer's wife); *Swan v. Jackson*, 55 Hun, 194, 7 N. Y. Supp. 821 (ice box); *Talley v. Beever*, 33 Tex. Civ. App. 675, 78 S. W. 23 (gasolene "pear burner"); *Longmeid v. Holliday*, 6 Exch. 761 (lamp, though the seller knew it was to be used by a third person); *Guinea v. Campbell*, Rap. Jud. Quebec, 22 C. S. 257 (bottle of cream soda).

In the following cases, which also assent to the general rule that a manufacturer or vendor was not liable to those not in privity of contract with him, for injuries resulting from his negligence, unless the article was dangerous in itself, it will be noticed that the rule was further limited to cases where he was ignorant of the defective condition of the article sold, thus leaving the inference that, if he knowingly sold a defective article otherwise not dangerous to human life or property, he would be liable even to strangers to his contract of sale:

Thus in *Heindirk v. Louisville Elevator Co.* 122 Ky. 675, 5 L.R.A. (N.S.) 1103, 92 S. W. 608, it was held that the manufacturer of a machine not imminently dangerous to human life was not, in the absence of knowledge of its defective condition, liable for injuries which resulted from such condition, to an employee of the purchaser.

And in *O'Neill v. James*, 138 Mich. 567, 68 L.R.A. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 A. & E. Ann. Cas. 177, it was held that there must be a knowledge of the dan-

of a judgment; for the words of the writ are *si judicium redditum sit*, etc. And hence it was formerly holden that a writ of error could not be brought before judgment given; and, if tested before, it was no super-sedeas. But it seems to be now agreed that a writ of error, bearing teste before judgment, is good, so as the judgment be given before the return of it; and this is the usual course for preventing execution, and the allowance of it may be served before the return of the writ of inquiry and final judgment. Still, however, if the writ of error be returnable before judgment, it may be quashed." And at page 1102 it is said: "If the writ of error be returnable before judgment is given, it may be quashed on motion. But, where the writ of error, on a judgment in

the common pleas, was returnable in Easter term, and the costs were not taxed and final judgment signed until Trinity term, after which the defendants, in Michaelmas term, served the plaintiff with a rule to assign errors; and, the plaintiff having assigned them, the defendants, in the same term, joined in error, and, the case being afterwards argued, the judgment of the court of common pleas was reversed,—the Court of King's bench, under these circumstances, refused to quash the writ of error, on the ground that it was returnable before costs were taxed in the court below, and consequently before any judgment was given in that court; as the defendant ought to have applied to quash it, in an earlier stage of the

gerous character of the thing sold before a seller can be liable to others than his immediate vendee; and that therefore a manufacturer of a champagne cider made by proper machinery and not excessively charged was not liable for injuries to an employee of his customers through the explosion of a bottle, unless he knew that for some reason such bottle was peculiarly liable to such accident.

And in *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630, it was held that the explosion of a cylinder of a threshing machine by which a person engaged in operating it was injured would not render the manufacturer liable in the absence of any privity of contract between the manufacturer and the injured person, unless the former knew the machine was defective, though he was guilty of negligence in manufacturing and testing the machine.

And in *Slattery v. Colgate*, 25 R. I. 220, 55 Atl. 639, it was held that a barber who had purchased shaving soap from a dealer in barber supplies could not recover from the manufacturer for damages resulting to his business by reason of the maker negligently using in its manufacture an excess of a necessary ingredient of the soap, such as alkali, unless the manufacturer knew of the excess.

And in *Corry v. Lucas*, Ir. Rep. 3 C. L. 208, recovery was refused against the manufacturer of a boiler for the death of an employee of the purchaser, where it was not shown that the manufacturer was aware of any defects in the boiler.

In accordance with the principle to be inferred from the foregoing decisions, recovery was allowed in the following cases to strangers to the contract of sale, for injuries caused by defects in articles not otherwise dangerous, where such defective condition was known to the manufacturers or vendors when they sold the goods:

Thus, in *Forgesen v. Schultz*, 102 N. Y. 156, 18 L.R.A. (N.S.) 726, 84 N. E. 956, it was held that, if the vendor of siphons of a rated water knew that the siphons were likely to explode when placed on the mar-

ket, and he failed to apply such tests as would render it tolerably certain that they would not explode, he would be liable for an injury caused to a person other than his immediate purchaser. See, however, *O'Neill v. James*, supra, in which an opposite conclusion was reached as to the sale of a similar article.

So, in *Holmvik v. Parsons Band Cutter & Self-Feeder Co.* 98 Minn. 424, 108 N. W. 810, recovery was allowed for the death of an employee of a purchaser of a machine called a separator caused by the breaking through of the covering of the machine upon which the deceased was walking. The court said that, if the covering contained a board so obviously defective as to be in reason known to be such to the manufacturer, but not so as to be apparent to the vendee or the employee in using it; and if the employee, stepping upon the board with force, broke it,—there was negligence on the part of the manufacturer sufficient to make him liable for the death resulting therefrom. Whether the machine was inherently dangerous or not cannot be determined from the report of the case.

Upon the same principle, it was held in *Skin v. Reutter*, 135 Mich. 57, 63 L.R.A. 743, 106 Am. St. Rep. 384, 97 N. W. 152, that one who sold hogs known to him to have a dangerous and infectious disease committed a wrong imminently dangerous to human life, within the rule that one guilty of such an act might be liable for injury to life or limb thereby caused, even to persons not immediately connected with the transaction. It was further held that, if the hogs so sold communicated the disease to sound animals belonging to a remote purchaser, from which they died, the liability of the first seller was not destroyed by the intervention of another buyer between the first seller and the last buyer.

Whether or not ignorance of the defective condition of the article sold will excuse a manufacturer or vendor from liability to third persons, where, with the exercise of reasonable diligence, he might have become acquainted with the condition, the few authorities upon the question are not agreed.

proceedings,"—citing *Denn ex dem. Nowell v. Roake*, 5 Barn. & C. 735, note.

In *Thompson v. Bowne*, 39 N. J. L. 2, our supreme court, upon an examination of the record returned with a writ of error, concluded that no judgment had, as yet, been actually entered, and therefore dismissed the writ, as having been providently issued and returned; and this, although manifest error appeared in the proceedings. So harsh a practice ought not to be followed (especially after joinder in error and consideration of the merits), unless the state of the return clearly requires it; else a mere mistake in form, for which the plaintiff in error is not responsible, may delay the reversal of an erroneous judgment, or the affirmation of one that is free from error. And

why should an erroneous judgment stand any the longer, because it adds informality to error? To so hold is simply to encourage loose practice in the entry of judgments.

In *Cooper v. Vanderveer*, 47 N. J. L. 178, it clearly appeared that the action in which the alleged error had been committed had not proceeded to its termination, and the supreme court properly dismissed the writ of error. Chief Justice Beasley, however, in delivering the opinion, employed the phrase: "A writ of error will not run until the conclusion of the course of law in the court of first instance."

But in *Stein v. Goodenough*, 69 N. J. L. 635, 56 Atl. 701, it was pointed out by this court that by the later English practice the writ of error was permitted to be tested be-

Thus, in *Lebourdais v. Vitrified Wheel Co.* 194 Mass. 341, 80 N. E. 482, the rule was laid down that a manufacturer of an article which he put upon the market was not ordinarily responsible in damages to those other than the immediate purchaser who might receive injuries caused by its defective condition, where he did not know of the same, though by the exercise of reasonable diligence he might have learned such condition. It was therefore held that a workman in a factory could not recover from the manufacturer for injuries caused by the bursting of a defective emery wheel bought by his employer, where he failed to show the manufacturer knew of the defect in the wheel when he sold it; and that it was not enough for him to show that the manufacturer sold the wheel in the open market without exercising reasonable diligence to discover whether it was defective.

So, in *Berger v. Standard Oil Co.* 31 Ky. L. Rep. 613, 11 L.R.A. (N.S.) 238, 103 S. W. 245, in which the rule was enunciated that a stranger to a contract of sale could have no right of action for the breach of a warranty, as there were lacking privity, mutuality, consideration, and every other element essential to constitute a contractual relation between the parties, it was further held that an employee could not recover from the seller of unsuitable lubricating oil to his employer for an injury to himself by an explosion of the oil, if he was unable to show that the seller had knowledge of the dangerous character of the oil, or of such facts that he ought to have known of it.

But in *Statler v. George A. Ray Mfg. Co.* 125 App. Div. 69, 109 N. Y. Supp. 172, it was held that a defectively constructed steam boiler was an article imminently dangerous to human life; and that one who manufactured and sold the same with knowledge of its defective condition, or who could have discovered the same by the exercise of ordinary diligence, was liable for injuries caused by its explosion, to an employee of a remote purchaser to whom its defective condition was unknown, the defect being concealed so that it could not be readily discovered.

covered. See, however, *Losee v. Clute and Correy v. Lucas*, supra, where an opposite conclusion was reached as to injuries caused by the explosion of a boiler.

On the other hand, in *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543, recovery was refused to an employee of the purchaser of an emery wheel for injuries received from the bursting of the wheel, though the manufacturer was aware of the defect from which the accident resulted, and still further weakened the wheel by attempting to overcome the defect. But here the purchaser's attention was called to the defect and the attempted remedy, and the wheel did not burst until after it had been in use for over four years.

Turning now to those cases in which recovery was allowed against a manufacturer or vendor in favor of one not in privity of contract with him, for injuries resulting from defects in the article sold, a clear enunciation of an exception to the general rule is found in *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797, in which an employee of a purchaser of a bottle of champagne cider recovered from the manufacturer for injuries caused by its explosion, upon the ground that the stuff was imminently dangerous. The rule was laid down that one who sold to another an article intrinsically dangerous to life or health, such as a poison, explosive, or the like, knowing it to be such, without notice to the purchaser that it was such, was responsible to any person who, without fault on his part, was injured thereby. The court went on to say that this rule did not rest upon any privity of contract or contractual relation between the person selling the article and the person injured, but upon the principle that the original act of selling such an article was wrongful, and that the wrongdoer was therefore responsible to everyone for the natural consequences of his wrongful act.

And in *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865, Judge Sanborn said that, while it was a general rule that a manufacturer or vendor was not liable to third parties who had no contractual relations with him, for negligence in the manufacture or sale of the

fore judgment entered, in order that it might operate as a supersedeas in cases where execution was forthwith sued out: that, even under this practice, the writ was good only provided judgment was given before its return, and if it was returnable before judgment was entered, it was quashed upon motion; and that this practice is prevalent in this state, and is recognized by that section of our practice act (P. L. 1903, p. 582, § 170) which provides that whenever any writ or other proceeding shall require the removal of the record of any judgment to any other court, the clerk shall record the judgment and the proceeding in the action in full. In *Stein v. Goodenough* we retained the cause, in order that the actual entry of judgment final might be procured, and the record then

brought up by certiorari. But in that case the return showed that, although rules entitling the defendant in error to judgment had been entered in the minutes, no judgment had been actually entered.

The present case differs, for here the return discloses, not a mere minute or memorandum of the judgment that is to be entered, but the very entry of the judgment itself. The order sustaining the defendant's demurrer is certified to us, by the supreme court, as the record of the judgment called for by our writ of error. It may be presumed to have been entered in that form in the judgment book. Of course such an entry is informal. The technical and proper form of a judgment, sustaining defendant's demurrer to plaintiff's declaration, after re-

articles handled, and that, if third parties, while using such articles for the purposes for which they were made or sold, were, without fault on their part, injured through the negligence of the manufacturer or vendor, there could be no recovery therefor because the makers or sellers owed no duty to strangers to their manufacture or sale,—yet an act of negligence on the part of a manufacturer or vendor which was dangerous to the health or life of mankind, and which was committed in the preparation of an article intended to preserve, destroy, or affect human life, was actionable by third parties who suffered from the negligence. Many cases were cited upholding this exception, in all of which the natural and probable results of the act of negligence—indeed, the inevitable result of it—was not an injury to the party to whom the sales were made, but to those who, after the purchasers had disposed of the articles, had used or consumed them. To quote from the opinion: "Hence, these cases stand upon two well-established principles of law: (1) That everyone is bound to avoid acts or omissions imminently dangerous to the lives of others; and (2) that an injury which is the natural and probable result of an act of negligence is actionable. It was the natural and probable result of the negligence in these cases that the vendees would not suffer, but that those who subsequently purchased the deleterious articles would sustain the injuries resulting from the negligence of the manufacturers or dealers who furnished them." It was also held that one who sold or delivered to another an article presumably not in itself dangerous, which he knew to be imminently dangerous to the life or limb, without notice of its qualities, was liable to any person who suffered injury therefrom, which might have been reasonably anticipated, whether there were any contractual relations between the parties or not; and that, therefore, if a manufacturer, without giving notice of its character or qualities, delivered to another a threshing machine, which at the time of delivery the former knew to be imminently dangerous to the life and limb of anyone who might use it for

the purpose for which it was intended, such manufacturer was liable to an employee of the purchaser who sustained injury from its dangerous condition, notwithstanding the absence of contractual relations.

Sales of oils for illuminating purposes have given rise to the most numerous class of cases in which a manufacturer or vendor has been held liable to strangers to the contract of sale, upon the ground of the inherent danger of the article sold. A leading case upon this branch of the subject is *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64, in which it was said to be well settled that one who delivered an article which he knew to be dangerous or noxious, to another without notice of its nature and quality, was liable for any injury which might reasonably be contemplated as likely to result, and which did in fact result, therefrom to that person or any other who was not himself at fault. Recovery was therefore allowed against a manufacturer of naphtha for injuries caused, by its explosion when used in a lamp, to the property of one who purchased the same from a retail dealer, where it appeared that the manufacturer sold the same for the purpose of being retailed and resold to be burned in lamps, knowing it to be explosive and dangerous to life when so used, and knowing the purchaser's business to be that of a retailer and his purpose to retail and sell his naphtha to the public to be so used, and where both the retailer and the consumer were ignorant of its dangerous qualities. The court said that, under such circumstances, the manufacturer was guilty of a violation of duty in selling an article which he knew to be explosive and therefore dangerous, for the purpose of being resold in the market, without giving information of its nature, and was therefore bound to contemplate as the natural and probable consequence of the unlawful act that it might explode or ignite and injure an innocent purchaser or his property, and to answer in damages for such a consequence if it should come to pass.

So, in *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508, 60 S. W. 453, a manufacturer of gasoline was held liable for the

citing that it appears to the court that the declaration and the matters and things therein contained are not sufficient in law for the plaintiff to have and maintain his action thereof against the defendant, proceeds, in substance, as follows: "Therefore, it is considered that the plaintiff take nothing by his said writ, and that the defendant go thereof without day," etc. And there follows a judgment for costs in the following form: "And it is further considered that the defendant to recover against the plaintiff [mentioning the sum], for his costs and charges by him about his defense, in this behalf laid out and expended, by the court here adjudged to the defendant with his assent, according to the form of the statute in such case made and provided; and that

the defendant have execution, thereof," etc. Archbold's Append. 299.

But the technical phrase *ideo consideration est* is not necessary to constitute such a judgment as will support a writ of error. Den ex dem. Rutherford v. Fen, 21 N. J. L. 700, 702. Such a defect, being one of form merely, may be amended (if necessary) in this court. Appgar v. Hiler, 24 N. J. L. 808; Delaware, L. & W. R. Co. v. Toffey, 38 N. J. L. 525, 526, citing Hooper v. Lane, 6 H. L. Cas. 443, 476, 489, 501, 555.

The common joinder in error—in *nullo est erratum*—amounts to an admission, by defendant in error, that what is returned as the record of the judgment under review is, in truth, the record thereof; so that after joinder in error neither party can of right

death of an employee of a purchaser resulting from an explosion of the gasoline, where it appeared that the manufacturer knew the dangerous qualities of the grade of gasoline sold, but they were unknown to the purchaser and his employee. The court said that there was a distinction made in all cases where the injury was caused by the sale and use of merchandise not essentially dangerous to human life and where it was caused by sales of merchandise inherently dangerous; and that in the last class of cases the law imposed a duty on the part of the seller to give notice to the purchaser of the dangerous qualities of the article sold, and, if he failed to do this, he would be liable for any injury which might reasonably be contemplated as likely to result therefrom to any person who was not himself at fault.

And in *Riggs v. Standard Oil Co.* 130 Fed. 199, it was held that a manufacturer who placed on the market an article which was dangerous, such as a mixture of kerosene and gasoline, under the name of one which was not dangerous, such as kerosene, was liable for injury to any person who might be injured by the use of it in the manner in which it was expected to be used, though that person did not buy directly of the one who put it upon the market.

And in *Standard Oil Co. v. Parrish*, 76 C. C. A. 405, 145 Fed. 829, it was held that one who supplied illuminating oil must have contemplated that it would be used in lamps in the household of the purchasers; and that, where the oil sold contained gasoline to such an extent that the mixture was liable to explode in an ordinary lamp, the first seller would be liable for an injury to a member of the remote purchaser's family, resulting from the oil being used in the ordinary fashion.

To the same effect were *Ellis v. Republic Oil Co.* 133 Iowa, 11, 110 N. W. 20, and *Nelson v. Republic Oil Co.* (Iowa) 110 N. W. 24, in which a manufacturer of oil was held to be liable for the death of a child caused by the explosion of what her father had purchased from a retail dealer for kerosene oil, but which was gasoline, or oil with which

gasoline had been mixed in dangerous quantities.

And in *Elkins v. McKean*, 79 Pa. 493, it was held that a manufacturer of oil who sold his product as illuminating oil bearing a high and safe fire test of 110°, when in fact he knew that his fire test would not exceed 64° or 65°, thus making it a most explosive and unsafe oil for domestic use, could not plead the absence of privity of contract against one injured by its explosion.

Many of the cases involving the sale of illuminating oil or gasoline present the further element of a sale in violation of statute. And this would seem to be sufficient to render the manufacturer or vendor liable to strangers, regardless of the fact that the article was also intrinsically dangerous, as these cases appear to base their decision upon the violation of the law, rather than upon the character of the article sold.

Thus, in *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 53 L. ed. —, 29 Sup. Ct. Rep. 270, affirming 18 Okla. 107, 89 Pac. 212, it was held that the absence of any contractual relation between an oil company and a private consumer did not relieve the former from liability for injury sustained by the latter in using in the customary manner that which both he and his innocent vendor supposed was coal oil, and which the oil company, knowing that it contained gasoline, sold to such vendor as coal oil in violation of statute and with the expectation that it would be retailed to the public for domestic use as such.

And in *Ives v. Welden*, 114 Iowa, 476, 54 L.R.A. 854, 89 Am. St. Rep. 379, 87 N. W. 408, a merchant who filled a jug with gasoline for a customer without complying with a statute requiring such packages to be marked "gasoline," was held to be liable for injuries to a member of the customer's family which resulted when she attempted to use it believing it to be kerosene, upon the specific ground that the failure to label it as required by law was negligence *per se*.

And in *Hourigan v. Nowell*, 110 Mass. 470, recovery was allowed against the manufacturer of illuminating oil for the death of a purchaser from one to whom the manufac-

allege diminution or have a certiorari. 2 Tidd, Pr. 1174; Gilliland v. Rappleyea, 15 N. J. L. 138, 145. Indeed, the common joinder ordinarily concludes with a prayer "that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed." And such is the prayer of the defendant in this case. It involves a clear inconsistency to admit the defendant in error afterwards to move to quash the writ of error, on the ground that no judgment has been returned.

It is true that, notwithstanding the parties may thus be bound by their admissions, the court of review is not restrained from looking into the record, and may of its own motion award a certiorari to supply any defects in the body of the record or in its out-branches. Such was the course pursued by

us in the case of Stein v. Goodenough, above cited. But in the present case the judgment record, in the form of which it has been made up in the supreme court, and by that court returned to us, sufficiently imports a determination of the merits raised by the demurrer, and lacks only a precise ascertainment of the amount of costs. Of this imperfection defendant in error makes no complaint. If the judgment is to be affirmed, only defendant in error will be harmed by the omission of costs. If the judgment is to be reversed, because erroneous on the merits, the judgment for costs would, of course, fall with it. A judgment in favor of either party upon demurrer to a declaration is a final judgment, reviewable on error. Hale v. Lawrence, 22 N. J. L. 72, 80. Upon the whole,

turer sold the same, where such oil was below the standard fixed by law, though the manufacturer was ignorant that it did not conform to such standard, or though an authorized inspector had said that it did so conform. The court said that it was not at all a question of diligence or good faith, but that the law proceeded upon the assumption that an ordinary purchaser at retail was not in a position to know whether the oil that he bought was such as the statute allowed to be sold; and that therefore the sale of such oils as were dangerous and unfit for ordinary use was altogether forbidden.

And in *Stowell v. Standard Oil Co.* 139 Mich. 18, 102 N. W. 227, in which recovery was allowed against the manufacturer of illuminating oil not up to the statutory standard, for injuries resulting to the daughter of a purchaser from the retailer from its explosion, it was held that the rule that the seller of an article of commerce not in itself dangerous was not responsible for injuries to a purchaser from his vendee resulting from defects in the article sold, which were unknown to the original seller, did not apply to the sale of adulterated kerosene oil in violation of statute. The court said that a recognized exception to the rule of non-liability to a remote purchaser existed in the case of the sale of an article dangerous in itself; and that the legislature of the state had recognized and treated illuminating oil not tested and shown to be up to a certain standard as a dangerous substance; and that one who sold it without inspection brought himself within the principle of this exception to the general rule as to the liability of manufacturers to strangers.

And the rule that, if one sells an article in violation of law, he will be liable to others than his immediate vendee for injuries resulting from the use of such article, would seem to be supported by *Gartin v. Meredith*, 153 Ind. 16, 53 N. E. 936, which was an action against one who had negligently and unlawfully sold cartridges to a minor, for injuries afterwards resulting to another minor, caused by the discharge of a gun containing one of the cartridges while held

by the purchaser. It is true that a complaint alleging these facts was held to be bad because freedom from contributory negligence on the part of the plaintiff was not alleged; but the language of the court would lead one to infer that such facts would have shown a cause of action had the complaint contained an averment as to the lack of contributory negligence.

So, where a manufacturer put upon the market stove polish composed of such inflammable and dangerous materials as rendered it liable to combustion or explosion when applied to the use for which it was intended, he would be liable for the death of one caused by its ignition when being used, though she purchased it from a retail dealer to whom the manufacturer sold it (*Wolcho v. Rosenbluth* [Conn.] 71 Atl. 566); as he would also be liable for injuries to a purchaser of such stuff from a retail dealer, though the latter knew of its dangerous nature and sold it without a warning (*Clement v. Crosby & Co.* 148 Mich. 293, 10 L.R.A.(N.S.) 588, 111 N. W. 745).

And *Favo v. Remington Arms Co.* 67 App. Div. 414, 73 N. Y. Supp. 788, appeal dismissed in 173 N. Y. 600, 66 N. E. 1107, would seem, also, to support the general rule that a manufacturer or dealer in dangerous articles intended for use, such as a gun, would be liable for damages to a purchaser other than his immediate vendee, resulting from negligence in using defective materials, or from the want of proper care and skill in the manufacture, though the plaintiff was denied recovery because he failed to show negligence on the part of the defendant.

So, in *Keep v. National Tube Co.* 154 Fed. 121, there was held to be a right of action against the manufacturer of a carbonic-acid-gas cylinder, for the death of an employee of the purchaser, where it appeared that the cylinder, because of its defective manufacture, exploded and killed such employee when it was applied to the only use for which it was made, upon the ground that the manufacturer of the thing which, when applied to its intended use, became dangerous, was liable in damages to anyone who, without fault

therefore, we see nothing in the exigencies of the present case to require that decision be delayed in order to enable the supreme court to perfect its judgment record, and return the perfected record to us pursuant to a certiorari. For the purposes of review we consider the judgment, as returned, sufficient in substance, and will treat it as if amended in this court with respect to the mere matter of form.

We proceed, therefore, to consider the case upon its merits. The plaintiff's declaration sets forth that the defendant was engaged in the business of putting up in tin cans or vessels, and vending, meats or ham for food and domestic use, and did put up a certain can of ham for food and domestic use which was sold by the defendant to a retail dealer,

to be sold to customers and patrons; that plaintiff purchased said can of ham from said retailer for food and domestic use; that the defendant "so carelessly, negligently, recklessly, and improperly put up, in said can of ham, diseased, unfit, and unwholesome pork or ham, which was deleterious and poisonous to the human body and health; that the plaintiff, after purchasing said can of ham, and without fault or negligence on her part, ate a piece of ham taken from said can, and, in consequence thereof, became poisoned and sick with ptomaine poison." Defendant's demurrer raised certain formal objections that, under the old practice, could have been raised only by special demurrer, and are now available only on motion to strike out. *Central R. Co. v. Van Horn*, 38 N.

on his part, sustained an injury which was the natural and proximate result of the manufacturer's negligence.

A manufacturer or vendor may also become liable to strangers to the contract of sale if he induced the first sale by false representations as to the quality of the article sold. Thus, in *Lewis v. Terry*, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398, it was held that one who sold a folding bed representing it to be safe for use when he knew it to be dangerous was liable for injuries caused by the defects in the bed, to any person who used it, though there was no privity of contract between them. It was admitted to be the general rule that, if a tradesman sold and furnished for use an article actually unsound and dangerous, but which he believed to be safe and warranted accordingly, he was not liable for injuries resulting from its defective or unsafe condition, to a person who was neither a party to the contract with him nor one for whose benefit the contract was made. As to the contention that such bed was not ordinarily a dangerous article, the court said that this would seem to enhance the wrong of representing the bed to be safe for use when known to be really unsafe, for the danger was thus rendered more insidious.

Attention should here be called to *King v. Creekmore*, 117 Ky. 172, 77 S. W. 689, in which *Lewis v. Terry*, supra, was said by the Kentucky court, in *Simons v. Gregory*, 120 Ky. 116, 85 S. W. 751, to be approved, though in that case the court, after citing *Lewis v. Terry*, to the effect that one who sold an article which he knew to be dangerous committed a wrong independent of the contract, and was liable to any person not himself at fault, for injury resulting therefrom, used the following language: "We do not express any opinion on the question."

So, in *Woodward v. Miller*, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847, the manufacturer of a buggy, who sold it to a municipal corporation for the use of an employee of the latter, representing it to be strong and in good condition, but knowing that it was in fact defective, the defect being so concealed that it

could not be detected, was held to be liable in damages to the person whose use of the buggy was contemplated at the time of the sale, for injuries caused by such defect, though there was no privity of contract between the two.

And in *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 1 L.R.A. (N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152, it was held that a manufacturer who made a bottle of soda water for public consumption, representing it to be harmless and refreshing, was under a legal duty not negligently to allow foreign substances dangerous to the human stomach, such as bits of broken glass, to be present in a bottle of the stuff when it was placed on sale; and that one who, relying on this obligation, purchased a bottle from a merchant to whom the manufacturer sold it, and, without negligence on his part swallowed several pieces of glass while drinking the beverage from the bottle, would have a right to recover against the manufacturer for injuries sustained in consequence.

In *State use of Hartlove v. M. Fox & Son*, 79 Md. 514, 24 L.R.A. 679, 47 Am. St. Rep. 424, 29 Atl. 601, the rule was laid down that the sale, by false representations to innocent purchasers, of property known to the seller to be imminently dangerous to human beings and likely to cause them injury, rendered the seller liable for resulting injury, not only to the purchaser, but to such persons as might, in the ordinary course of events, be called upon to take charge of the property for him. It was accordingly held that, where one falsely sold a horse which he knew had glanders, to a purchaser who was ignorant of the fact, the seller would be liable for the death of a third person who contracted the disease while in charge of the horse for the purchaser, if such death was the natural and probable consequence of contact with the horse.

This principle of false representations as to an article sold by him making a manufacturer or vendor liable even to those with whom he was not in privity of contract was carried still farther in *Cunningham v. C. R. Pease House Furnishing Co.* 74 N. H. 435, 20 L.R.A. (N.S.) —, 124 Am. St. Rep. 979, 69 Atl.

J. L. 133, 139; *Race v. Easton & A. R. Co.* 62 N. J. L. 536, 539, 41 Atl. 710; *Minnuci v. Philadelphia & R. R. Co.* 68 N. J. L. 432, 53 Atl. 229; *Jackson v. Pennsylvania R. Co.* 69 N. J. L. 79, 54 Atl. 532; *Karnuff v. Kelch*, 69 N. J. L. 499, 55 Atl. 163. These objections the supreme court properly disregarded.

The only question properly raised by the demurrer is whether, upon the facts stated in the declaration, and in the absence of *scienter*, there is a liability on the part of the defendant. The supreme court held there was none; and this, upon the ground that at common law, upon a sale of food or provisions, by a manufacturer to a dealer, there is no implied warranty of wholesomeness, and that, assuming a different rule exists in the

case of a sale by such dealer to a consumer, yet the consumer, in the absence of a statute, cannot hold the manufacturer or original vendor to a higher degree of duty than that cast upon him by common law with respect to his own vendee. In our opinion the supreme court erred in making the question of defendant's liability turn upon the existence or nonexistence of a warranty. Whether a warranty be express or implied, it is a matter of contract, rendering the maker liable in case of breach, notwithstanding he used all care to prevent a breach, but rendering him liable in ordinary circumstances only to the party with whom he contracted, or to others for whose benefit the contract was made. Assuming (without deciding) that there is no implied warranty, on the part of

120, in which a merchant selling stove blacking which he negligently represented to be intended for stoves, and to work the better the warmer the stove, was held to be liable to a member of the purchaser's family who was injured by the blacking exploding while being used on a warm stove, though he honestly believed his representation to be true.

On the other hand, in *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436, in which it appeared that the owner of certain sheep apparently sound and healthy, and which he represented so to be, though he knew they were diseased with a contagious malady, sold them to an agent who avowed the purpose of mingling them with a larger herd belonging to his principal, which was done, and, in consequence of which, the united herd was infected; and the agent, who, with his principal, was still unaware of the existence of the disease, bought the united herd from the principal on his own account and suffered further damages from the spread of the disease,—it was held that the representations made by the original seller, not having been made to the last purchaser to induce him to act upon them in any manner affecting his own interests, gave him no right of action against the original seller for the deceit.

And in *Carter v. Harden*, 78 Me. 528, 7 Atl. 392, the seller of a horse which he falsely represented to be a kind animal and a good family horse, though he knew it was vicious, was held not to be liable because of his false representations, at the suit of the purchaser and his wife for an injury to the wife caused by the horse running away, where the seller did not know that the horse was purchased for the use of the wife.

Attention may here be called to *Langridge v. Levy*, 2 Mees. & W. 519, in which recovery was allowed to the son of the purchaser of a gun against a seller who knowingly made false representations as to its manufacture, excellence, and safety, apparently upon the ground, however, that, as the defendant had sold the gun knowing that it was to be used by the purchaser's son, the plaintiff was actually a party to the contract of sale. This interpretation would 19 L.R.A. (N.S.)

also seem to be supported by the result on appeal in 4 Mees. & W. 337, where the judgment for the plaintiff was affirmed upon that portion of the opinion of the lower court which stated that, as there was fraud, and damage resulted from that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, he who was guilty of the fraud was responsible to the injured party.

And these false representations which would make a manufacturer or vendor liable to strangers for injuries caused by articles sold by them need not, it seems, be expressed in language.

Thus, in *Kuelling v. Roderick Lean Mfg. Co.* 183 N. Y. 78, 2 L.R.A. (N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 A. & E. Ann. Cas 124, reversing 88 App. Div. 309, 84 N. Y. Supp. 622, it was held that the manufacturer of a road roller, who wilfully and fraudulently placed therein defective materials which he concealed by putty and paint, was liable for injuries thereby caused to one who put it to its intended use, though it passed through the hands of wholesale and retail dealers, so that there was no privity of contract between the manufacturer and the person injured. The court said that there were here not only fraudulent deceit and concealment, but what also amounted to an affirmative representation that the roller was sound, as the manufacturer, by so concealing the defects that no weakness could be detected, must be held to have represented the roller to be in a perfectly marketable condition.

And in *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103, the manufacturer of a stepladder made of poor, cross-grained and decayed lumber, but so varnished, oiled, and painted that the defects could not be discovered, thereby rendering it dangerous to the life or limb of anyone using it, was held to be liable to the employee of one who purchased it from a middleman. The court laid down the rule that a manufacturer of an article not ordinarily dangerous, which was put upon the market for sale and for

the manufacturer of canned food, that the goods shall be wholesome and fit to be eaten, it by no means follows from this that there is no duty resting upon the manufacturer to exercise care that the contents of the cans, which it puts upon the market to be sold for food and domestic use, are, in fact, food, rather than poison.

In this state we have repeatedly held that, where a duty arises solely out of a contract,

no one can bring an action for its breach unless he be a party to the contract, or one for whose benefit it is made. *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Styles v. F. R. Long Co.* 67 N. J. L. 413, 417, 51 Atl. 710, same case at a later stage, 70 N. J. L. 301, 57 Atl. 448; *Conklin v. R. P. & J. H. Staats*, 70 N. J. L. 773, 59 Atl. 144. But in these cases liability was denied upon the ground that, aside from the contract, there was no duty

ultimate use, and which was so negligently made that it thereby became obviously dangerous to the life or limb of anyone using it, would be liable for injuries caused by such negligence, to one into whose hands the dangerous article came for use in the usual course of business, even though there were no contractual relations between the injured person and the manufacturer, if the latter knew of such defects, and knew the same were concealed and were not likely to be discovered by anyone using the article.

Upon the same principle, it was held in *Pierce v. C. H. Bidwell Thresher Co.* 153 Mich. 323, 116 N. W. 1104, that, if one engaged in the business of manufacturing goods not ordinarily of a dangerous nature, which were to be put upon the market for sale, so negligently constructed an article that, by reason of such negligence, it would obviously endanger the life or limb of anyone who might use it; and if the manufacturer, knowing of such defect and knowing that the same was so concealed that it was not likely to be discovered, sold the article without notice of such dangerous condition, he would be liable for injuries caused by such negligence, to anyone into whose hands the dangerous article might come for use in the usual course of business, even though there were no contractual relations between the injured party and the manufacturer. Recovery was therefore allowed to an employee of the purchaser of a threshing machine for injuries sustained by falling through the deck of the machine, where it appeared that the deck was fastened by a cleat in which were driven several fourpenny nails upwards, which condition rendered the machine dangerous to life and limb to those who might operate it, and was so concealed by the manufacturer that it could not be readily discovered.

The principles of law here discussed, that a manufacturer or vendor will not ordinarily be liable for injuries resulting from the defective condition of the articles sold by him to strangers to the contract of sale, unless the articles were inherently dangerous to life and property, are supported by *dicta* in the following decisions, in many of which the several cases above reviewed were cited with approval: *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Goodlander Mill Co. v. Standard Oil Co.* 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Daugherty v. Herzog*, 145 Ind. 253, 32 L.R.A. 837, 57 Am. St. Rep. 19 L.R.A. (N.S.)

204, 44 N. E. 457; *Simons v. Gregory*, 120 Ky. 116, 85 S. W. 761; *Kahl v. Love*, 37 N. J. L. 5; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Albany v. Cunliff*, 2 N. Y. 165; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Wyllie v. Palmer*, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381; *Burke v. De Castro & D. Sugar Ref. Co.* 11 Hun. 354; *Glenn v. Winters*, 17 Misc. 597, 40 N. Y. Supp. 659; *Bailey v. Northwestern Ohio Natural Gas Co.* 4 Ohio C. C. 471; *Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; *Zieman v. Kieckhefer Elevator Mfg. Co.* 90 Wis. 497, 63 N. W. 1021; *Collis v. Selden*, L. R. 3 C. P. 495; *Earl v. Lubbock* [1905] 1 K. B. 253, 1 A. & E. Ann. Cas. 755.

And in *Kahner v. Otis Elevator Co.* 96 App. Div. 169, 89 N. Y. Supp. 185, affirmed without opinion in 183 N. Y. 512, 76 N. E. 1097, there is a *dictum* that, if a machine not in itself inherently dangerous was made so by the negligence of the manufacturer having notice and knowledge that it was to be used by others than the purchaser, and an injury resulted to one other than the purchaser, directly traceable to that negligence, such manufacturer was liable to the person injured because of that negligence.

Attention should finally be called to two cases in which recovery was refused to strangers to a contract of sale for injuries caused by defects in the thing sold, but upon grounds not material to the question here discussed.

In *Marples v. Standard Oil Co.* 71 N. J. L. 352, 59 Atl. 32, a demurrer was sustained to a declaration which alleged that the plaintiff, while in a certain store, was injured by the explosion of gas generated from gasoline supplied by the defendant in a tank in the cellar of such store, instead of petroleum or crude oil theretofore furnished, upon the ground that the declaration failed to show that there was any duty upon the defendant to furnish petroleum or crude oil, or that it did not change the supply at the request of the proprietor of the store.

And in *Empire Laundry Machinery Co. v. Brady*, 164 Ill. 58, 45 N. E. 486, recovery was denied to the employee of a purchaser of a laundry wringer for injuries caused by its improper construction, where it appeared that, after delivery and acceptance thereof by the purchaser, the manufacturer was again put in charge to make alterations, the case being treated as if the machine had never been actually sold.

incumbent upon the defendant. In the case in 46 N. J. L. 19, Ward was subject to a contractual obligation to build a bridge in accordance with his contract, and was under no other duty. The contract was subject to modification and waiver as between the parties. In the *Styles Case*, as reported in 67 N. J. L. 413, 417, 51 Atl. 710, it appeared that the trial judge had submitted to the jury the contractual obligation to light the footbridge, arising out of defendant's agreement with the board of freeholders as forming in and of itself a sufficient basis for imposing upon the defendant the duty of exercising care towards the public, for breach of which duty the plaintiff, as one of the public, could maintain an action of tort; and that the stipulations of the contract were adopted as the sole criterion for determining what precautions were necessary to be taken by the defendant in order to fulfil the duty in question. It was held by the supreme court that this was error. In the case, in 70 N. J. L. 301, 57 Atl. 448, it was held by this court that the contractual obligation created no liability toward the traveling public, and that the Long Company was not liable under the doctrine of invitation, because it was the county authorities who had invited the public to use the bridge, and not the bridge builder. In *Conklin v. R. P. & J. H. Staats* the scow that was damaged was berthed by the defendant at a place where there was a submerged pile, upon which the plaintiff's scow was impaled when the tide fell. There was no notice to the defendant of the existence of the submerged pile, but, because defendant had contracted with a third party to remove all old piles, it was contended that it thereby came under a general duty to the public, including the plaintiff. This court held that the plaintiff, not being a party to that contract, could not maintain an action of tort in respect to the breach of a duty that arose solely from its provisions.

In *Styles v. F. R. Long Co.* 70 N. J. L. 302, 57 Atl. 448, Mr. Justice Swayze, speaking for this court, cited some distinguishable cases, where the existence of the contract creates a situation that subjects the parties to duties that are independent of the obligation to perform the contract, instancing the duty of carriers of passengers (*Marshall v. York, N. & B. R. Co.* 11 C. B. 655), the duty of a vender of drugs (*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455), the duty of the vender of a gun to a person for whom it was bought (*Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337), the duty of a person who participates in the management of a highly dangerous agency (*Van Winkle v. American Steam Boiler Co.* 52 N. J. L. 240, 19 Atl. 472), the duty of a county clerk under the statute in canceling a mort-

gage (*Appleby v. State*, 45 N. J. L. 161), as cases where the duty was held to be a positive duty, independent of the contract although arising out of a state of facts created by the contract.

Coming, then, to consider the facts of the present case as averred in the declaration, and dealing with them, irrespective of the presence or absence of contractual obligations arising out of the dealings between manufacturer and retailer and between retailer and consumer, the question is whether the manufacturer is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer, to exercise care that the goods which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison. Canned goods are, at the present day, in such common use that we may judicially recognize that the contents are sealed up, not open to the inspection or test, either of the retailer, or of the customer, until they are opened for use; and not then susceptible to practical test, except the test of eating. When the manufacturer puts the goods upon the market in this form for sale and consumption he, in effect, represents to each purchaser that the contents of the can are suited to the purpose for which it is sold, the same as if an express representation to that effect were imprinted upon a label. Under these circumstances, the fundamental condition upon which the common-law doctrine of *caveat emptor* is based—that the buyer should “look out for himself”—is conspicuously absent; for he has no opportunity to look out for himself. And when he thus buys and eats the contents of the package, relying upon the assurance of the manufacturer that they are fit to be eaten, it seems to us to result from general and fundamental principles that he has a right to insist that the manufacturer shall at least exercise care that they are so fit, and are not wholesome and poisonous.

Among the most fundamental of personal rights, without which man could not live in a state of society, is the right of personal security, including the “preservation of a man's health from such practices as may prejudice or annoy it” (1 Bl. Com. 129, 134)—a right recognized, needless to say, in almost the first words of our written Constitution (Const. art. 1. §1). To assert, therefore, that one living in a state of society, organized, as ours is, according to the principles of the common law, need not be careful that his acts do not endanger the life or impair the health of his neighbor seems to offend against the fundamentals. Upon what other fundamental principle does the

rule rest that one who uses a highway must be careful not to collide with his neighbor? Upon what other fundamental principle does the law of libel and slander rest? Or the rule, recently laid down by this court in *Brennan v. United Hatters*, 73 N. J. L. 729, 744, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 A. & E. Ann. Cas. 727, that any act is wrongful which, in the ordinary course, will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right?

In *Langridge v. Levy*, supra, plaintiff's father bargained with defendant to buy of him a gun, for the use of himself and sons, and the defendant, by falsely and fraudulently warranting the gun to have been made by N., and to be a good, safe, and secure gun, sold the gun to plaintiff's father, and the plaintiff, knowing and confiding in the warranty, used the gun, which in his hands, by reason of its weak, dangerous, and insufficient construction and materials, burst, whereby plaintiff was injured. Held, by the courts of exchequer and of exchequer chamber, that the action was maintainable, on the ground "that, as there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." This case of itself is, of course, not an authority closely in point with the case before us, for here there is no averment of fraud, but only of negligence. But in *George v. Skivington*, L. R. 5 Exch. 1, where the declaration alleged that the defendant carried on the business of a chemist, and in the course of his business professed to sell a chemical compound, made of ingredients known only to him, and by him represented to be fit to be used for a hair wash; and the plaintiff J. G. thereupon bought of the defendant a bottle of this hair wash, to be used by his wife, the plaintiff E. G., as the defendant then knew, and averred that the defendant had negligently and unskillfully prepared the hair wash, so that, by reason thereof, it was unfit to be used for washing the hair, whereby the female plaintiff, who used it for that purpose, was injured,—it was held by the court of exchequer on demurrer that a good cause of action was disclosed. This decision was based upon the authority of *Langridge v. Levy*, it being held that the duty was of a similar character; one of the barons saying: "Substitute the word 'negligence' for 'fraud,' and the analogy between *Langridge v. Levy* and this case is complete." *Longmeid v. Holliday*, 6 Exch. 761, was distinguished, but upon grounds that are not very satisfactory. In the latter case it was held that a tradesman who contracts with an individual for

the sale to him of an article to be used (in this instance a lamp) for a particular purpose by a third party is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article. In this case the declaration averred that there was a fraudulent representation that the lamp was safe; but of this there was no proof at the trial. There was no averment, in the declaration, of negligence on the part of the defendant in the manufacture of the lamp. The decision may perhaps be sustained upon this ground.

The leading American case is *Thomas v. Winchester* (1852) 6 N. Y. 397, 57 Am. Dec. 455. This is a well-considered case, and holds that a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label; that such liability arises, not out of any contract or privity between the dealer and the person injured, but out of the duty which the law imposes upon the former to avoid acts in their nature dangerous to the lives of others. This decision has been cited with approval by our supreme court as a typical instance of the duty imposed, on public grounds, upon any person who undertakes the performance of an act which, if not done with care and skill, will be dangerous to the persons or lives of others; the duty being to exercise such care and skill. *Van Winkle v. American Steam Boiler Co.* 52 N. J. L. 240, 247, 19 Atl. 472. And this court has already approved *Thomas v. Winchester* to the extent that it held the chain of causation was not broken by the innocent acts of the intervening parties who, in reliance upon the label, bought and sold the poison until it came to her who finally used it as a medicine. *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 310, 23 Am. Rep. 214. The doctrine of *Thomas v. Winchester* has been recognized and approved in Massachusetts. See *Norton v. Sewall*, 106 Mass. 143, 144, 8 Am. Rep. 298. And in *Bishop v. Weber* (1885) 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154, an action of tort was sustained against a caterer for improperly and negligently furnishing unwholesome and poisonous food. *Allen, J.*, said: "This liability does not rest so much upon an implied contract as upon a violated or neglected duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter have a right to assume that he will furnish for their consumption provisions which are not

unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties."

In *Blood Balm Co. v. Cooper* (1889) 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118, it was held, upon the authority of *Thomas v. Winchester*, that the proprietor of a patent medicine, who puts upon the bottle containing it a prescription that it is to be taken in certain quantities, and sells it to a druggist for resale to any who may wish it, is liable for any injury sustained, on account of its poisonous effect, by one who buys it of the druggist, and uses it according to the prescription. The court said: "the liability of the plaintiff in error to the person injured arises, not by contract, but for a wrong committed by the proprietor in the prescription and direction as to the dose that should be taken. We can see no difference, whether the medicine was directly sold to the defendant in error by the proprietor, or by an intermediate party, to whom the proprietor had sold it in the first instance for the purpose of being sold again. It was put upon the market by the proprietor, not alone for the use of druggists to whom they might sell it, but to be used by the public in general, who might need the same for the cure of certain diseases, for which the proprietor set forth in his label the same was adapted. This was the same thing as if the proprietor himself had sold this medicine to the defendant in error, with his instructions and directions as to how the same should be taken."

A recent Minnesota case, *Schubert v. J. R. Clark Co.* (1892) 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103, perhaps extends the doctrine of *Thomas v. Winchester* further than we need to go in the present case. There one Phelps had ordered a new stepladder from a retail merchant, for the use of the plaintiff, who was a house painter in the employ of Phelps. The merchant, not having such a ladder in his stock, ordered the defendant corporation to deliver such a ladder to the plaintiff for his use. Pursuant to this order, defendant delivered a ladder to the plaintiff, which was made of poor, cross-grained, and decayed lumber, but was so painted that neither the plaintiff nor his employer nor the merchant could discover the defects. Plaintiff, supposing the ladder to have been made of good material, proceeded to use it in the performance of his work, when it broke under his weight, and he was thereby injured. The liability was sustained.

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Craft v. Parker, W. & Co. (1893) 96 Mich. 245, 21 L.R.A. 139, 55 N. W. 812, is a case more closely in point, and is, we deem, a reliable authority.

In *Huset v. J. I. Case Threshing Mach. Co.* (1903) 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865, the precise question was this: "Is a manufacturer or vendor of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of anyone who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale, for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use?" Sanborn, J., in the course of a somewhat elaborate opinion, approves, *arguendo*, the doctrine of *Thomas v. Winchester*, *Bishop v. Weber*, and other cases of that character.

In *Salmon v. Libby, McNeill, & Libby* (1905) 219 Ill. 421, 76 N. E. 573, the declaration alleged, in substance, that the defendant prepared, put up in a package, and sold to the trade, certain mince-meat, which, in the due course of business, passed through the hands of a wholesale dealer, a retail dealer, and finally was made into a pie, of which plaintiff's testator ate; that the defendant negligently and improperly prepared and manufactured the mince-meat in question; that as a result the same became unfit for food, and poisonous and destructive to human life when used as food; and that plaintiff's testator, lawfully partaking of the same, was poisoned, and lost his life in consequence thereof. There was no averment of a *scienter*, the declaration counting upon the negligence alone. The supreme court of Illinois held that this set forth a good cause of action, under a statute permitting a recovery for the death of a person caused by the wrongful act or omission of another.

Upon both reason and authority, we are clearly of the opinion that the declaration before us sets up a good cause of action. The fact that the defendant was the manufacturer, presumably having knowledge, or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers, under circumstances such that neither dealer nor consumer had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to intending purchasers that they were fit for food and beneficial to the human body; that, in the ordinary course of business, there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchas-

ing, in reliance upon the representation; and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured,—make a case that renders the defendant liable for the damages sustained by the plaintiff thereby.

Let the judgment be reversed, and the record be remitted to the Supreme Court, to the end that the defendant may apply there for leave to withdraw its demurrer and plead to the merits. See *Hale v. Lawrence*, 22 N. J. L. 72, 82.

NEW MEXICO SUPREME COURT.

S. C. SMITH

v.

DARIUS HICKS, Appt.

(— N. M. — 98 Pac. 138.)

Appeal — correction of pleadings.

1. A judgment will not be reversed because of refusal of the trial court to strike out portions of a pleading because redundant, or a legal conclusion, in the absence of anything to show prejudice therefrom.

Landlord — covenant to furnish water — breach.

2. A landlord does not comply with his agreement to furnish water to irrigate the crops to be grown on the land, from an artesian well on the property, by completing through a contractor whose contract antedated the lease a well sufficient to furnish

Case Note. — Measure of damages for breach of contract to furnish water for irrigation.

Aside from *SMITH v. HICKS* and the cases therein cited and sufficiently reviewed, very little authority can be found on the question as to what is the measure of the damages recoverable for a breach of contract to furnish water for irrigation. However, those found all involve the destruction of a growing crop, and support, in effect at least, the rule laid down in the above case.

Thus in *Raywood Rice Canal & Mill. Co. v. Langford Bros.* 32 Tex. Civ. App. 401, 74 S. W. 926, it was held that, for the failure of a lessor to furnish his lessee with sufficient water for irrigation purposes, as per contract he was obliged to do, the measure of damages for the injury to a growing crop was the difference between what the crop damaged made and what it would probably have made but for the injury, less the cost of raising, harvesting, and marketing it. The same measure of damages seems to have been applied in *Tres Palacios Rice & Irrig. Co. v. Eidman*, 41 Tex. Civ. App. 542, 93 S. W. 698.

In *Raywood Rice Canal & Mill. Co. v. Wells*, 33 Tex. Civ. App. 545, 77 S. W. 253, it was held that, for breach of contract to

the water, if the contractor, for the purpose of securing his compensation, immediately caps and locks the well so that to procure the water the tenant would be compelled to break the lock.

Damages — loss of crops.

3. The measure of damages for breach of contract to furnish water to irrigate growing crops so that they become worthless is the value of the crops on the market at maturity, less the cost necessary to put them in condition for and upon the closest market.

Same — evidence — neighboring crops.

4. Upon the question of measure of damages for failure to furnish water to irrigate crops, so that they are lost, evidence is admissible of the value of matured crops of like kind with those planted, in the neighborhood where they were growing.

(September 2, 1908.)

APPEAL by defendant from a judgment of the District Court for Chaves County in plaintiff's favor in an action brought to recover damages for loss of plaintiff's crops through defendant's breach of contract. Affirmed.

Statement by McFie, J.:

This is a suit for damages brought by the appellee, S. C. Smith, hereinafter called "plaintiff," against Darius Hicks, appellant, hereinafter called "defendant," upon special covenant in a lease to furnish water, which plaintiff alleges was broken by defendant. The complaint alleges that, on March 13,

furnish water for irrigating purposes, the measure of damages is the market value of the crop that would have been produced when harvested, less that proportion of the crop which was agreed to be paid for the water, and the expenses that would have been incurred in planting, raising, harvesting, and preparing such crop.

In *Barstow Irrig. Co. v. Cleghon* (Tex. Civ. App.) 93 S. W. 1023, it was held that the proper measure of damages for breach of contract to furnish water for irrigation is the difference between what the crop damaged made and what it probably would have made if it had been properly watered, less certain expenses which were necessary to its cultivation and preparation for market.

In *Anderson v. Adams*, 43 Or. 621, 74 Pac. 215, where, because of a breach of contract to furnish water for irrigation, a growing crop was destroyed, it was evidently held that the damages recoverable was the value of the crop at the time of its destruction, this value to be ascertained by evidence of the value of the crop at maturity less the cost of the labor, care, and attention necessary to put it in condition for the nearest market.

In *Watson v. Needham*, 161 Mass. 404, 24 L.R.A. 287, 37 N. E. 204, it was held

1906, the defendant leased to plaintiff a certain quarter section of land in Chaves county, New Mexico, containing 160 acres of land, for one year, and agreed to furnish water sufficient for the irrigation of the land leased from a certain artesian well to be sunk on a portion of the premises, in consideration of which the plaintiff was to prepare and seed said lands in certain crops, properly cultivate and irrigate said crops, and deliver to defendant the share falling to him at Dexter, New Mexico, and that plaintiff performed said contract on his part, but defendant failed to furnish the water as contracted for in the lease, and, by reason of such failure, the crop died, with the result that plaintiff was damaged in the sum of \$1,000. To the complaint defendant directed a motion to strike out certain portions as legal conclusions and surplusage, which motion was overruled, and defendant answered. The defendant answered, denying all the material allegations contained in the complaint; denied that he failed and refused to furnish plaintiff with water with which to irrigate the crop; and alleges compliance with the terms of the lease contract; alleges that he caused to be brought in, on June 9, 1906, an artesian well located on the northwest corner of the land described in the lease with water sufficient to irrigate the whole of said demised premises, and that plaintiff, being in full charge of said demised premises, negligently permitted and allowed the well to be locked up, and failed and refused to use the waters

thereof to irrigate the crops; that plaintiff's failure and refusal to secure the water was not the fault or neglect of the defendant, but that at the time plaintiff and defendant entered into the lease the plaintiff had full knowledge that the water to be furnished with which to irrigate the crops was to come from the well then being bored, and that, in addition to the well furnished by defendant, defendant notified plaintiff before and after the well was brought in not to allow the crop to die for lack of water, that defendant would pay extra for water from neighboring claims, and that plaintiff negligently and wilfully abandoned the premises on June 15, 1906, and rented other lands and refused to cultivate the lands of the defendant, and failed to use the water furnished by the defendant from the artesian well. The defendant further alleged by way of counterclaim that plaintiff was indebted to him in the sum of \$100 as stipulated damages provided for in the lease because of his alleged breach of contract. The plaintiff denied the new matter set up in the answer and reply. The cause was tried to a jury upon the issues thus made, which resulted in a verdict in favor of the plaintiff, and his damages were assessed in the sum of \$362.50. Whereupon defendant filed a motion for a new trial, which was overruled, and he prosecutes this appeal.

Messrs. K. K. Scott and W. A. Dunn,
for appellant:

The amount of damages recoverable for

that, for lack of due diligence by a municipal corporation to furnish a supply of water according to contract for steam heating in a greenhouse, the damages recoverable was the full amount of damage to the growing lettuce in such greenhouse, which was frozen by reason of the breach.

In *Colorado Canal Co. v. McFarland* (Tex. Civ. App.) 94 S. W. 400, it was held that, where damages are claimed for breach of contract to furnish water for irrigation purposes, evidence of what similar lands properly cultivated and irrigated yielded in the same year, in connection with other evidence, was admissible to ascertain the damages sustained.

It will be noticed that in some, at least, of the above cases the measure of damages is stated to be the value of the crop at the time of its destruction, to be ascertained by the admission of evidence of the value of the crop at the time of maturity less the expenses and cost necessary to prepare it for the nearest market. It would seem, therefore, that this class of cases makes a rule in regard to the admissibility of evidence out of what seems to be stated in *SMITH v. HICKS*, and some of the cases gathered in this note, to be the measure of damages. Whether there is any real practical distinction between these two statements of

the rule is difficult to state, since most of the courts fail to draw any distinction at all. This was so in *SMITH v. HICKS*, and also in *Raywood Rice Canal & Mill. Co. v. Langford Bros.* supra, where the court, after approving a statement of the latter, said that it was but another way of saying "Find for plaintiffs the value of the crops at the date of the breach." It is suggested here, however, that those cases which state the measure of damages to be the value of the crop at the time of its destruction, and admit as evidence the value of the crop at the time of maturity less the cost of preparing it for market, might also admit other evidence to ascertain the damages recoverable, and thus finally come to a somewhat different result than those cases which state the market value of the crop at the time of maturity less the cost of preparing it for its nearest market to be the measure of damages, for, under a statement of the latter rule, the admissibility of other evidence would seem to be precluded.

A note discussing this same question and including all cases concerning the measure of damages for injury to, or destruction of, growing crops, may be found with *Teller v. Bay & River Dredging Co.* 12 L.R.A. (N.S.) 267.

the loss of growing crops must be ascertained solely by the value of the lost or injured crops in their then condition, without reference to their conjectural worth at maturity.

Chicago & R. I. R. Co. v. Ward, 16 Ill. 522; Kankakee & S. R. Co. v. Horan, 17 Ill. App. 650; Ohio & M. R. Co. v. Nuetzel, 43 Ill. App. 108; Economy Light & P. Co. v. Cutting, 49 Ill. App. 422; Roberts v. Cole, 82 N. C. 292; Ward v. Chicago, M. & St. P. R. Co. 61 Minn. 449, 63 N. W. 1104; Burnett v. Great Northern R. Co. 76 Minn. 461, 79 N. W. 523; Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151; Gresham v. Taylor, 51 Ala. 505; International & G. N. R. Co. v. Benitos, 59 Tex. 326; Taul v. Shanklin, 1 Tex. App. Civ. Cas. (White & W.) 642; Richardson v. Northrup, 66 Barb. 85; Drake v. Chicago, R. I. & P. R. Co. 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215; Houston, E. & W. T. R. Co. v. Adams, 63 Tex. 200; Hays v. Crist, 4 Kan. 350; Sabine & E. T. R. Co. v. Joachimi, 58 Tex. 456; Texas & St. L. R. Co. v. Young, 60 Tex. 201; Texas & P. R. Co. v. Bayliss, 62 Tex. 570; Gulf, C. & S. F. R. Co. v. Helsley, 62 Tex. 593; Gulf, C. & S. F. R. Co. v. Pool, 70 Tex. 713, 8 S. W. 535; Sabine & E. T. R. Co. v. Smith, 73 Tex. 1, 11 S. W. 123; Sabine & E. T. R. Co. v. Johnson, 65 Tex. 389; Gulf, C. & S. F. R. Co. v. Nicholson (Tex. Civ. App.) 25 S. W. 54.

The true rule for the measure of damages is the difference between the rental value of the land leased with water and the rental value without water.

Pallett v. Murphy, 131 Cal. 192, 63 Pac. 366; Crow v. San Joaquin & K. River Canal & Irrig. Co. 130 Cal. 309, 62 Pac. 562, 1058; Horres v. Berkeley Chemical Co. 57 S. C. 189, 52 L.R.A. 36, 35 S. E. 500.

The water was "furnished" to plaintiff by defendant, within the terms of the contract, when the well was completed and capped by the contractor.

Chulan v. Princeville Plantation Co. 5 Haw. 88; Southland Waterworks Co. v. Howard, L. R. 13 Q. B. Div. 217; Francis v. State, 21 Tex. 285; Taylor, Land. & T. § 767, 7th ed. 656.

Messrs. Ed S. Gibbany and Emmett Patton, for appellee:

The measure of damages was the value of the crop at the closest market, at maturity, less the cost necessary to put it in condition for the market.

Gulf, C. & S. F. R. Co. v. Carter (Tex. Civ. App.) 25 S. W. 1023; Raywood Rice Canal & Mill. Co. v. Langford Bros. 32 Tex. Civ. App. 401, 74 S. W. 926; Northern Colorado Irrig. Co. v. Richards, 22 Colo. 450, 45 Pac. 423; Herring v. Armwood, 130 N. C. 177, 57 L.R.A. 958, 41 S. E. 96; 13 Cyc. Law 19 L.R.A. (N.S.)

& Proc. pp. 208, 209, notes 61-64; Houston & T. C. R. Co. v. Darwin (Tex. Civ. App.) 105 S. W. 825; 8 Am. & Eng. Enc. Law, p. 330, note, 5; 2 Farnham, Waters, 2643, 2644; Long, Irrigation, §§ 131, 273; Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 36 L.R.A. 423, 61 Am. St. Rep. 578, 70 N. W. 263; Mills, Irrigation, § 213, p. 267; Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540.

McFie, J., delivered the opinion of the court:

The first error assigned is upon the overruling of defendant's motion in the lower court to strike out portions of the complaint as being redundant or legal conclusions. There was no error committed in the overruling of this motion. "But, even if the court had erred in overruling the motion, a reversal of the judgment would not follow. A party has no absolute right to have his adversary's pleadings pruned to suit his fancy. A reviewing court will only interfere in such matters where it appears that the denial of a motion to correct a pleading was not only erroneous, but prejudicial to the substantial rights of the moving party." Lincoln Mortg. & T. Co. v. Hutchins, 55 Neb. 158, 75 N. W. 538. In the case of Pfau v. State, 148 Ind. 539, 47 N. E. 927, the supreme court of Indiana says that "this court has repeatedly held that the overruling by the court below of a motion to strike out a part of a pleading is not on appeal an available error here. The reason assigned for such decision is that, 'at most, it can but leave surplusage in the record, which does not vitiate that which is good.'" Hudelson v. First Nat. Bank, 56 Neb. 247, 76 N. W. 570; Coddington v. Canaday, 157 Ind. 243, 61 N. E. 567; Atchison, T. & S. F. R. Co. v. Marks, 11 Okla. 82, 65 Pac. 996. There is nothing disclosed by the record in this case to show that the defendant was prejudicially affected by the ruling so as to bring the case within the exception referred to in some of the cases above cited.

While there are several assignments of error, they all relate to the four remaining questions in this case, namely: (1) Did the defendant, Hicks, comply with his covenant in the lease, which is in the following language: "Party of the first part agrees to furnish water sufficient to irrigate land above described; said water to come from an artesian well located on land?" (2) Did the court submit to the jury in his charge the correct measure of damages? (3) Was error committed in the overruling of the demurrer of the evidence and refusal to give peremptory instructions? (4) Was error committed in overruling the motion for

new trial? We will consider these questions in the above order.

Considering, then, the first, it is found to be based upon two paragraphs of the court's charge, and the refusal of the court to give two instructions requested by the defendant in the court below. It became the duty of the court to charge the jury as to the meaning of the defendant's covenant in the lease, "Party of the first part agrees to furnish water sufficient to irrigate land above described; said water to come from an artesian well located on land." The undisputed facts are that at the time the lease was entered into March 13, 1906, work was progressing on the well by the contractor Fisher. The crops were planted, as agreed upon, in April, May, and the last about the 1st of June. The oats came up and grew to be from 2 to 3 inches high, alfalfa 2 to 8 inches high, Indian corn 3 to 4 inches high. All of these crops dried up and died for want of water to irrigate them. The final flow of water was struck on the 9th day of June, and on the same day the contractor Fisher capped, put a chain and padlock on, and locked the well up so that Smith, the lessee, could not, and did not, get any water from the well. Smith was present when Fisher locked the well, and protested verbally, to the extent of saying that he would break the lock, but Fisher replied that he had to do so to get a settlement with Hicks, and, if he broke the lock, he would do it at his peril. There was some correspondence between Smith and Hicks, who had gone to Illinois some time before and was still there, in which Hicks told Smith to break the lock and take the water; Hicks claiming that he did not owe Fisher anything. Fisher gave Smith the key to unlock the well July 5th, and he then obtained water, and, while some of the maize he had planted then came up and continued to grow, it was too late to mature. The frost killed it, and it was worthless. The evidence tended to show that, although the crops were planted and became growing crops, they were total loss to the plaintiff, and that the failure of the defendant to furnish the water necessary as provided for in the lease was the cause of the loss. Upon this branch of the case the court charged the jury as follows: "The first question for you to determine upon going to your jury room is whether there has been a breach of the contract in the respect alleged; that is, whether or not the defendant failed to furnish water sufficient to irrigate the crops as provided by the lease here from the artesian well located upon the premises. The court instructs the jury that plaintiff, by the terms of the written lease submitted in evidence, was entitled

to one half of the hay and grain that might be produced on the west 80 acres, and to all of the hay and grain produced on the east 80 acres of the premises described in said lease and occupied by the plaintiff during the year 1906, and that, by the terms of said lease, the defendant was bound to furnish sufficient water for the irrigation of the crops planted by the plaintiff on said leased premises; and, if you find from the evidence, defendant failed to furnish water sufficient to irrigate the crops planted by the plaintiff, and that plaintiff lost his crops on said premises by reason of the failure of the defendant to furnish water sufficient for the irrigation thereof, then and in case you so find your finding should be for the plaintiff. The court instructs you that the term used in the lease, 'to furnish water sufficient to irrigate the land, said water to come from an artesian well located on the land,' means in law the duty was imposed by law on the defendant to deliver to the plaintiff, Smith, for the irrigation purposes of the premises occupied by him under the lease in evidence, a sufficient water source from which to irrigate said land. It does not impose the duty upon the defendant of being constantly in attendance for the purpose of seeing that this water was conveyed upon the premises, nor did it impose upon the defendant the duty of protecting the well from trespassers after the same had been completed and the water delivered to the plaintiff, because the duty rested upon the plaintiff to protect himself against trespasses, but the court charges you it was the duty of the defendant, Mr. Hicks, in the first instance under his contract to furnish water sufficient to irrigate the land, said water to come from an artesian well located on the land. It was his duty to deliver water from said well to the plaintiff, Smith, for the irrigation of the premises occupied by him under the lease in evidence. Now, the court charges you that if, in case you find that the defendant, within the terms of this instruction, did furnish water to this plaintiff sufficient for the irrigation, then and in that event the plaintiff cannot recover because the breach of the contract relied upon has not been established by the evidence. If, on the other hand, you find that the defendant failed to furnish water sufficient to irrigate the lands in question from the artesian well referred to, it would become your duty to assess the damages in favor of the plaintiff."

The argument of counsel for the defendant is that the water was furnished to the plaintiff, within the terms of the contract, by defendant, when the well was completed and capped by Alonzo Fisher, the contract-

or. They further say that, if the plaintiff permitted the contractor to do some unlawful act on his premises, it certainly would not be contended that Fisher, going beyond the scope of his employment and committing such unlawful act, could be the agent of the defendant or bind the defendant. If, after the well was brought in, Fisher had permitted the water to run for a time, and had Smith been permitted to use it, thus obtaining possession thereof, the argument of counsel would be quite forcible, as Fisher in seizing and locking up the well would have been a trespasser against whom Smith would doubtless have been charged with the duty of defending his possession thereof; but under the facts here it is different. The defendant had put Fisher in possession of the well under a contract to which Smith was not a party, and this contract gave Fisher a right to be upon the premises superior to that of Smith himself, as this right existed when the lease was executed. Fisher refused to allow the well to flow for the use of Smith, and immediately locked the well. Smith protested to the extent of threatening to break the lock and take the water, but without effect. The situation, therefore, on June 9th, was that to obtain the water Hicks had bound himself to furnish the plaintiff must do an act of violence, such as breaking the lock, thereby incurring personal damage and possibly criminal prosecution, or bring legal proceedings to obtain the use of the water he had a right to be peaceably furnished by the defendant. The word "furnished" as used in that lease is used in the sense of delivery; that is, to provide with the right of possession and use. The water was to be furnished for the use of the plaintiff in raising crops, and was not furnished, when, to obtain possession and use of it, the plaintiff would be required to incur personal danger or become involved in litigation. Smith was not the agent of Hicks in regard to the sinking or paying for this well. Fisher was in possession with a claim of right, and, in our opinion, the plaintiff was not required to do more than he did to obtain the water.

The views expressed as to the correctness of the court's charge in effect dispose of the ninth and tenth assignments of error. Those assignments are based upon the refusal of the court to give to the jury instructions Nos. 3 and 4, requested by counsel for the defendant. No. 3 is substantially that, if the jury believe that the well was brought in on June 9th, and that, after the well began to flow, Fisher locked it up, that Fisher's act was a trespass, and the plaintiff had a right to remove the lock and use the water. No. 4 is to the effect that

Smith, as lessee, had full right and authority to protect the place from all trespasses, and that, if Fisher locked up the well, it was the right and duty of Smith to protect himself against such trespass, and it was not the duty of the defendant, Hicks, to do so. These instructions are along the line of defendant's contention that the plaintiff was compelled to break the lock and take the water, and that the defendant was under no obligation to place the water at the disposal of the plaintiff as he had contracted to do.

In the case of *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487, the court says: While we are to determine the legal import of these provisions according to their own terms, it may be well to briefly recall certain well-settled rules in this branch of the law. One is that, if a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances, can equity interpose. *Dermott v. Jones* (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762; *Cutter v. Powell*, 6 T. R. 320, 2 Smith, Lead. Cas. 1. It was within the power of the defendant to provide for this emergency when he executed the lease, but, failing to do so, he must comply with its terms or be liable for the consequences. The case of *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. 366, is a case where Murphy was the owner of a ditch and obligated to supply water to the Rancho Paso de Bartolo tract of land, part of which was leased to the plaintiff. The lessee offered to pay the water rates and demanded the water, which was refused on the ground that the defendant had disposed of all the water to other parties. The court held the defendant liable, and affirmed the judgment for damages. In this case the lessee had a right to the water from the defendant's ditch on the land, but he did not take it by violent means. His right of action for damages was sustained; and we regard the law as laid in that case equally applicable to the present one. Entertaining the views we have above expressed, we think the court properly refused to give the jury these instructions.

Coming, now, to the main point in the case,—that of the measure of damages,—we find quite a conflict of authority upon that subject. An examination of the authorities also shows that the measure of damages as applied to the leased lands and crops depends to a considerable extent upon the con-

dition of the lands and crops at the time of the alleged damage: that is, whether the lands have been planted or contain growing or matured crops, thus necessitating a different measure of damage in accordance with the facts. This question of the damages was before this court in case of *Mogolon Gold & Copper Co. v. Stout* (N. M.) 91 Pac. 724; but the measure of damages adopted in that case is not controlling in this, inasmuch as the plaintiff Stout sued to recover damages for the destruction of trees and vines which pertain to the real estate, as well as for crops, and different measure of damages is found to exist as between real estate and growing crops. As to the measure of damages in this case, the court instructed the jury as follows: "The court charges you that the only damages claimed in this case are damages resulting from the loss of the crop in question. The court instructs you upon this point that the measure of damages in this case is the value of the crop at the time it was destroyed, if it was destroyed through the fault of the defendant, and the value at maturity and the labor necessary to put the crop in a condition for marketing are the *data* from which to estimate this value. The value of the crop at maturity would be its value on the farm where it is produced or at the closest market. If you find from the evidence that, by the negligence or failure of the defendant to furnish water sufficient to irrigate the crops of the plaintiff, said crops were wholly destroyed, or were destroyed to such an extent as to be worthless, then the plaintiff's damages, if any, would be the value of such crops on the market at maturity, less the cost of labor, care, and attention necessary to put the crops in condition for the closest market and upon such market. The court charges you that, in determining this branch of the case, it becomes material what the value of such crops would be at maturity, you have a right to take into consideration the results which came from crops situated upon similar land in that immediate vicinity under irrigation, and from this date you are permitted, and it is your duty, to proceed to the determination of what would have been the results in the crops upon the land in question. And from the value of the crops upon the adjacent lands or similar lands you may determine what would have been the value of these crops on the property in this section. You have a right to take into consideration from the experience of crops upon neighboring lands to what extent these crops, if they had been allowed water, would have arrived at maturity, and, if you find from the evidence that the crops upon adjoining lands to a considerable extent did

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not reach to maturity by reason of the character of the season or otherwise, these are circumstances you have a right to consider in determining to what extent, if any, the plaintiff had been damaged in this case." The defendant submitted and requested the court to give the following instruction as to the proper measure of damages: "If you find from the evidence in this case, under the instruction heretofore given you, that the plaintiff is entitled to recover anything from the defendant on account of defendant's failure to furnish water, as alleged in the complaint, then I instruct you that the amount which the plaintiff can recover is the difference between the rental value of the premises described in the complaint without water and the value of their rental value with water; and, if you should find for the plaintiff, you will assess his damages for the sum as the evidence may have shown the rental value of the land with water to be in excess of the rental value without water." Briefly stated, the court charged the jury that, "if they found from the evidence that the crops were wholly destroyed, or were destroyed to such an extent as to be worthless, then the plaintiff's damages, if any, would be the value of such crops on the market at maturity, less the cost of labor, care, and attention necessary to put the crops in condition for the closest market and upon such market," while the measure of damages contended for by counsel for the defendant is "that the amount which the plaintiff can recover is the difference between the rental value of the premises described in the complaint without water and the value of the rental value with water." There is no doubt that the measure of damages contended for by the defendant's counsel is supported by quite a number of the decided cases, and is, no doubt, the true measure of damages in some jurisdictions, especially in cases where, on account of failure to obtain water, crops were never planted.

Counsel for the defendant are to be commended for their diligence in referring the court to almost every case to be found in the books supporting, even remotely, their contention. Their main reliance, however, is upon two cases from the state of California, namely, *Crow v. San Joaquin & K. River Canal & Irrig. Co.* 130 Cal. 310, 62 Pac. 562, 1058; *Pallett v. Murphy*, supra. These cases hold that the true measure of damages under the facts is the difference between the rental value of the land with and without water for irrigation; but in those cases there were no growing crops on the land to be destroyed, as the crops were never planted owing to the failure to obtain water; and, further, the lessees were

evidently paying rent for the land, judging from the reference of the court, although not directly stated. The authorities show that a different measure of damages prevails where crops have been planted and destroyed in whole or in part. The case of *Teller v. Bay & River Dredging Co.* 151 Cal. 209, 12 L.R.A. (N.S.) 267, 90 Pac. 942, is a case on all fours with the present case, and was decided in May, 1907, being reported in the last volume of California Reports published up to this date. The lands were rented for a share of the crops, and the suit was brought by the tenant for the total destruction of growing crops. The syllabus, which is supported by the opinion of the court as to the measure of damages, is as follows: "In an action by a tenant entitled to three fourths of a crop, for the total destruction of the crop while growing, the court, in arriving at the value of the crop at the time of its destruction, found the probable yield of the crop and the market value thereof, deducting therefrom the cost of producing and marketing the crop, and deducting therefrom one fourth of such value as the landlord's share. Held the true measure of damages." As will be seen, the measure of damages in this case in practically the same as that given the jury on the charge of the court in this case. The court's attention was called to the fact that the measure of damages was different from that declared in 130 Cal. 310, 62 Pac. 562, 1058, but the court overruled a motion for a rehearing of the case. From this it appears that in California, in an action for the destruction of growing crops, the measure of damages is not that contended for by the defendant, but is that which the court submitted to the jury in this case. The court, in his charge, speaking of the measure of damages, said: "The court instructs you upon this point that the measure of damages in this case is the value of the crop at the time it was destroyed, if it was destroyed, through the fault of the defendant, and the value at maturity and the labor necessary to put the crop in condition for marketing are the data from which to establish this value." The court here lays down the general rule as to measure of damages in case of the destruction of growing crops, that it is "the value of crops at the time of their destruction." In an extensive note in support of the case of *Candler v. Washoe Lake Reservoir & G. C. Ditch Co.*, reported in 6 A. & E. Ann. Cas. p. 949, the author cites the states of Alabama, Arkansas, California, Colorado, Indiana, Michigan, Minnesota, Missouri, New York, Oregon, Utah, and Nevada as adhering to this measure of damages. As the court below in his charge pointed out, there is a marked difference

between the measure of damages and the mode from which the value at the date of destruction is to be ascertained.

In *Teller v. Bay River Dredging Co.* supra, the court discusses this matter, as follows: "This question thus turns upon the mode of ascertaining the value of the growing crop at the time of its destruction. The appellant contends that the rental value of the land, with the cost of labor and materials up to the time of the destruction expended in producing the crop, with legal interest at legal rate thereon, furnishes the correct method of arriving at this value. Such a method finds support from and has been adopted by the supreme court of South Carolina, in the case of *Horres v. Berkeley Chemical Co.* 57 S. C. 189, 52 L.R.A. 36, 35 S. E. 500. The objection to this method is that it is not a determination of value at all. It is but a determination of cost, which, while always an element of value, never furnishes its exact measure. By such a method of computation nothing is allowed for the fact that the crops, simply as growing crops, and before maturity, are necessarily an expense, and not a profit, to the owner. They are of value to him not as growing vegetation upon his land, but because in the course of nature they will come to fruition, and so have a market value, and thus will bring to him profit for his disbursement and expenses in their care and maintenance. Moreover, in taking cost as the measure of value, there is lost sight of the fact that by the destruction of the crop it cannot for that year at least be replaced, and that the very possibility, aside from the reasonable expectation, of future profit is forbidden to the agriculturist; and, finally, that cost cannot be the measure of the detriment under such circumstances ought to become patent from consideration of the fact that if you should, upon successive years, destroy the farmers' crops, and in full compensation therefor pay him only the money which he had expended in their growth up to the time of destruction, you could in a very short time starve to death every agricultural community in the United States." The court, after stating the above reasons for the adoption of the measure of damages in the court below, commended the rule contained in the following instruction: "In arriving at the value of the crops as they then stood (at the time of their destruction) and in the condition in which they were, the court has adopted as the best means available the probable yield of each tract multiplied by the market value of the crop, deducting therefrom the cost of producing and marketing said crops, and deducting therefrom the one fourth of such value as and for the landlord's share," etc.,

—while stated in different language, the measure of damages above stated is identical with that given the jury in the present case, except the reference to the landlord's share. As to that, however, the court below, in another part of his charge, informed the jury plainly that the landlord was to receive one half of the crops raised on the west 80 acres and the tenant all of the remaining crops, thus precluding the idea that the jury miscalculated the damages. The court states at the time of the trial that he would adopt and give the jury the measure of damages laid down by the Texas courts. On examination of the decided cases in that state, it is found that, up to and including 1894, the measure of damages for the destruction of growing crops was held to be "the difference between the value of the crops before and after injury, and is not ascertained by their probable worth at maturity less expenses in maturing." 6 A. & E. Ann. Cas. 950.

But, beginning with the case of *Gulf, C. & S. F. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336, and including decisions rendered in the year 1904, the Texas courts have adopted a different rule (which is the rule laid down by the court below in this case), that the probable yield of the crops, with a deduction for the expenses of fitting for market, should be taken as the measure of damages. *Gulf, C. & S. F. R. Co. v. McGowan*, supra; *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526; *Galveston, H. & S. A. R. Co. v. Parr*, 8 Tex. Civ. App. 280, 28 S. W. 264; *Chicago, R. I. & G. R. Co. v. Longbottom* (Tex. Civ. App.) 80 S. W. 542; *San Antonio & A. P. R. Co. v. Kiersey* (Tex. Civ. App.) 81 S. W. 1045; 6 A. & E. Ann. Cas. 950. In *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254, the measure of damages adopted was the market value of the crops over and above the cost of producing, harvesting, and marketing the same. In *Carron v. Wood*, 10 Mont. 500, 26 Pac. 388, the measure of damages was held to be the net profit which the owner would have realized from the crops planted on the land had the same been irrigated, after deducting the expense necessarily involved in raising and marketing them. In *Candler v. Washoe Lake Reservoir & G. C. Ditch Co.* 28 Nev. 151, 80 Pac. 751, 6 A. & E. Ann. Cas. 946, the measure of damages was held to be "the probable yield of the crops under proper cultivation, the value of the yield when matured and ready for market, and deducting therefrom the estimated expense of producing, harvesting, and marketing them, and also deducting the value of any portion of the crops that may have been saved." The case of *Northern Colorado Irrig. Co. v. Richards*, 22 Colo. 19 L.R.A. (N.S.)

450, 45 Pac. 423, was a case involving a partial destruction of growing crops, and the measure of damages adopted by the court was "the difference between the amount realized from the crops and the amount that would have been realized had water been furnished, less the cost of raising, harvesting, and marketing." All of these cases are from the irrigation states, and are quite recent cases, and, while the language is slightly different, the measure of damages in all is substantially the same as the Texas rule given for the guidance of the jury in this case. The criticism of this rule by the courts adopting a different one is the element of uncertainty therein; but it must be conceded that there is more or less uncertainty in whatever measure of damages may be adopted in such cases, but it is reasonable to believe that the courts in the irrigation states take the view that the element of uncertainty as to the maturing of the crops planted is reduced to a minimum where water is provided by irrigation, and this may serve to explain the adherence to the measure of damages above referred to. Certain it is that the measure of damages contended for by appellant finds little or no support as a proper measure of damages under the circumstances of this case outside of the two cases from California above referred to, and the later cases from the same court do not sustain those cases.

The court permitted some witnesses to testify, over the objection of defendant, as to the value of matured crops of like kind with those planted in the neighborhood where the crops were planted; and this action of the court is assigned as error. This character of evidence is competent in a case of this kind, and such testimony has been held admissible in several of the cases above referred to. In *Lester v. Highland Boy Gold Min. Co.* 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 A. & E. Ann. Cas. 761, the court says: "In cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land in dispute and on other similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops at the time of injury or destruction, the expense of cultivating, harvesting, and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops." At the close of the case for the plaintiff, counsel for the defendant demurred to the evidence, and at the close of the case defendant's counsel requested the court to instruct the

jury to find for the defendant, for want of evidence to support a verdict for the plaintiff. The demurrer was overruled, the instruction was refused, and the action of the court is assigned as error. As there was sufficient competent evidence to support the verdict rendered, no error was committed in the action taken, nor was there error committed by the court in overruling of the motion for a new trial under the view we take of this case.

There being no reversible error in the record, the judgment of the lower court will be affirmed, with costs. It is so ordered.

Mills, Ch. J., and Parker, Mann, and Abbott, JJ., concur. Pope, J., having tried the case below, did not participate in this decision.

NEW YORK COURT OF APPEALS.

WILLIAM BOSWELL, Appt.,

v.

SECURITY MUTUAL LIFE INSURANCE COMPANY, Reapt.

(193 N. Y. 465, 86 N. E. 532.)

Insurance — agent's contract — legislative interference.

1. A statute limiting the amounts which insurance companies may expend for securing new business does not apply to an existing long-term contract with a general agent, so as to reduce the amounts to be paid him under his contract.

Contract — obligation — impairment.

2. The legislature cannot require the reduction of the compensation of general insurance agents under existing contracts in view of the provision of the Federal Constitution forbidding the impairment of the obligation of contracts.

Case Note. — Effect of legislation limiting cost of new insurance on existing contracts with agents.

The foregoing opinion is valuable as being a final determination upon certain questions arising under the much-discussed new insurance laws of New York. It will be noticed that the court upholds the law so far as it restricts the cost of new insurance, but construes it so that it will not apply to any contracts made by the insurance company with its agents prior to the passage of the law. Were the act construed to apply to such contracts, it seems clear that it would be unconstitutional as impairing the obligation of contracts.

A search of the authorities reveals no other case passing upon this particular question.

One other case, viz., *Akers v. Mutual L. Ins. Co.* 59 Misc. 273, 112 N. Y. Supp. 254, construing portions of the same law, may 19 L.R.A. (N.S.)

Corporation — legislative power — agent's contract.

3. A general agent of an insurance company taking charge of its business in another state does not become such a factor in its domestic affairs, mechanism, internal organization or policy, that his contract for compensation is subject to reduction by the legislature under its reserve power over corporations.

Contract — insurance agent — legislative interference.

4. A provision in a contract by a general agent of an insurance company placed in charge of the business in another state, that the contract is subject to the condition that the company continue to be legally authorized to transact business in said district, does not make the provisions of the contract as to compensation subject to future legislation of the state where the company is incorporated.

Police power — insurance agents — compensation.

5. The police power of the state does not extend to reducing the compensation of general agents of insurance companies under existing contracts.

Same — new forms — commissions.

6. Changes in premium rates or clauses in present forms of life-insurance policies are not to be construed as new forms, within the meaning of a provision in an agent's contract that the commissions specified in the contract shall not apply to any new forms of policies hereafter adopted.

(December 8, 1908.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Third Department, denying him a portion of the amount claimed in a controversy submitted under the Code upon an agreed statement of facts to determine the compensation to which plaintiff was enti-

be cited in connection with the foregoing case. One section of the law provides that no life insurance corporation doing business in the state shall make any agreement with any of its officers, trustees, or salaried employees whereby it agrees that, for the services rendered or to be rendered thereafter by such official, trustee, or employee, he shall receive any salary, compensation, or emolument that will extend beyond a period of twelve months from the date of such agreement or contract; and the statute further provided for a penalty for any violation of the law. The court held that a contract made in violation of the law was *malum prohibitum*; but the prohibition in the statute was directed against the company only, and an agent could recover his salary under such a contract as upon an implied assumpsit. It will be noted that the decision in this case resembles *BOSWELL v. SECURITY MUT. L. INS. CO.* in that the agent in each case was protected in his contract.

titled under his contract with defendant. Modified.

The facts are stated in the opinion.

Mr. George M. Baker, for appellant:

The law as interpreted and applied by the court below is not within the scope of the "police power."

People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Jacobson v. Massachusetts, 197 U. S. 17, 49 L. ed. 648, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Re Viemeister, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 A. & E. Ann. Cas. 334; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; People ex rel. Nechameus v. Warden, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; Re Sugden, 174 N. Y. 87, 66 N. E. 655; People ex rel. Simpson v. Wells, 181 N. Y. 252, 73 N. E. 1025.

The legislature cannot deprive the corporation of its property, or annul its existing contracts with third persons.

Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 A. & E. Ann. Cas. 253; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Fletcher v. Peck, 6 Cranch, 87, 135, 3 L. ed. 162, 177; Mumma v. Potomac Co. 8 Pet. 281, 8 L. ed. 945; Tomlinson v. Jessup, 15 Wall. 454, 21 L. ed. 204; Myers v. Knickerbocker Trust Co. 1 L.R.A. (N.S.) 1171, 71 C. C. A. 199, 139 Fed. 111; McKee v. Chautauqua Assembly, 65 C. C. A. 8, 130 Fed. 536; New York v. Twenty-third Street R. Co. 113 N. Y. 311, 21 N. E. 60; Langdon v. New York, 93 N. Y. 129; People v. National Trust Co. 82 N. Y. 283; Lord v. Equitable Life Assur. Soc. 109 App. Div. 252, 96 N. Y. Supp. 10; Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140, 5 N. W. 275; Com. v. Essex Co. 13 Gray, 239.

The reserved power to repeal the charter of a corporation does not imply authority to reduce by law the compensation which the

corporation, by a valid contract which it had power to make, agreed to pay an employee.

Mumma v. Potomac Co. supra; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; People v. Globe Mut. L. Ins. Co. 91 N. Y. 174; People v. Formosa, 131 N. Y. 482, 27 Am. St. Rep. 612, 30 N. E. 492; Security Mut. L. Ins. Co. v. Prewitt, 200 U. S. 446, 50 L. ed. 545, 26 Sup. Ct. Rep. 314; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Crane v. Bennett, 177 N. Y. 112, 101 Am. St. Rep. 722, 69 N. E. 274.

Mr. Morgan J. O'Brien also for appellant.

Mr. Fredric William Jenkins, for respondent:

The act applies, and was intended to apply, to past as well as future commission contracts.

Hyatt v. Taylor, 42 N. Y. 260; 26 Am. & Eng. Enc. Law, 2d ed. p. 598.

The possibility of such legislation was within the contemplation of the parties.

2 Parsons, Contr. 9th ed. 728; Hicks v. British America Assur. Co. 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743; Davis v. Supreme Lodge, K. H. 165 N. Y. 159, 58 N. E. 891; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; People v. Tubbs, 37 N. Y. 586; Lorillard v. Clyde, 142 N. Y. 456, 24 L.R.A. 113, 37 N. E. 489; J. H. Labaree Co. v. Crossman, 100 App. Div. 499, 92 N. Y. Supp. 565; affirmed without opinion in 184 N. Y. 586, 77 N. E. 1189; Jones v. Judd, 4 N. Y. 412; Niblo v. Binasse, 1 Keyes, 476; People v. Bartlett, 3 Hill, 570; People v. Manning, 8 Cow. 297, 18 Am. Dec. 451; Kingsley v. Brooklyn, 78 N. Y. 200; Shellington v. Howland, 53 N. Y. 371; Heine v. Meyer, 61 N. Y. 171.

Edward T. Bartlett, J., delivered the opinion of the court:

One of the questions submitted was decided below in favor of the defendant, but the appellate division awarded the plaintiff judgment for \$132.06; the defendant conceding that amount was due him. The plaintiff insists this award of judgment was insufficient in amount for reasons hereinafter stated. It was stipulated that, if both the questions submitted were decided in favor of the plaintiff, he should have judgment for \$191.54. The case presented involves the construction of § 97 of the insurance law

(Laws 1906, chap. 326, p. 794, § 33), the material portions of which are as follows: "Sec. 97. Limitation of expenses.—No domestic life insurance corporation shall in any calendar year after the year 1906 expend, or become liable for, or permit any person, firm, or corporation to expend, on its behalf or under any agreement with it (1) for commissions on first year's premiums, (2) for compensation, not paid by commission, for services in obtaining new insurance exclusive of salaries paid in good faith for agency supervision either at the home office or at branch offices, (3) for medical examinations and inspections of proposed risks, and (4) for advances to agents, an amount exceeding in the aggregate the total loadings upon the premiums for the first year of insurance received in said calendar year (calculated on the basis of the American Experience Table of Mortality with interest at the rate of $3\frac{1}{2}$ per centum per annum and the present values of the assumed mortality gains for the first five years of insurance on the policies on which the first premium, or instalment thereof, has been received during said calendar year, as ascertained by the select and ultimate method of valuation as provided in § 84 of this chapter. . . . No such corporation, nor any person, firm, or corporation on its behalf or under any agreement with it, shall pay or allow to any agent, broker, or other person, firm, or corporation for procuring an application for life insurance, for collecting any premium thereon, or for any other service performed in connection therewith, any compensation other than that which has been determined in advance. . . . No such corporation, nor any person, firm, or corporation on its behalf or under any agreement with it, shall make any loan or advance to any person, firm, or corporation soliciting or undertaking to solicit applications for insurance without adequate collateral security; nor shall any such loan or advance be made upon the security of renewal commissions, or of other compensation earned or to be earned by the borrower, except advances against compensation for the first year of insurance."

The statement of facts contains, in part, the following: The plaintiff was, at the time of making the contract, and ever since has been, a citizen of the state of Ohio. The defendant is a domestic life insurance company with its principal place of business in the city of Binghamton, New York. The defendant is a mutual company on what is known as the "old line" basis. In the written agreement between the parties entered into on the 30th day of October, 1901, the defendant is party of the first part and the plaintiff party of the second part. The de-

fendant appointed the plaintiff its general agent in the states of Ohio, West Virginia, Tennessee, and Kentucky, for the purpose of procuring applications for insurance on the lives of individuals satisfactory to the defendant. It is provided that the contract is subject to the condition that the company continues to be legally authorized to carry on business in the territory named, and, if its authority is terminated in any section thereof, the contract is to be null and void so far as new business in such section is concerned. The plaintiff is obligated to devote his entire time and best energies to the service of the company; to have the exclusive right to appoint agents within said district, for whose fidelity and honesty he is to be responsible to the company. In consideration of the performance of this contract by the plaintiff, the company is to pay a brokerage commission on the cash premiums as collected for the first year, as follows: On certain participating policies from 70 per cent to 20 per cent; on other non-participating policies from 60 per cent to 30 per cent. There are also provisions for overwriting brokerage and other commissions and various regulations unnecessary to state in detail. The plaintiff is to give a bond with sureties for the faithful performance of the contract; also is to pay all the expenses of building up and conducting the business, subject to minor exceptions not now important. The contract further provides as follows: "During the continuance of this contract, said party of the second part shall not act as agent or broker for any other life insurance company or agent, except to place business which this company may have declined. . . . This contract is for the term of twenty years from its date, subject to its terms and conditions." It also appears in the statement of facts that, at the time the contract was entered into, the defendant had comparatively little business in force in the four states mentioned; that, upon the execution of the contract, the plaintiff entered upon the performance thereof and continues up to the present time; that he established agencies and rented offices for the conduct of defendant's business in numerous cities and towns in said territory, paying the resident agents and office rents; that he employed superintendents and instructors, paying their salaries and traveling expenses; that he advertised, at his own expense, the business of the defendant in various newspapers in the states named. In brief, it appears that the plaintiff has performed the contract on his part, and, as a result of his efforts and the expenditure of his money, he has built up for the defendant business ag-

gregating about \$5,000,000 now in force in said states.

There are two questions presented for our determination. The first is whether the plaintiff's contract with the defendant as to the rate of commissions which have been in existence for nearly five years, and having about fourteen years to run, at the time § 97 of the insurance law was enacted, in 1906, is affected by said legislation to the extent of changing its provisions as to the amount of plaintiff's commissions and materially reducing them. It is important to keep in mind the precise relations of the parties. The defendant company at the time the contract was executed, October 30, 1901, had comparatively little business in force in the states of Ohio, West Virginia, Tennessee, and Kentucky. The plaintiff, who was a resident of the city of Cincinnati, Ohio, covenanted to devote his entire time and energies to building up a business for the defendant in the states named during the twenty years the contract was to run. He received no salary. He paid substantially the expense of the undertaking, and it is obvious that the long term of the contract was due to the fact that its initial years would be unproductive to a great extent; that the building up of a paying business was a work of time, hard labor, and large expenditure. It appears that, after the lapse of some five years, the plaintiff had secured the defendant business aggregating about \$5,000,000 now in force in the states mentioned. The remaining fourteen years or more of the contract term evidently covered the period when plaintiff might well expect the reward for past labor and expenditure. The plaintiff and defendant at the outset had agreed upon the commissions to be allowed the former, which were, by legal construction, to be paid during the life of the contract, unless modified by the parties, or interrupted as to its future performance by the decrease or incapacity of the plaintiff, or the corporate death of the defendant. We thus have a contract in full force and effect satisfactory to the parties, and the sole question presented on this branch of the case is whether that has been abrogated or modified by the subsequent act of the legislature of the state of New York. We are of opinion that § 97 of the insurance law should not be construed as retroactive, and therefore it does not apply to the contract before us. If construed otherwise, it would contravene the provision of the Federal Constitution that no state shall pass any law impairing the obligation of contracts. Article 1, § 10. The contract provides for an ordinary business arrangement between a citizen of Ohio and a private corporation of this state. It does not

offend against public policy, and cannot be interfered with by the general or reverse powers of the legislature, or the exercise of the police power. At this late day it is unnecessary to quote largely from the authorities bearing upon the question when the obligation of a contract is impaired. In *Sturges v. Crowninshield*, 4 Wheat. 122, 197, 4 L. ed. 529, 549, Chief Justice Marshall said: "In discussing the question whether a state is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use. What is the obligation of a contract, and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. . . . Any law which releases a part of this obligation must, in the literal sense of the word, impair it." Applying this language to the contract before us, we have precisely the situation pointed out by the learned chief justice in his illustration of what constitutes the impairment of the obligation of a contract. In the present case definite compensation of the plaintiff by way of commissions was fixed by the contract for twenty years, subject to minor exceptions.

In 2 Story on the Constitution (§ 1385), the learned author lays down the rule as follows: "It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulations in the contract necessarily impairs it." See also *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48; *Ogden v. Saunders*, 12 Wheat. 256, 6 L. ed. 620. In *New York v. Twenty-third Street R. Co.* 113 N. Y. 311, 317, 21 N. E. 60, 62, Earl, J., states: "It is difficult to put precise limits upon the power of the legislature thus reserved over corporations created by it or under its authority. Under its reserved power it cannot deprive a corporation of its property, or interfere with or annul its contracts with third persons." *People v. O'Brien*, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692, deals with the legal situation presented when the Broadway Railway Company suffered legal death. It was held that its mortgages and valid contracts survived its dissolution. See also *People v. National Trust Co.* 82 N. Y. 283. In the case before us the corporation has not suffered legal death, but is a going company clothed with all its charter rights.

The question is thus presented whether the obligation of the contract of the plaintiff

with the defendant company can be impaired by the act of the legislature of the state of New York long after the contract went into effect. The counsel seeking to sustain this legislation cites two cases, *viz.*, *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, and *People v. Formosa*, 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492. The case of the *Globe Mutual Life Insurance Company*, held that, where a life insurance company had entered into a contract with its general agent for his services for a specified term, and, before any breach of the contract on its part, it was deprived of corporate life and its assets turned over to a receiver, the agent had no valid claim upon the fund in the receiver's hands for damages for an alleged breach of the contract because of the discontinuance of his employment. The case of *People v. Formosa*, *supra*, held that a foreign corporation seeking to do business in this state must obey its laws and conform to its public policy. And it was accordingly held that the provision of law in relation to life insurance companies doing business in this state which forbids them or their agents from paying or allowing any rebates of premiums as an inducement to any person to insure, and declaring any person violating the prohibition guilty of a misdemeanor, was constitutional; and the fact that a person indicted and found guilty of a violation of the act was acting in the transaction as an agent of a foreign corporation did not affect his liability.

Obviously these cases, having in mind what was actually decided therein, have no bearing on the question before us. The appellate division [119 App. Div. 728, 104 N. Y. Supp. 133], in discussing when the obligation of the contract is impaired, states: "The rule doubtless is, as contended by plaintiff, that the legislature, under this reserved power granted to it by the Constitution, cannot interfere with or annul a contract between a corporation and other parties." This concession is in accordance with the unbroken current of authority, either in the case of a contract terminated by the legal death of a corporation, where the agent may resort to the receiver for the collection of any amount due him at that time, or the case of an agent of a going corporation, where contract obligations for his benefit cannot be impaired by subsequent legislation. The ground upon which the court below rested its decision is best stated in its own language as follows: "Now, the plaintiff, when he became the general agent of the defendant, under his contract, became vitally and essentially connected with its 'domestic affairs.' He became an important part of its mechanism. The machinery of life insurance has largely been conducted

through the instrumentality of agents. Such corporations have, through their agents, promulgated, performed, and perpetuated their policies, plans, and purposes, and through them the wrongs and abuses, if any, of life insurance have sometimes been inflicted on a confiding public. When plaintiff made his contract, he knew that he was to become an essential factor in the domestic affairs and internal organism of the defendant, and that such domestic affairs and internal organism were under the reserve power of the Constitution of this state, subject to legislative change. He became identified with the operation, development, and business life of the defendant and one of the organs of its corporate existence." The learned court then cites *People v. Globe Mut. L. Ins. Co.* and *People v. Formosa*, *supra*. Referring to the *Formosa* Case, the court said: "What was said in the above case is doubly emphasized when we recall that the act of 1906 was enacted in response to an aroused and urgent public sentiment as the result of grave evils and abuses disclosed by the processes of a legislative investigation. And, when it is also recalled that among such abuses were the methods employed by certain agents, the claim of plaintiff that his contract was not within the purview of the statute would seem to be completely refuted." We are unable to concur in this reasoning of the court below. The plaintiff, in executing his contract with the defendant, became its general agent in the foreign territory named, subject to the provisions thereof, nothing more nor less; and no inference is to be drawn that he became a factor in the domestic affairs, mechanism, internal organism, or policy of the defendant. The opinion of the court below then continues: "Were there otherwise any doubt that the legislation in question was within the contemplation of the parties to the contract, such doubt would be dissipated by reference to the following provision in such contract: 'This contract is made subject to the condition that the said company is and shall continue to be legally authorized to transact business in said district. Should authority to transact business in any section thereof be at any time terminated, this contract shall become null and void so far as new business in such section is concerned.' True, this provision in terms only relates to a total cessation of business. But the parties clearly had in mind the possibility that the legislature of this state might interdict the defendant from all business within the states, comprising the plaintiff's territory. They were also bound to know, what no one disputes, that said legislature might put the corporation to death. Knowing all this, it was a psychological impossi-

bility for the parties not to include within their mental grasp the idea that the corporation might be limited or restricted in its operation in such a way as to affect the plaintiff's contract."

The court below in quoting from the contract, as above, is in error as to its terms only relating to a total cessation of business. The quotation is very clear when the other provisions of the contract are recalled. The defendant was entering upon an agreement with the plaintiff in regard to territory covering the four states named, and the first provision was that the contract was subject to the condition that the defendant should continue to be legally authorized to transact business in the district covered by these states; and, furthermore, it was provided that, should authority to transact business in any section thereof—that is, in any of the territory embraced by the four states—be withdrawn, the contract should become null and void so far as new business in such section is concerned. We cannot concur with the reasoning that this very proper provision in the contract relating to the four states named leads to the inference that the parties clearly had in mind the possibility that the legislature of the state of New York might interdict the defendant from all business within the states comprising the plaintiff's territory. It is doubtless true that the defendant, as a domestic corporation of this state, was bound to know the law that, if it violated the statutes of this state to such an extent as to merit corporate death, the legislature had full power and authority to inflict upon it that penalty. The result of such legislative action would terminate all contracts of agency which were, of course, dependent upon the continued life of both parties. We agree with the contention of plaintiff's counsel that the police power of the state cannot justify the reduction by law of the compensation which the defendant agreed in its contract with the plaintiff to pay him. We see nothing in the provisions of the contract, or in the surrounding circumstances of this case, that disclose a situation which warrants an appeal to the police power. While it has been frequently said that the police power cannot be defined, and it is not desirable to have it limited by a hard and fast definition, yet all the cases hold that it must be invoked in order to protect the lives, health, morals, comfort, and general welfare of the public. There is nothing in the facts of this case that brings it within any of the accepted definitions of the police power.

Referring to the nature of this power, Judge Peckham, in *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L.R.A. 710, 19 L.R.A. (N.S.)

45 Am. St. Rep. 579, 39 N. E. 833, 835, said: "It has frequently been said that it is difficult to give any exact definition which shall properly limit and describe such power. It must be exercised subject to the provisions of both the Federal and state Constitutions, and the law passed in the exercise of such power must tend in a degree that is perceptible and clear towards the preservation of the lives, the health, the morals, or the welfare of the community, as those words have been used and construed in many cases heretofore decided." This general subject was considered in *Lawton v. Steele*, 152 U. S. 133, at page 137, 38 L. ed. 385, at page 388, 14 Sup. Ct. Rep. 499, at page, 501 the court said: "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts." See also *Wright v. Hart*, 182 N. Y. 330, 333, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263. The court below, at the close of its opinion, states that, "having reached the conclusion that the statute limits the amount which the defendant may lawfully pay the plaintiff, it is unnecessary to consider the further question raised by defendant as to the difference in the forms of policies."

We will now consider the second question, as to whether new forms of policies have been adopted upon which plaintiff is to recover changed commissions under the contract, subdivision "sixteenth," which reads as follows: "The commissions hereinbefore specified shall not apply to any new forms of policies hereafter adopted by the said party of the first part, but shall apply only to the policies now in use by said company, but changes in premium rates, or clauses in present forms of policies, shall not be construed as a new form of policy. It, however, is understood and agreed that the said second party shall be allowed and paid on any such new policies as large a brokerage and renewal commission as is paid to or allowed any other manager or agent of the company." The discussion of this question in the briefs and arguments of counsel has taken a wide range and considered many propositions that are irrelevant, in view of the fact that in deciding the first question we have reached the conclusion that § 97 of the insurance law (Laws 1906, chap. 326) does not apply to the contract between the plaintiff and defendant, as it is not retroactive. The sixteenth paragraph of the contract, already quoted, provides in part that "the commissions hereinbefore specified shall

not apply to any new forms of policies hereafter adopted by the said party of the first part [the defendant], but shall apply only to the policies now in use by said company; but changes in premium rates, or clauses in present forms of policies, shall not be construed as a new form of policy." In subdivision "fifth" of the statement of facts it is agreed that "the words 'form of policy,' as used in the contract, have, prior to January 1, 1907, been interpreted by the parties as equivalent to 'plan of policy;' the whole life being considered as one 'form' or 'plan,' the limited payment as another 'form' or 'plan,' the endowment as another 'form' or 'plan,' etc." It is agreed that the policies on which the plaintiff seeks to recover his commissions (subdivision "ninth" in the statement of facts) are exhibits M and N, being the New York Standard Life Insurance policies. It is also agreed in said subdivision that, since January 1, 1907, the plaintiff has from time to time procured applications in his said territory for insurance which have been approved by the defendant company, and on which participating policies have been issued by the defendant, and for which the defendant has been paid in cash the first year's premiums thereon. It is further agreed that exhibit N is the twenty-year endowment; exhibit M embraces two "forms" or "plans" of policy, *viz.*, 20-payment life and 10-payment life.

The defendant asks the court to hold that the foregoing policies are all new forms of policies under the contract, and, as such, are subject only to commissions as therein provided. Referring to the statement of facts, subdivision "ninth," it is agreed that since January 1, 1907, the defendant has received on policies procured by plaintiff in cash the first year's premiums on twenty-year endowment policies, exhibit N; 20-payment life policies, exhibit M; and 10-payment life policies, exhibit M. It appears these "forms" or "plans" of policies were not new. The 20-year endowment policy issued after January 1, 1907, is within the meaning of the contract the same "form" or "plan" as the twenty-year endowment policy issued prior to January 1, 1907. The same is true of the 20-payment life and the 10-payment life. In other words, changes in premium rates or clauses in present forms of policies are not to be construed as a new form. The various names applied to policies indicate the "form" or "plan" under which they are to be operated. We have in the statement of facts two illustrations of the rule above stated. It is agreed that, some years after the making of the contract and prior to January 1, 1907, the defendant issued a "new form of policy" called a "Coupon Bond," which both parties agreed was a new form

within the meaning of the plaintiff's contract, and the defendant fixed the commissions thereon accordingly. It is also agreed that since January 1, 1907, the defendant has adopted for use outside of the state of New York a new form of policy known as the "five-year convertible term." We have, therefore, reached the conclusion that the policies involved in this submitted case are not new in "form" or "plan" as contended by the defendant. It follows that, under the stipulation of the parties, the plaintiff is entitled to judgment for \$191.54, without costs.

The judgment of the Appellate Division should be modified by providing that the plaintiff should have final judgment for \$191.54, without costs.

Cullen, Ch. J., and Gray, Haight, Werner, Willard Bartlett, and Hiscock, JJ. concur.

NORTH DAKOTA SUPREME COURT.

WILLIAM A. DUNCAN, Resp't.,

v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

(— N. D. —, 118 N. W. 826.)

Carriers — freight — exemptions from liability.

1. An inland common carrier is an insurer against loss of property consigned to it for carriage between its receipt at shipping point and arrival at destination when unaccompanied by the consignor, except from loss occasioned: (1) By an inherent defect, vice, or weakness, or spontaneous action of the property itself; (2) the act of a public enemy of the United States or of

Headnotes by SPALDING, J.

Case Note. — Effect of shipper's negligence in loading car, or as to condition of car, upon the carrier's common-law liability.

It is the purpose of this note to show the effect upon the carrier's common-law liability to furnish a suitable car and properly load the goods, of some negligence upon the part of the shipper in loading the goods, or some act upon his part in permitting the goods to be negligently loaded, or to be loaded in a defective car, which act upon his part might be deemed contributory negligence so as to release the carrier from his common-law liability. Cases which treat merely of the right of the carrier to limit, by contract or otherwise, his common-law liability to furnish a suitable car, have been excluded, as have also cases which discuss the abstract question of the duty of the shipper to inspect the car. Upon the latter question, see

this state; (3) the act of the law; (4) any irresistible superhuman cause; (5) and it may also be assumed that certain acts of the consignor may exempt the carrier from liability.

Same — injury — evidence.

2. On proof of delivery of the property to the carrier in sound condition, and of its redelivery at the end of the route in damaged condition, or a failure to redeliver it, a sufficient case is made to sustain a recovery for the damages or loss by the shipper.

Same — liability — burden of proof.

3. The burden of proof is upon the carrier to exempt himself from liability in case of loss or damage by showing that it was occasioned by one or more of the exceptions mentioned under paragraph 1.

case note to Cleveland, C. C. & St. L. R. Co. v. Louisville Tin & Stove Co. 17 L.R.A. (N.S.) 1034.

Upon the question of duty of carrier to furnish car adapted to the subject of the shipment, see case note to Forester v. Southern R. Co. 18 L.R.A. (N.S.) 508.

Numerous factors enter into the decisions, and it is frequently impossible to determine what the rulings have been under some different state of facts. Some of these different elements are shown in Leonard v. Whitcomb, 95 Wis. 646, 70 N. W. 817, where, after a review of numerous decisions upon the question, the court declared the following principles: "It is the duty of a railroad company: as a common carrier of live stock, to furnish suitable cars therefor, on reasonable notice so to do from a person desiring to transport such stock over its road: that this duty is absolute, and a contract exempting it from liability for damages arising from unsuitableness of cars so furnished, attributable to a failure on its part to exercise ordinary care, is void; that, if a car be furnished having defects rendering it unsuitable, which defects are not obvious or such as may be presumed that an inspection by an ordinary person will bring to his knowledge, and yet are such that a reasonably careful inspection by a person experienced in such business will lead to their discovery, an inspection and acceptance of the car by the shipper will not save the carrier harmless from damages caused by such defects, unless it be shown that they were actually pointed out to the shipper, and that he accepted the car with full knowledge of their existence."

Many of the cases hold that the mere knowledge on the part of the shipper that the car was defective would not exempt the carrier from liability for losses due to the defective condition of the car: but these cases do not pass upon the question of what the effect of actual negligence upon the part of the shipper would be.

Thus, in Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827, it was held that it was the duty of the carrier to furnish suitable vehicles for transportation; and, if he furnished unfit or unsafe vehicles, 19 L.R.A. (N.S.)

Same — loss of freight — evidence.

4. The evidence in this case shows that a quantity of flax was loaded by the plaintiff and his servants into a car furnished by the defendant for such purpose, that inside doors were furnished by the defendant carrier, and used and fastened with appliances provided for that purpose by defendant, in the usual manner, and that the loss complained of occurred while such flax was en route to Duluth, some or all of it by reason of a small inside door used for retaining the flax in the car, hung on hinges at the top, coming open.

The defendant failed to show that the door opened by failure on the part of plaintiff to properly fasten it. It was closed by defendant's conductor at the station where the leak was discovered, but the inspector at Duluth reported a leak in the same

he was not exempted from responsibility by the fact that the shipper knew them to be defective, and used them, even though there had been an agreement that it should not be liable therefor. This was an appeal from the supreme court of Massachusetts (102 Mass. 557), where the decision upon this point was to the contrary.

The principles of the Pratt Case have been followed by a number of other cases, some of which have cited it. St. Louis, I. M. & S. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802; Union P. R. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986; Jones v. St. Louis & S. F. R. Co. 115 Mo. App. 232, 91 S. W. 158; Potts v. Wabash, St. L. & P. R. Co. 17 Mo. App. 394; Mason v. Missouri P. R. Co. 25 Mo. App. 473; Hunt v. Nutt (Tex. Civ. App.) 27 S. W. 1031; Gulf, C. & S. F. R. Co. v. Wilhelm, 3 Tex. App. Civ. Cas. (Willson) 558.

And in Peters v. New Orleans, J. & G. N. R. Co. 16 La. Ann. 222, 79 Am. Dec. 578, it was held that a carrier was bound to furnish a suitable and safe car, and was responsible for any loss arising from neglect of duty in this particular, and the mere presence of the owner and his knowledge of the defects did not lessen this responsibility, for he had no power over the train or right to make any change in the disposition of the cars, which were necessarily under the control of the defendant's agents.

So, in Forrester v. Southern R. Co. 147 N. C. 553, 18 L.R.A. (N.S.) 505, 61 S. E. 524, it was held that the fact that a shipper knew that the car to be used was unsuitable for the goods to be shipped was not sufficient to free the carrier from liability for losses due to furnishing such a car.

And in Welsh v. Pittsburg, Ft. W. & C. R. Co. 10 Ohio St. 65, 75 Am. Dec. 490, it was held that a carrier was liable for losses due to a defective car, notwithstanding the fact that it had stipulated against such losses, and the shipper had accepted the car with knowledge of the defects. And to the same effect was the decision in Gregory v. West Midland R. Co. 2 Hurlst. & C. 944.

In Paddock v. Missouri P. R. Co. 60 Mo. App. 328, the same general rule was announced; but, on appeal, in 155 Mo. 524, 56

place on the arrival of the car at its destination. Held, that the evidence fails to bring the defendant within the exceptions to the law holding it liable.

Same — liability.

5. The shipper inserted in the car inside doors for retaining the flax, such doors being furnished by the carrier, and supplied with a fastening device. The evidence shows that these doors were properly fastened with the device so furnished, by the shipper and assistants, all of whom were familiar with the use of such doors and devices. The car, after being so loaded with these doors inserted, was receipted for, and the outside doors closed and sealed by the defendant's agent, who had full opportunity to observe, while closing the outside doors, whether the inside doors were properly fastened. Held that, if they were not properly fastened, in view of these facts, the carrier is not relieved from liability for loss occasioned thereby.

Same — loss of freight — evidence — jury — directed verdict.

6. Plaintiff showed by himself and other competent witnesses that the inside doors

referred to were properly closed and fastened with the device furnished by defendant for that purpose.

The only evidence claimed to create a conflict arises from the fact that, a few miles after the car started on its journey, one of the inside doors referred to came open, and a quantity of flax with which the car was loaded ran out through the opening so made. Held, that such door opening may as readily be attributed to other causes as to the failure of the shipper to properly fasten it; and, had the question been submitted to a jury, a verdict for defendant, based upon the fact that such door came open in transit, could only have been arrived at by inference, and would have been mere guesswork on the part of the jury under the facts of this case, and that the opening of this door did not create a sufficient conflict in the evidence to constitute error on the part of the trial court in directing a verdict for plaintiff.

Directed verdict — motion for — conclusiveness — appeal.

7. On submission of all their evidence, both parties made motions for a directed

S. W. 453, the judgment was reversed; although this particular question was discussed, it was not determined, and the decision rests upon another ground.

In the following cases it was held that the act indicated would not prevent a recovery:

In *Trexler v. Baltimore & O. R. Co.* 28 Pa. Super. Ct. 198, it was held that the act of the plaintiff in opening the door of a car for ventilation would not prevent a recovery for loss which was caused by the plaintiff's negligence, but which would not have occurred but for the open door, where the defendant's servants knew that the door was open, and acquiesced therein.

And in *Wallingford v. Columbia & G. R. Co.* 26 S. C. 258, 2 S. E. 19, it was held that the fact that the plaintiff accepted the cars furnished would not relieve the carrier from the duty of furnishing suitable cars.

So in *Texas & P. R. Co. v. Townsend* (Tex. Civ. App.) 106 S. W. 760, it was held that the plaintiff was not estopped from claiming damages by accepting a car with a defective roof, and refusing to allow the carrier, as it offered to do, to substitute a car with a good roof for the one in question, when it was about loaded, and before the journey began, where he had not absolutely refused to allow the substitution, but only had insisted that the roof of the car which he had been at great expense and trouble in loading, in ignorance of its defective condition, be repaired, which course was adopted by the carrier, and its agent had negligently made the repairs.

In *St. Louis & S. F. R. Co. v. Brosius* (Tex. Civ. App.) 105 S. W. 1131, it was held that a failure to furnish a safe car wherein to transport stock would be negligence on the part of the carrier, and such negligence, if any, would not be waived by the acts of the plaintiff in an attempt to remedy the defects of the car and to make it safer.

In *Cincinnati, N. O. & T. P. R. Co. v. Fairbanks*, 33 C. C. A. 611, 62 U. S. App. 231, 90 Fed. 467, this question was not strictly involved, but the court said that it would not be conceded that the carrier could, by devolving upon the shipper the duty of selecting or inspecting the cars in which his goods are to be shipped, avoid the duty of furnishing fit and suitable cars for the carriage of goods.

Where a shipper himself assumes the duty of selecting the car, or of directing the loading, the carrier generally is not held liable for losses due to the kind of car, or its condition, or to negligence in the loading.

Thus, in *Frohlich v. Pennsylvania Co.* 138 Mich. 116, 110 Am. St. Rep. 310, 101 N. W. 223, 4 A. & E. Ann. Cas. 1140, it was held that if the shipper selected a car and loaded it with a commodity for which it was not suitable, and damage to the goods resulted, the carrier would not be liable on the ground of negligently furnishing an unsuitable car.

So, in *Illinois C. R. Co. v. Hall*, 58 Ill. 409, it was held that the carrier was not liable for injuries received because of the defective condition of cars belonging to another company, but selected by the plaintiff for the shipment in question.

And in *Harris v. Northern Indiana R. Co.* 20 N. Y. 232, it was held that where a shipper selects his cars for shipment, the carrier will be responsible for such injuries only as are caused by defects not palpable or not pointed out to him.

Where a shipper had a chance to hold his stock for another day or ship them in a box car, and elected to do the latter, it was held, in *Huston Bros. v. Wabash R. Co.* 63 Mo. App. 671, that the carrier was not liable for losses due to the fact that the box car was unsuitable.

So, where a shipper personally selected the vehicles by which certain perishable prop-

verdict. Neither party requested the submission of any facts to the jury. Held, that they thereby waived any right which they might have otherwise had to an undirected verdict, and are estopped from assigning error for not submitting the facts to the jury.

(November 27, 1908.)

APPEAL by defendant from an order of the District Court for Rolette County denying a motion for a new trial after judgment for plaintiff in an action brought to recover for the loss of a shipment of flax alleged to have been occasioned by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Murphy & Duggan, for appellant:

A carrier of freight is not liable for loss occasioned by the act of the shipper.

Hutchinson, Carr. §§ 265, 328; Van Zile, Carr. § 478; Texas & P. R. Co. v. Edins, 36 Tex. Civ. App. 639, 83 S. W. 253; Goodman v. Oregon R. & Nav. Co. 22 Or. 41. 28 Pac.

erty was to be transported, it was held, in Carr v. Schafer, 15 Colo. 48, 24 Pac. 873, that evidence tending to show that some of the vehicles were unsuitable was incompetent to show negligence on the part of the carrier.

Where, by the terms of the contract, the plaintiffs undertook to furnish and load the cars for the carriage of their animals, and reported themselves as competent to do the entire work of loading, it was held, in Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961, that if the plaintiffs fulfilled this work in a careless manner, and caused the injury complained of, the defendant would not be liable, although there was a general duty resting upon the defendant or its agents to examine the trains under their control and see that they were properly loaded.

And in Ficklin v. Wabash R. Co. 115 Mo. App. 633, 92 S. W. 347, it was held that, conceding that the defendant was negligent in failing to furnish the kind of cars ordered, the negligence of the plaintiff in overloading the car would be deemed to be the proximate cause of an injury to the sheep; the court said that where experienced shippers knowingly and voluntarily took the risk of overloading the cars, they could not complain of the result reasonably to be anticipated.

In Ft. Worth & D. C. R. Co. v. Word (Tex. Civ. App.) 32 S. W. 14, it was held that if the shipper overcrowded the cattle in a car upon the assurance of the defendant that the car was larger than it was, the company would be liable for damages resulting therefrom; but if, with full knowledge of the size of the car, it was overcrowded by the direction and under the supervision of the plaintiff, there could be no recovery.

In the following cases it was held the acts of the shipper indicated would prevent a recovery:
19 L.R.A. (N.S.)

894; Mitchell v. Champaign County, 5 Ohio N. P. 158; Camp v. Rogers, 44 Conn. 291.

The legislature cannot create absolute liability on the part of a railroad company in the absence of a statutory duty, and irrespective of negligence.

Catril v. Union P. R. Co. 2 Idaho, 576, 21 Pac. 416; Oregon R. & Nav. Co. v. Smalley, 1 Wash. 206, 23 Pac. 1008; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 27 L.R.A. 263, 46 Am. St. Rep. 92, 16 So. 602; Wadsworth v. Union P. R. Co. 18 Colo. 600, 23 L.R.A. 812, 36 Am. St. Rep. 309, 33 Pac. 515; Cairo & F. R. Co. v. Parks, 32 Ark. 131; Zeigler v. South & North Ala. R. Co. 58 Ala. 595; Jensen v. Union P. R. Co. 6 Utah, 253, 4 L.R.A. 724, 21 Pac. 904; Schenck v. Union P. R. Co. 5 Wyo. 430, 40 Pac. 840; South & North Ala. R. Co. v. Morris, 65 Ala. 193; Cooley, Const. Lim. 5th ed. pp. 430, 436; Bielenberg v. Montana Union R. Co. 8 Mont. 271, 2 L.R.A. 813, 20 Pac. 314; Ohio & M. R. Co. v. Lackey, 78 Ill. 55; Mathews v. St. Louis & S. F. R. Co. 121 Mo. 298, 25 L.R.A. 161, 24 S. W. 591.

Thus, in Roderick v. Baltimore & O. R. Co. 7 W. Va. 45, it was held that a common carrier would not be held liable for injury to a horse, occasioned by the improper interference of the plaintiff with the management of the car.

And in Lee v. Raleigh & G. R. Co. 72 N. C. 236, it was held that a carrier is not liable for the loss of some horses which escaped through an unlocked door of a horse car, where the plaintiff told the carrier not to lock the door, as someone would accompany the stock.

So, in Hutchinson v. Chicago, St. P. M. & O. R. Co. 37 Minn. 524, 35 N. W. 433, it was held that the plaintiff's negligence in leaving open a car window through which his horse jumped and was injured, would prevent a recovery, even though the defendant was negligent in starting the train while the window was open. And the same general principle was followed in Newby v. Chicago, R. I. & P. R. Co. 19 Mo. App. 391.

Where the plaintiff's agent noticed the overcrowding of his hogs and the want of ventilation in the car, but did not mention the fact to the defendant's agents, and obtained a pass, so as to travel upon the same train, and, upon arriving at an intermediate station, did not insist upon having the cars detached so as to unload the hogs, it was held, in Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162, that the plaintiff could not maintain an action against the carrier for damages due to the overcrowding.

And in Betts v. Farmers' Loan & T. Co. 21 Wis. 81, 91 Am. Dec. 460, it was held that no recovery could be had because of the unsafe condition of a car door where the agent of the plaintiff knew of the defective condition, and failed to notify the defendant's agents thereof. To the same effect

taneous action of the property itself; (2) the act of the public enemy of the United States or of this state; (3) the act of the law; or (4) any irresistible superhuman cause." This section is, in the main, an enactment of the common law making common carriers insurers of property intrusted to them for transportation. In so far as it varies from the common law it does so in favor of the carrier. Many common-law authorities include the act of the shipper as among the exceptions relieving the carrier from liability, but even such authorities do not hold that all acts of every nature done by the shipper relieve the carrier. The liability of the carrier begins when he receives and accepts the goods, and continues until after their arrival at destination. The only defenses which the carrier can interpose, where property is lost in transit, are those named as exceptions relieving him from his liability as an insurer, except in cases where there is a special contract. This court cannot read into the statute an exception which existed at common law. *State v. Smith*, 2 N. D. 515, 52 N. W. 320. It will be presumed, by reason of the omission of the act of the shipper from the exceptions, that the legislature intended to still hold the carrier liable as against such actions as the principles of justice and fundamental law do not relieve it from. The difficulty lies in determining the line between those acts of the shipper which relieve the carrier from liability and those which, by reason of the evident purpose of the legislature, do not relieve it. The authorities on this subject are few in number. It is, however, clear that acts of fraud, misrepresentation, or concealment by the shipper relieve the carrier. Fraud invalidates all contracts, and concealment or misrepresentation is fraud. Where the shipper interferes with the property after accepted by the railway company, and the loss is occasioned by such interference, it may well be contended that the carrier is also relieved; and we are disposed to the belief that, when the shipper assumes the responsibility of loading the car and seeing that it is properly prepared for the transportation of the particular article which he is loading, he assumes responsibility for all defects in package and loading which are necessarily invisible to the agent of the carrier who accepts the freight, or which he cannot discern by ordinary observation, or such inspection as he can readily make. In this case there is no evidence showing that the car was not properly coopered.

The question is whether it was the duty of the carrier, under the circumstances, to see that the small door referred to was properly fastened, and, if it did not do so, whether

it is liable. As stated, the agent accepted the car and its contents for transportation, and he himself closed and sealed the outside doors. The devices for fastening the small doors were open to his inspection when he closed the outside doors, and were where he could not avoid seeing them if he looked at all, or even used ordinary care, or made the slightest effort to ascertain whether they were properly fastened. If he did not do so, or, doing so, failed to call the defect to the attention of the shipper or to remedy it himself, we think the fact, if it were a fact, that they were not properly fastened when he accepted the freight, under the circumstances of this case, does not relieve the defendant from its obligation as an insurer. The terms of the statute are very broad. It reads: "From any cause whatever."

The supreme court of Iowa passed upon this question in *Kinnick Bros. v. Chicago*, R. I. & P. R. Co. 69 Iowa, 665, 29 N. W. 772. The plaintiff in that case shipped a car load of hogs, some of which died in transit, and it was contended that their loss was occasioned by overloading the car. The court says: "Plaintiff's loaded the hogs on the car without assistance or direction from defendant's agents or employees. Defendant claimed that the car was overloaded, and that the injury was caused by such overloading. The court instructed the jury that, if defendant had knowledge of the number of hogs in the car, and of the condition of the car as to the loading when it received it, or if it might have known these facts, it could not escape liability for the damage on the ground that the car was overloaded. Exception is taken to this instruction, but we think it is correct. It is not claimed that there was any deceit or misrepresentation by plaintiff as to the condition of the car or to its loading. Defendant's agent, who made the contract for it, went to the car after the loading was done, and closed and sealed it. There was nothing to prevent him from seeing the manner in which it was loaded. As defendant received the property under these circumstances, and undertook to transport it to its destination, it should be held to have assumed all the liabilities of a common carrier with reference to it." This case is cited as authority in *Swiney v. American Exp. Co.* (Iowa) 115 N. W. 212. The case at bar is a stronger one in plaintiff's favor than the Iowa case, for the reason that most authorities recognize a distinction in favor of the carrier of live stock as against a carrier of dead freight. The doctrine of the Iowa case is followed in *McCarthy v. Louisville & N. R. Co.* 102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370, where

the court says: "If the improper loading was apparent,—that is, was a fact which addressed itself to the ordinary observation of the carrier's servants,—or if it was not apparent, but the carrier was yet guilty of negligence, but for which the injury would not have happened, the carrier would be liable, notwithstanding the negligence of or imputable to the plaintiffs. If the cars used in this transportation were closed cars and came to the defendant with their doors closed, so that, without opening the doors, the condition of their contents could not be seen, we should say the improper loading, if they were indeed improperly loaded, was not apparent within the meaning of the rule we have stated." And in Ohio it is said: "The carrier may well refuse to receive the property unless it is properly packed; but, if he receives it, the duty attaches of exercising due care for its safe carriage. . . . Where . . . the carrier takes charge of the property for the purposes of carriage, the duty rests on him to show that the injury is attributable to the defective packing, and not to any fault or neglect on his part." *Union Exp. Co. v. Graham*, 26 Ohio St. 595.

On proof of the delivery of the property in sound condition, and its redelivery at the end of the route in damaged condition, or failure to redeliver all or a part of it, a sufficient case is made to sustain a recovery for damages or loss. The plaintiff may rest his case on evidence of these facts, and, unless the defendant then submits evidence showing the cause of the loss to be one or more of the excepted causes, the plaintiff must prevail. The burden of proof changes from plaintiff to the defendant when plaintiff has proven the delivery and the failure to redeliver. The authorities are practically uniform on this question, and the reason given is stated to be that, after delivery of the goods to the carrier, they are no longer subject to the shipper's supervision or observation. If they are lost by the carrier, the circumstances surrounding such loss are without the knowledge of the shipper. The means and proof of the facts causing the loss are ordinarily wholly within the control of the carrier and its servants. In most instances the shipper is compelled to do business with the carrier, and to intrust to its care on the road and in places distant from the shipper his property, and the burden of proving facts exempting itself from liability as an insurer rests upon the carrier, and requires it to show that the loss occurred by reason of one or more of the exceptions. *Moore, Carr.* 386; *Hull v. Chicago, St. P. M. & O. R. Co.* 41 Minn. 510, 5 L.R.A. 587, 16 Am. St. Rep. 722, 43 N. W. 391; *Norway Plains Co. v. Boston & M. R. Co.* 61 Am. 19 L.R.A. (N.S.)

Dec. 432, and note (1 Gray, 263); *Wolf v. American Exp. Co.* 43 Mo. 421, 97 Am. Dec. 406; *Swiney v. American Exp. Co.* supra; *Illinois C. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; 6 Cyc. Law & Proc. p. 518 (b), and cases cited. We see no reason for holding the statute in question unconstitutional by reason of the omission to include the act or fault of the shipper among the exceptions.

The second question raised by the appellant, namely, that, conceding the law to be constitutional, there was conflict enough in the evidence to require its submission to the jury, requires notice. As we have shown, the testimony of the plaintiff and his assistants who prepared and loaded the car and fastened the inside door with the appliances furnished by the carrier was all positive to the effect that the door had been properly fastened. It is contended that the fact that the door came open while the car was running creates a conflict in the evidence. We think there are two answers to this contention: First, the duty rested on the defendant to show that the loss was occasioned by the fault of the shipper, and the mere fact of the door coming open does not make the showing required. That the door was fastened is evident from the fact that it remained closed until some time after the car left Rolla. If it had not been fastened originally, the weight of the flax would have caused the door to swing open before the car started. The fact that it opened while in transit, in the absence of other proof as to the cause of its doing so, may be attributed just as logically to a rough track, or to the bumping of cars, or starting or stopping with a jar, or to a defect in the fastening, as to the failure to fasten it. Had it been given to the jury, any verdict which it might have found, based upon the fact that the door came open, would have been mere guesswork or conjecture, and, had it found this the cause of the loss, it could only have done so by inference. It will thus be seen that, at the most, the fact of its coming open, under the circumstances, furnished only a *scintilla* of evidence which might indicate a failure to fasten it. This court has long since, following the great weight of authority, rejected the *scintilla* theory of submitting cases to the jury. *Fuller v. Northern P. Elevator Co.* 2 N. D. 220, 50 N. W. 359. In *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. 123, 22 L. ed. 827, the Supreme Court of the United States held that it is the duty of the carrier to furnish suitable vehicles for transportation, and, if he furnished defective or unsafe vehicles, he is not exempt from responsibility by the fact that the shipper knew them to be defective and used them. In *Cleveland C.*

C. & St. L. R. Co. v. Louisville Tin & Stove Co. 33 Ky. L. Rep. 924, 17 L.R.A. (N.S.) 1034, 111 S. W. 358, it is said that the owner is not required to see that the cars are suitable or safe. He is not required to show negligence on the part of the railway company. All that he is required to show is the loss of his goods. No defect in the vehicle can excuse a common carrier from its common-law liability. See, also, Hutchinson, Carr. § 497; Elliott, Railroads, § 1478; Miller v. Northern P. R. Co. (N. D.) 118 N. W. 344.

At the close of the case, both parties submitted motions for a directed verdict. The court denied the motion of the defendant and granted that of the plaintiff. The defendant, after the denial of his motion, made no request to have any question of fact submitted to the jury. It is well established that, in such case, the party making the motion waives any right to insist that the court should consider other questions, and, in view of the fact that appellant did not call the court's attention to any other question, or request that any other part of the case be submitted to the jury, it is now estopped from making such claim. The language of Chief Justice Corliss, in *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938, as directly in point. He says: "The defendants having requested the court to direct a verdict in their favor, and the court having instructed the jury to find for the plaintiff, on his motion, the defendants must be regarded as having submitted all controverted facts to the court for decision; no request having been made by them, after their motion for a directed verdict had been overruled, that any question of fact be submitted to the jury. It follows that if there is any evidence at all to support the verdict, in point of damages, the judgment must be affirmed. The defendants by their motion took the position that there was no question of fact which they desired to have submitted to a jury, and cannot complain of the decision of any question of fact on which the evidence is conflicting, which the court must be regarded as having made by instructing the jury to find for the plaintiff. After a party has moved the court that the jury be instructed to render a verdict in his favor, he must, if the court denies his motion, specifically request that there be submitted to the jury the questions of facts which he desires to have so submitted. Otherwise he is deemed to have acquiesced in the decision of such questions by the court; and, if the court directs a verdict in favor of the other party, on his motion, the defeated litigant is not in a position, in case of his failure to make such requests, to claim that

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any issue upon which the evidence is conflicting should have been left to the decision of the jury." See, also, *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473; *Bank of Park River v. Norton*, 12 N. D. 497, 97 N. W. 860; *Larson v. Calder*, 16 N. D. 248, 113 N. W. 103.

The order of the district court is affirmed.

Morgan, Ch. J., concurs.

Fisk, J., concurring specially.

I concur in the conclusion arrived at in the foregoing opinion; but, in doing so, I deem it unnecessary to express any opinion upon the question whether, by § 5690, Rev. Code, 1905, the legislative intent to depart from the well-established rule of the common law relieving the carrier from liability occasioned solely by the shipper's negligence. Conceding the law to be that the carrier is relieved from liability for loss occasioned solely by the negligence of the shipper, as at common law, which is the most favorable rule that is or can be contended for by appellant, still the order appealed from must be affirmed, for the reasons stated in the latter portion of the opinion, which meet with my approval.

OKLAHOMA SUPREME COURT.

T. P. MELLON, Plff. in Err.,
v.

M. FULTON.

(— Okla. —, 98 Pac. 911.)

Pleading — joinder of counts — election.

1. In a suit on account for services rendered, where there is more or less uncertainty as to the grounds of recovery, there may be properly joined in the petition a count upon express contract and a count upon *quantum meruit*; and the question of granting or overruling a motion to require plain-

Headnotes by TURNER, J.

Case Note. — Right of attorney, in the absence of express agreement, to compensation for debarring himself from representing antagonistic interests.

Since it seems to be generally considered that the proper scope and application of the right to charge retainers is to remunerate counsel for being deprived, by being retained for one party, of the opportunity of rendering services for or receiving pay from the other, the question whether or not an attorney, in the absence of an express agreement, has the right to compensation for debarring himself from representing antagonistic interests, is simply another form of stating the question whether or not an at-

tiff to elect upon which count he will stand is addressed to the sound legal discretion of the court.

Appeal — conflicting evidence.

2. Where the question of whether a professional employment was general or special was, by the referee, decided upon conflicting evidence, this court will not interfere with the finding.

Attorney — retainer — charges.

3. Where an attorney, under the terms of his general employment, debars himself from employment by others whose interests are antagonistic to those of his client so employing him, such service is a proper item of charge in a suit for services rendered under such general employment.

(November 23, 1908.)

ERROR to the District Court of Oklahoma County to review a judgment in plaintiff's favor in an action on an open account for legal services rendered. Affirmed.

torney, in the absence of an express agreement on being employed generally or to prosecute or defend a suit, or series of suits, has the right to charge a retaining fee.

That he has such right has been recognized in several cases other than *MELLON v. FULTON*, and the cases therein cited and reviewed.

Thus, in *Blackman v. Webb*, 38 Kan. 688, 17 Pac. 464, it was held that an attorney and counselor at law, employed to defend one action already commenced and to prosecute another in contemplation, may recover from his client a retaining fee, although the contract of employment did not expressly or specifically mention such fee. The court, in this case, said: "When an attorney is engaged to prosecute or defend in an action, his entire services in that action are engaged for his client, and he cannot perform services for the adverse party. He is retained by his client for that entire action; and, whether his client may ever call upon him to perform services, or not, he cannot perform services in that action for the adverse party, nor can he receive any fee or compensation from the adverse party. All his skill and ability for that case are at the command of his client. A retainer of an attorney at law is presumably worth something to the client, and presumably a loss to the attorney, and, whether the attorney is ever called upon to perform any services, or not, in that case, he may, when the case is terminated, recover for whatever the evidence shows the retainer was worth." Whether an attorney may in any case recover a retaining fee, and also an additional amount for his services, was a question expressly left open by the court.

In *Aldrich v. Brown*, 103 Mass. 527, it was held that, after attorneys are retained, it is proper for them to charge a reasonable

Statement by Turner, J.:

On February 12, 1904, M. Fulton, defendant in error, plaintiff below, sued T. P. Mellon, plaintiff in error, defendant below, in the district court of Oklahoma county, on open account for professional services rendered in the sum of \$782.90, a copy of which is filed with his petition, which contains two counts, the first being upon an express contract and the second upon *quantum meruit*. On May 7, 1904, defendant filed motion to require plaintiff to elect upon which count he would stand, alleging the same to be inconsistent, which said motion was overruled by the court and exceptions saved. On November 2, 1904, defendant filed answer, in effect a general denial and set-off, evidenced by open account, alleged to be due from plaintiff to defendant, in the sum of \$88.37. On November 4, 1904, plaintiff filed reply, in effect a general denial, and on May 12, 1905, by leave of court, defendant filed supplemental answer to plaintiff's petition, claiming a set-off in

fee for retainer without any special contract. *Eggleston v. Boardman*, 37 Mich. 14, holds to the same effect, the court saying that retainers are uniformly and universally charged, and that the same may be recovered under the common counts.

It was also recognized in *Blair v. Columbian Fireproofing Co.* 191 Mass. 333, 77 N. E. 762.

In *Perry v. Lord*, 111 Mass. 504, it was held that the fact that one who had a claim which he intended to prosecute at law sent for an attorney and employed him as counsel through the whole case, the latter accepting, and giving him advice several times, was sufficient to warrant a recovery by the attorney in an action for retainer.

In California it is also held that, in estimating the value of an attorney's services, it is proper to include in the consideration a reasonable retaining fee. *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698; *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956; *Clements v. Watson*, 7 Cal. App. 74, 93 Pac. 385.

However, in *Re Schaller*, 10 Daly, 57, where the question arose upon an application to confirm the report of a referee, it was held that an attorney who is employed to act as the general adviser of an assignee for the benefit of creditors, and who conducted several suits in the course of his regular duties, is not entitled to charge a retaining fee.

So, in *McLellan v. Hayford*, 72 Me. 410, 39 Am. Rep. 343, the right of an attorney to a retaining fee as a matter of law was denied: there being in this case no express or implied agreement to the contrary between the parties.

The necessity of an express agreement to recover a retainer was also recognized in *Windett v. Union Mut. L. Ins. Co.* 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 751.

all the sum of \$124.01 in full liquidation of plaintiff's claim. After supplemental reply, to wit, on May 4, 1905, on motion of plaintiff, the cause was referred to a referee "with full power to hear and determine all the matters in controversy between the parties and make his finding, his conclusions of law, and conclusions of fact, and report the proper judgment to the court," which he subsequently did, and which the court, on April 2, 1906, after overruling defendant's exceptions thereto, approved and entered judgment in favor of plaintiff and against the defendant in the sum of \$673.63, together with costs, from which said judgment defendant appealed and prosecuted the same by petition in error and case made to the supreme court of the territory of Oklahoma, and the same is now before us for review.

Messrs. Harris & Wilson for plaintiff in error.

Messrs. M. Fulton and Selwyn Douglas for defendant in error.

Turner, J., delivered the opinion of the court:

The first error assigned is that the court erred in overruling the motion to require plaintiff to elect upon which cause of action stated in his petition he would stand. It is urged in support of this contention that, as the first count declares upon an express contract and the second upon a *quantum meruit*, they are inconsistent, and for that reason the court should have required the election. We do not think so. It is a familiar rule of pleading that, when the plaintiff has two or more separate reasons for the obtaining of the relief sought, or when there is more or less uncertainty as to the grounds of recovery, the petition may set forth a single claim in more than one count. 5 Enc. Pl. & Pr. p. 321. Accordingly it has been expressly held in a large number of cases that a *quantum meruit* count may be joined with a count founded on express contract. See *Id.* 324; *Ware v. Reese*, 59 Ga. 588; *Wilson v. Smith*, 61 Cal. 209; *Hawley v. Wilkinson*, 18 Minn. 525, Gil. 468; *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. 308; *Plummer v. Mold*, 22 Minn. 15; *Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836—where this is held to be the rule, although the Code provides, as in this jurisdiction, that the petition shall contain a statement of the facts constituting the cause of action in ordinary and concise language, without unnecessary repetition, and that the question of overruling or sustaining such a motion is within the sound discretion of the court. That being the case, as we see no abuse of discretion in the action of the court in overruling the

motion, we cannot say the court erred in so doing.

Plaintiff's account sued on, which does not contain many forgotten items of proper charge, contained, among other items, the following charge: "Retainer fee December 1, 1898, to December 1, 1903. \$300.00,"—which was allowed by the referee in his report, as follows: "I further find that, in consequence of the conversation had by and between the plaintiff and defendant on the 1st day of December, 1898, that the plaintiff was given the right to believe that he was retained up to the 1st day of December, 1903; a retainer consisting, as it does, of giving the party retaining rights to expect professional services of the party retained in all respects. It binds the person retained not to take a fee from anyone against the party retaining, to do nothing except what he is asked to do, and that when a party places an attorney in a position in which he, as such attorney, is deprived from taking litigation against or giving advice against the party so retaining him, he is entitled to be paid therefor: all of which T. P. Mellon did in this case, and M. Fulton so acted and rendered services. And I further find that such retainer fee was reasonably worth the sum of \$60 per year, and did continue for five years, and the same is allowed in the sum of \$300." Which was excepted to by the defendant for the reason: "That there is no legal evidence presented in this record establishing a contract for a retaining fee between plaintiff and defendant for the period found by the referee; that such contract is by the statute of frauds required to be in writing, signed by the party to be charged, because being a contract not to be performed 'within a year.'" The court overruled the exception, and this is the next assignment of error.

As the findings of the referee upon the facts have the effect of a special verdict of a jury, and will not be set aside by this court unless clearly against the weight of the evidence (*Erismann v. Kerwin*, 8 Okla. 92, 56 Pac. 858), let us see if there is any testimony reasonably tending to support this part of the report. The testimony discloses that in December, 1898, defendant was a merchant just opening up his "Fair" store in Oklahoma city in a building belonging to one Pettyjohn: that he was at that time having some trouble with Pettyjohn over some goods and fixtures in said store; that plaintiff was a lawyer occupying offices above the store; that plaintiff was called on to assist defendant in the matter, at which time defendant retained plaintiff, in effect, to assist not only in that, but in all matters of a legal nature that might arise in the future, and said to

plaintiff that he would tell his manager to come to plaintiff for his assistance from time to time as his services might be required, and requested plaintiff to attend to the business, all of which he agreed to do; that there was no contract in writing between them, and nothing was said at any time about the amount plaintiff was to receive for his services, or how long the arrangement was to continue, but he was given to understand that he was generally retained in a professional way; that, pursuant to the said understanding, from that time up to the date of the last item of the account sued on (some five years), defendant and those in his employ consulted plaintiff regularly; that he represented defendant in a number of matters in and out of court, always with the understanding from the beginning of the retainer that he would not advise or receive employment from others against defendant's interests; that, during that time, the account sued on accrued for services thus rendered, in which said account plaintiff made the charge complained of, and in support thereof showed to the referee, as stated, and that his services on this general retainer were reasonably worth \$60 per year, or \$300 for the five years he so served defendant. As defendant admits that, beginning December, 1898, he did employ plaintiff, and agreed to pay him a fee in the various cases as they might arise from time to time, but denies that he retained him generally or as regular counsel, the question of whether the employment was a general or special one was settled by the referee on conflicting evidence in favor of the former, and we do not feel disposed to interfere with the finding. That being the case, we do not see why the items should not constitute a proper charge.

It goes without saying that an attorney is as free to make any contract with his client on the subject of compensation for his services as is any other individual. Or, as said by Cooley, J., in *Detroit v. Whittemore*, 27 Mich. 281: "The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business." In the absence of express contract, as in this case, he is entitled to what the services are reasonably worth. The referee, in effect, found, and correctly, that plaintiff was entitled to compensation, beyond the actual itemized services rendered, for debarring himself by implied agreement from accepting employment from others when their interests were antagonistic to those of defendant; that such was contemplated in the retainer, and that defendant was bound to compensate him for it in such sum as such service was reasonably worth. 19 L.R.A. (N.S.)

That such is a proper item of compensation in such general employment was held in *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514. That was a suit for professional services rendered by plaintiff, on a general employment as attorney for an executrix, extending over many years. The question before the supreme court on appeal was whether the testimony of the various lawyers who testified contained such elements that they could show the value of plaintiff's services by their opinion. On this point the court, in passing, said: "If Mrs. Richardson had come to Judge Kelley now and then, or ever so frequently, without any general employment, and asked him to-day to draw a petition, or a deed, or an affidavit, or to go into court and argue a single case, and no more, there would be some reason for saying that for each of these detached services he should charge a separate price, and, in case of dispute, prove its separate value. But any such practice in regard to a general employment would be unreasonable and impracticable, and would be just as much so in everyday affairs as in legal affairs. . . . The employment means that he becomes professionally informed concerning private affairs of his client which he has no right to reveal, and that he has formed, perhaps on long study, an opinion concerning the right of his client, and the best remedy to enforce it. It means, further, that he debars himself from employment by any other person concerning the matters in controversy. Any standard of reward which leaves out any of these considerations would be wrong."

Yates v. Shepardson, 27 Wis. 238, was a suit on an itemized account for services rendered by plaintiff on a general retainer. In the trial court it was proposed to show that plaintiff was entitled to recover \$1,000 per annum as an annual counsel fee from 1853 to 1868, inclusive, in consequence of this general retainer, and for advice given where no charge had been made and for which no bill of particulars had or could be given. On appeal the supreme court disallowed the item, and on a rehearing adhered to its former opinion, and, in passing, said: "What the plaintiff proposed to show was that, some time in 1853, he was generally retained by the defendant. . . . but without any price being stipulated therefor. . . . It was not proposed to show that he gave professional advice in any particular matter for which he had the right to claim a proper compensation, or that he had declined acting as counsel for others against the defendant, and thus lost the opportunity of performing services for which he might possibly have received a reasonable fee,"—thereby intimating very

strongly, as we take it, that, had such been shown, as was done in this case, the charge would have been a proper one.

Hence we say that, under the testimony, the item was a proper charge in estimating the worth of plaintiff's services under the general employment found by the referee to exist; and to have failed to regard it would have been wrong. It was not disputed that such service was reasonably worth \$60 per year, or \$300 for five years, charged in plaintiff's account, and, as we are of the opinion that the finding is reasonably supported by the evidence, we do not think the court erred in overruling defendant's exception to it.

As there was nothing in this arrangement to prevent either party from terminating the retainer at any time, we do not think the contract was within the statute of frauds as one not to be performed in one year, as urged by plaintiff in error. 29 Am. & Eng. Enc. Law, 2d ed. p. 952.

Among other items, plaintiff's account also contained the following charge: "December 10, 1903, mechanics' lien cases, suits in district court vs. Mellon, and mechanics' liens and legal services on lien filed, not sued, \$300.00,"—which was allowed by the referee as follows: "I further find that the services rendered in mechanic lien cases, suits in the district court, and mechanic liens and legal services on liens filed, on which suit was not brought, was reasonably worth the sum of \$200, and allowed the same in the sum of \$200,"—which was accepted to by the defendant for the reasons: (1) "That said finding is not supported by sufficient evidence, and is against the weight of the evidence. (2) That, from the testimony, it appears that said work was never performed by the said plaintiff, and that he, after starting the work in said cases, refused to finish it, and defendant was compelled, for his own protection, to employ other counsel, which he did,"—and asks that plaintiff be allowed not to exceed \$100 for his services in said cases. The court, however, overruled the exception, which constitutes the next assignment of error.

It is not necessary to enter into an elaborate discussion of the testimony bearing on this finding. We think it sufficient to say that it is amply supported by the evidence, which is, in short, that, during the existence of this retainer, plaintiff was engaged in the construction of a building in Oklahoma city: that his contractors became involved, and, as a consequence, several mechanics' liens were filed against the building; that one or more suits were brought to enforce the same, in which there were interventions by a number of lien holders; that plaintiff represented defendant in these suits and in

interventions, and pursued a policy of delay in order to bring about an adjustment of the matter; that one importunate lien holder was settled with, and other liens were in course of settlement when defendant refused to pay plaintiff anything on account for services rendered; that friction then arose between them, at which time plaintiff had a conversation with defendant over the telephone in which he asked defendant whether he wanted him to continue as his attorney in the lien cases, and was informed that he did not, and that suit was then brought by plaintiff on this account in full for services rendered. Plaintiff testified that the value of his services in these cases was reasonably worth \$300. Another witness, who was a lawyer, perfectly familiar with the extent and character of the services rendered, testified that they were reasonably worth \$600. The referee found and reported them to be reasonably with \$200, and we will not disturb the finding.

As these are the only items of the account allowed by the referee and specifically excepted to and urged as error in the brief of defendant, we are of the opinion that the court did not err in approving the report of the referee and entering judgment thereon in favor of plaintiff, and for that reason the judgment of the trial court is affirmed.

Petition for rehearing denied.

TENNESSEE SUPREME COURT.

FRANK HEART, Appt.,

v.

EAST TENNESSEE BREWING COMPANY.

(— Tenn. —, 113 S. W. 364.)

Lease — legality — termination.

A lease for years of property to be used for the sale of intoxicating liquor is terminated by the adoption, during the term, of a law making the sale of liquor illegal.

(November 4, 1908.)

Case Note. — Effect upon lease of property for saloon of passage of prohibitory laws during the term.

In *San Antonio Brewing Asso. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 638, in holding that an existing lease of premises used for saloon purposes was not terminated by the subsequent adoption of local prohibition, the court placed its decision upon the ground that the lease did not restrict the lessee from using the premises for any other purpose; however, the court intimated that had the lease been such as to deny the right to use the premises for any other purpose,

A PPEAL by complainant from a decree of the Chancery Court for Knox County sustaining a demurrer to a bill filed to enforce payment of rent. Affirmed.

The facts are stated in the opinion.

Mr. Lewis Tillman, for appellant:

When, after the granting of a lease, a statute has been passed which renders it illegal to use the premises for the purpose for which they were let, the refusal to permit them to be used for the purpose is no breach of a covenant for quiet enjoyment.

18 Am. & Eng. Enc. Law, 2d ed. p. 628, note 1; Newby v. Sharpe, L. R. 8 Ch. Div. 39.

Messrs. Webb, McClung, & Baker, for appellee:

If one contracts to do a thing that is lawful, and, after the contract is made, but before performance is completed, the thing is made unlawful by an act of the legislature, the act renders the contract void.

2 Parsons, Contr. 186, chap. 111, § 3; Clark, Contr. pp. 681, 682; Lawson, Contr. §§ 423, 424; Hammon, Contr. § 209, pp. 338, 339, § 210, pp. 345, 346; 9 Cyc. Law & Proc. p. 630; Mississippi & T. R. Co. v. Green, 9 Heisk. 588; Gray v. Sims, 3 Wash. C. C. 276, Fed. Cas. No. 5,729; Sauner v. Phenix Ins. Co. 41 Mo. App. 480; Corrigan v. Chicago, 144 Ill. 537, 21 L.R.A. 212, 33 N. E. 746; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; Presbyterian Church v. New York, 5 Cow. 538.

a different question would have been presented.

And this doctrine was applied in Kerley v. Mayer, 10 Misc. 718, 31 N. Y. Supp. 818, affirmed without opinion in 155 N. Y. 636, 49 N. E. 1099, where, after a lease was entered into, but before the commencement of the term, it became impossible for the lessee to obtain a license for the sale of intoxicating liquors because of the passage of an act prohibiting the granting of the same where the business was to be carried on within 200 feet of a building occupied exclusively as a church or schoolhouse. The court said: "It is only when the lessee is deprived without his fault of the use of the premises for any purpose that rent ceases; and, if the lessee was deprived in this instance, it was his own fault, for he should have stipulated against the contingency of a refusal of a license"

But it was held in Houston Ice & Brewing Co. v. Keenan, 99 Tex. 79, 88 S. W. 197, that a lease of premises for a term to begin at a future date, restricting the use thereof for saloon purposes only, is not terminated by the adoption before the beginning of the term of local prohibition so as to absolve the lessee from liability for rent. 19 L.R.A. (N.S.)

Shields, J., delivered the opinion of the court:

Complainant, on August 31, 1902, leased a certain house and lot situated in Knoxville, Tennessee, and owned by him, to the defendant for a term of eight years, to be used as a saloon or place for the sale of intoxicating liquors, as expressed in the written lease that day made and executed by both parties. The defendant entered into possession of the property, and paid the rent contracted for to November 1, 1907, but after that declined to further use it, or to pay any rent. Complainant sues to collect rent accruing since November 1, 1907. The contract of lease was exhibited with and made a part of the bill, and therein the terms of the contract and the purposes for which the property was to be used are fully set forth.

The chancellor sustained a demurrer to the bill upon the ground that, by chapters 17, 206, 207, pp. 81, 752, 755, Acts Gen. Assemb. 1907, the sale of intoxicating liquors was made unlawful and prohibited in the city of Knoxville from and after November 1, 1907, and therefore the purpose for which the lease was made was from that time illegal, and the contract void and unenforceable; and complainant has brought the case to this court for review.

There is no error in the action of the chancellor. When the contract was made, the purpose for which the property was leased—the sale of intoxicating liquors in Knoxville—was lawful, and the lease valid and enforceable. Afterwards, November 1,

The court stated that, as the local-option law was in existence when the lease was entered into, the lessee knew that the use of the demised premises might become illegal, and, in order to relieve himself from liability in that event, he should have stipulated therefor.

It was held in Miller v. Maguire, 18 R. I. 770, 30 Atl. 966, that, where there is no restriction as to the use of demised premises, the lessee is not constructively evicted, so as to absolve him from payment of rent, by reason of the fact of the establishment of a schoolhouse within such distance of the leased premises as to prevent a renewal of his license for the sale of intoxicating liquors.

It was held in Barghman v. Portman, 12 Ky. L. Rep. 342, 14 S. W. 342, that the lessee of a hotel and barroom took subject to legislative regulation; and that it was no violation of the terms of the lease for him to advocate and vote for a local-option law, which rendered the procurement of a further license for the sale of intoxicating liquors impossible.

See also on this subject Lawrence v. White, post, 966.

1907, that purpose was made unlawful by the acts of the general assembly above referred to, and thus, by operation of law, the lease became and is void and unenforceable at the instance of either party.

It is a principle of general application that all contracts are void which provide for doing a thing which is contrary to law, morality, and public policy. *Yerger v. Rains*, 4 Humph. 259; *Wetmore v. Brien*, 3 Head. 723; *Henderson v. Waggoner*, 2 Lea, 134, 31 Am. Rep. 591; *Rhodes v. Summerhill*, 4 Heisk. 205; Page, Contr. § 326.

It has been applied to contracts of this character, and held, for that reason, that the rent contracted to be paid could not be collected. *Ralston v. Boady*, 20 Ga. 449; *Sherman v. Wilder*, 106 Mass. 537; *Mound v. Barker*, 71 Vt. 253, 76 Am. St. Rep. 767, 44 Atl. 346; *Riley v. Jordan*, 122 Mass. 231; *Holmead v. Maddox*, 2 Cranch, C. C. 161, Fed. Cas. No. 6,629; 2 Taylor, Land. & T. § 521.

The rule is the same when the purpose of the contract, although lawful when made, becomes unlawful by statute enacted before the full performance of its terms. In Mr. Parson's work on Contracts (vol. 2, p. 674) it is said: "That the illegality of a contract is in general a perfect defense must be too obvious to need illustration. It may, indeed, be regarded as an impossibility by act of law; and it is put on the same footing as an impossibility by act of God, because it would be absurd for the law to punish a man for not doing, or, in other words, to require him to do that which it forbids his doing. Therefore, if one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise; and so if one agrees not to do that which he may lawfully abstain from doing, but a subsequent act requires him to do, it [this act] also avoids the agreement."

In *Hammon on Contracts*, § 210, pp. 345, 346, it is said: "Where the performance of an executory agreement which was lawful in its inception is made unlawful by subsequent enactment, the agreement is thereby dissolved and the parties are discharged from its obligation."

Other text-books are to the same effect. Clark, Contr. 681; Lawson, Contr. §§ 423, 424.

The rule has also been frequently applied by this and other courts of last resort. In *Mississippi & T. R. Co. v. Green*, 9 Heisk. 592, it was held that a contract for the payment of Confederate notes, lawful when made, but afterwards made unlawful by law, could not be enforced. It is there said: "The law had therefore made it impossible for the plaintiffs to perform that portion of the condi-

tion precedent which required them to demand payment in Confederate notes. The nonperformance of a contract will always be excused where it is occasioned by act of law."

The case of *Gray v. Sims*, 3 Wash. C. C. 276, Fed. Cas. No. 5,729, is directly in point. This was a suit upon a policy of marine insurance. The vessel insured was to be employed in importing goods from Calcutta or Madras into the United States, and the contract of insurance specified this as one of the purposes of the voyage. After the policy was written, and before the return of the vessel, it became by act of Congress illegal to import goods into the United States from those points. The master undertook to do so, and the ship was seized and confiscated. The loss was within the terms of the policy. A recovery was denied. The court said: "But, if the contract be legal when it is made, and the performance of it is rendered illegal by a subsequent law, the parties are both of them discharged from its obligation. The insured loses his indemnity and the insurer his premium."

Other cases in accord are: *Sauner v. Phoenix Ins. Co.* 41 Mo. App. 480; *Corrigan v. Chicago*, 144 Ill. 537, 21 L.R.A. 212, 33 N. E. 746; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; *Presbyterian Church v. New York*, 5 Cow. 538.

It is not necessary in this case to determine whether or not the contract contained in the lease restricts the use of the property for the sale of intoxicating liquors. It was the purpose of both lessor and lessee, as clearly expressed in the instrument, that it should be used as a saloon, and, this being made unlawful by law, the contract is no longer enforceable.

The decree of the chancellor is affirmed, with costs.

GEORGIA SUPREME COURT.

BRYAN LAWRENCE, Plff. in Err.,
v.

J. B. WHITE.

(— Ga. —, 63 S. E. 631.)

Lease — liquor traffic — prohibition — effect.

1. Where a landlord leased to a tenant for a term of five years a hotel described as consisting of "the corridor, office, bar,

Headnotes by LUMPKIN, J.

Note. — As to effect upon lease of property for saloon of passage of prohibitory laws during the term, see case note to *Heart v. East Tennessee Brewing Co.* ante, 964.

barber shop, cigar stand, billiard room, on the first floor, boiler house and kitchen fronting on Ellis street, the second, third, fourth, and fifth stories of the hotel proper, the open court on the second floor, the open courts fronting on Ellis street," and provided that the tenant might sublet the news stand, cigar stand, barber shop, billiard room, and barroom, and, if he should do so, such part of the premises subleased, and especially the bar and billiard rooms, should be kept free from disorder, and maintained in an orderly and reputable manner, and where, after the commencement of such lease, the legislature passed an act prohibiting the sale of alcoholic, spirituous, malt, or intoxicating liquors, and thus the barroom could no longer be used for the purpose of conducting such business in the absence of any provision in the contract of lease for that purpose, the tenant was not entitled to a reduction or proportional abatement of the agreed rental.

Arbitration — agreement for — jurisdiction of court.

2. A mere general stipulation in a contract of lease that, in case of difference between the parties, it shall be referred to arbitration, does not prevent either party from resorting to the courts without such reference.

(February 11, 1909.)

ERROR to the Superior Court for Richmond County to review a judgment refusing to abate the rent on certain premises. Affirmed.

Statement by Lumpkin, J.:

James B. White leased to Bryan Lawrence a hotel in the city of Augusta, known as the "Albion Hotel," for the term of five years, to begin on the opening of the hotel for the reception of guests not later than April 20, 1901, with privilege of renewal. The stipulated rent was \$10,000 per annum, payable in monthly instalments of \$833.33. The only portions of the written contract of lease which need be set out are as follows: "The leased premises consist of the corridor, office, bar, barber shop, cigar stand, billiard room, on the first floor, boiler house and kitchen fronting on Ellis street; the second, third, fourth, and fifth stories of the hotel proper; the open court on the second floor; the open courts fronting on Ellis street, to which the tenants occupying stores fronting on Broad street are entitled to use in common with the tenant herein named. . . . The said Bryan Lawrence, tenant, subject to the provisions hereinafter stated, may sublet the news stand, cigar stand, barber shop, billiard room, and barroom; provided, that all such subletting shall be with the distinct contract and agreement on the part of the subtenants that the premises, or parts of the premises, sublet to them, shall be conducted, kept, and

maintained in a quiet, peaceable, orderly, and reputable manner, the tenant herein especially agreeing that the bar and billiard room shall be kept free from disorder and all objectionable features and maintained in a quiet, peaceable, orderly, and reputable manner, and that, if there is any violation of this agreement, the said subtenant or subtenants failing to carry out the agreements herein shall at once be evicted by said Bryan Lawrence, or, upon his failure so to do, that the lease of the premises described herein may immediately, or at any time thereafter, at the option of the lessor, be declared at an end, and the lessor entitled to re-enter and take possession of the entire premises: Provided, also, and it is distinctly understood and shall be a part of the agreement with every subtenant, that if, for any reason, this lease is forfeited, abandoned, or terminated, that the rights of said subtenant or subtenants to the part of the premises sublet to him or them shall at once cease and become void, and such subtenant or subtenants may be evicted. . . . If at any time there shall be any disagreement between the parties as to the rights and duties of the parties, or either of them, or as to the meaning or construction of these presents, or if any dispute, difference, or issue shall arise between the parties touching the effect of these presents, or of any clause or thing herein contained, then every such dispute or matter in dispute shall be referred to the arbitration of two persons of kin to neither of the parties, one arbitrator to be appointed by each party. And both the parties hereto agree to stand to, abide by, and perform any award rendered under the provisions of this lease, and this paragraph. . . . It is distinctly agreed by the tenant that, as a material and essential part of this contract, the said Albion Hotel and the premises hereby leased shall be used, occupied, and operated for hotel purposes alone, and that the said Albion Hotel, in furniture, appointment, fare, and service, and in every other respect, shall be conducted and maintained as a first-class hotel, and that the same shall be conducted and maintained in a businesslike, orderly, and reputable manner, and substantially like other first-class hotels in the South. . . . But nothing herein shall deprive, or be construed to deprive, the lessor of the right to resort to the courts for the enforcement of any rights hereunder, nor shall this contract be construed to deprive the lessor of any statutory or common-law remedy for the collection of rents or damages for breach of the covenants herein stipulated." It was also provided that, if the premises should be wholly destroyed by fire before the expiration of the lease, the liability to pay rent should cease, and, in case

of damages by fire, rendering the premises temporarily untenable, repairs were to be made, and no rent required while this was being done. The lease was renewed after the first term for five years more.

On August 6, 1907 (Laws 1907, p. 81), an act passed by the legislature was approved, prohibiting the manufacture or sale of alcoholic, spirituous, malt, or intoxicating liquors in the state after the expiration of that year. After this act became operative, the lessee claimed that he was entitled to an apportionment and reduction of the rent, because of his inability to further conduct the business of a bar in the hotel. A correspondence ensued between him and his landlord on the subject. He sent to the landlord the key of the bar, writing him that: "As I have been prohibited from using this part of the property for that purpose, by the law of the land, and as I rented it for that purpose, I have no use for it for any other purpose." The landlord returned the key to the barroom, declining to make an abatement in the rent on account of the effect of the prohibition law, and demanded the payment of rent at the monthly rate stated in the lease. In one of his letters the lessee demanded an arbitration. The lessor declined to allow any abatement in the rent, and sued out a distress warrant for the past-due rent at the monthly rate stipulated, and also a dispossessionary warrant, for the purpose of evicting the lessee from the premises on account of the failure and refusal to pay the rent without abatement. The lessee thereupon filed an equitable petition, claiming an abatement of the rent to be made in proportion to the diminution in rental value because of the legal impossibility of operating a barroom on the premises, and praying that the lessor be enjoined from prosecuting the actions at law commenced by him, and for process and general relief. It is unnecessary to set out the evidence further than to state that the lessee testified that the agent of the lessor, in negotiating with him in regard to the lease before it was first made, had informed him that parties had endeavored to rent the bar for \$5,000, and that, if the witness would lease the bar and hotel, he (the agent) would give him the names of the parties who had offered to rent it, so that the lessee could realize from the bar that amount, and that he could take that into consideration in making an agreement as to the amount of rental he was to pay; that the witness stated to the agent that, by reason of the location of the bar within the hotel, it was absolutely necessary that the witness should control the conduct and management of it if he should lease the hotel property; that the value of the bar was urged as a reason for increasing an offer made by him for the rent—19 L.R.A. (N.S.)

al; and that it induced him to make the offer of \$10,000 for the bar and other parts of the hotel property, as subsequently set out in the lease. In the correspondence between the parties the attorneys for the lessor denied the statement which had been made in a letter of the lessee, that the bar was largely the inducement which controlled him in making the lease at the price named, and stated that the lessor insisted that the hotel was leased as a whole, and that he was in no respect responsible or liable for the effects of state prohibition on the property leased. On the hearing of the application for interlocutory injunction it was denied, and Lawrence excepted.

Messrs. C. H. Cohen, R. S. Cohen, W. K. Miller, and Austin Branch for plaintiff in error.

Messrs. Lamar & Callaway, for defendant in error:

The tenant should have protected himself by providing in the lease for an abatement in the event an adverse liquor law was passed.

White v. Molyneux, 2 Ga. 128; Brooks v. Smith, 21 Ga. 265.

The tenant of a saloon, in the absence of a stipulation therefor, is not entitled to an abatement in rent because of the passage of a law making the sale of liquor illegal.

Barghman v. Portman, 12 Ky. L. Rep. 342, 14 S. W. 342; International Trust Co. v. Schumann, 158 Mass. 287, 33 N. E. 509; Teller v. Boyle, 132 Pa. 56, 18 Atl. 1069; Houston Ice & Brewing Co. v. Keenan, 99 Tex. 79, 88 S. W. 197; San Antonio Brewing Assn. v. Brents, 39 Tex. Civ. App. 443, 88 S. W. 368; Miller v. Maguire, 18 R. I. 770, 30 Atl. 966; Kellogg v. Lowe, 38 Wash. 293, 70 L.R.A. 510, 80 Pac. 458; McLarren v. Spalding, 2 Cal. 510; Guthman v. Castleberry, 49 Ga. 274; Newby v. Sharpe, L. R. 8 Ch. Div. 39; Fleming v. King, 100 Ga. 453, 28 S. E. 239; 18 Am. & Eng. Enc. Law, 2d ed. pp. 627, 628; Nicholls v. Byrne, 11 La. 171; Chase v. Turner, 10 La. 19; 24 Cyc. Law & Proc. p. 1148; Taylor v. Finnigan, 189 Mass. 568, 2 L.R.A. (N.S.) 973, 76 N. E. 203; Gallup v. Albany R. Co. 65 N. Y. 1.

A landlord is not an insurer against the law or casualties.

Hand v. Armstrong, 34 Ga. 232; Lennard v. Boynton, 11 Ga. 112; Brooks v. Smith, 21 Ga. 265; Fleming v. King, supra; 24 Cyc. Law & Proc. p. 1132; Menken v. Atlanta, 78 Ga. 668, 2 S. E. 559; Osborn v. Nicholson, 13 Wall. 660, 20 L. ed. 695; White v. Hart, 13 Wall. 646, 20 L. ed. 685.

Lumpkin, J., delivered the opinion of the court:

1. The question in this case is whether the lessee of a hotel, including a barroom, was

entitled to a reduction or proportional abatement of the agreed rental because, during the term of the lease, the legislature of the state enacted a law prohibiting the sale of alcoholic, spirituous, malt, or intoxicating liquors, and thus the bar could no longer be used for that purpose. The adjudicated cases with unusual uniformity answer this question in the negative, though they do not all give the same reasons for the ruling.

It has been very generally held that the enforcement by public officers of restrictions or conditions in regard to the use of leased premises does not amount to an eviction of the tenant. And it has been suggested that a basic principle on which these rulings may rest is that, to constitute a constructive eviction by the landlord, the act complained of must have been done by the landlord or by his procurement, with the intention and effect (or perhaps with the natural effect) of depriving the lessee of the use and enjoyment of the demised premises, in whole or in part. *Taylor v. Finnigan*, 2 L.R.A. (N.S.) 973, and note; (189 Mass. 568, 76 N. E. 203).

In *Abadie v. Berges*, 41 La. Ann. 281, 6 So. 529, it was said that "a landlord cannot be held to warranty and indemnity against the 'acts of the law,' in the absence of express stipulation to that end. Should a tenant sustain damage in consequence of a constitutional police legislation adopted subsequently to his contract of lease, such as the 'Sunday law,' which forbids the use of the property rented to a particular use to which the lessee applies it, in a special way and on a special day, such damage is *injuria sine damno*, which is not compensable. Such legislation could have been foreseen, and does not impair rights under the contract." In *San Antonio Brewing Assn. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368, it was held that "a lease which recited that the building was let for the purpose of conducting a first-class saloon, 'and shall not be used for any disreputable purpose,' and providing that the premises should not 'be sublet for any purpose other than for conducting a saloon, without the consent of the landlord, in writing,' did not limit the use by the lessee to saloon purposes, nor release him from liability for rent after the adoption of prohibition of that business under the local option law." In *Teller v. Boyle*, 132 Pa. 56, 18 Atl. 1069, it was held that "the lessee under a lease containing a covenant that, under penalty of forfeiture, he would neither occupy nor permit the premises to be occupied otherwise than as a saloon or a dwelling, without the lessor's written consent indorsed, is not released from liability for the rent by a failure to obtain a license to sell liquors." In *Barghman v. Portman*, 12 Ky.

L. Rep. 342, 14 S. W. 342, a contract of rental for a one-half interest in a hotel which had a barroom attached to it was made for a term of years. In the opinion it was stated that "a barroom was attached to the hotel, and, no doubt, was one of the principal sources of revenue to the proprietor. The local option law, passed by the legislature after the making of this contract, deprived the appellee of this source of profit, and reduced the proceeds from the hotel greatly. Barghman, who owned the hotel in conjunction with Portman, was an ardent advocate of the law, and it is urged that this act of his so far affected the contract as to authorize its rescission. Without discussing this question, we need only say that, if a renting, the lessee took it subject to legislative regulation; and it was no violation of the terms or the spirit of the contract for Barghman to vote either for or against the sale of liquor." In *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197, premises were leased for three years "for the saloon business." Afterward prohibition was adopted in the county by an election held under the local option law. The tenant contended that the stipulation in the lease that the premises should be used for the saloon business constituted an express covenant that said premises should be used for no other purpose, and that, inasmuch as such use became illegal by the adoption of prohibition in the county by an election, this absolved him from liability for the rent. Under the stipulation in the lease then being considered, that the premises should be used for saloon purposes, the court was of opinion that the tenant covenanted to use them for no other purpose. But, in spite of this, it was held that "the fact that such business was rendered unlawful by the result of the election did not relieve him from his obligation to pay the rent;" and it was added: "The law being in existence when the lease was made, he should have provided in the contract against the contingency of its being put in force in the county if he wished relief from his obligation in that event."

In *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966, it was held that "the inability of a lessee to obtain a renewal of his license for the sale of intoxicating liquors on the leased premises because the power of the license commissioners to grant a license had been taken away by the erection of a public school by the city of Providence within 400 feet of the premises is not an eviction. To constitute an eviction which will operate either to annul a lease or to suspend the rent, some act must have been done by the landlord or by his procurement, with the intention and effect of depriving the lessee of the use and enjoyment of the demised

premises, in whole or in part." In *Kerley v. Mayer*, 10 Misc. 718, 31 N. Y. Supp. 818, a lease was made of certain premises "to be used and occupied only as a strictly first-class liquor saloon." After the execution of the lease, but before the commencement of the term, the legislature enacted a law forbidding the sale of liquor within 200 feet of a church or schoolhouse. It was held that this did not release the lessee, as he was not deprived of the beneficial use of the premises. The court thought that the provision that the premises should be used only as "a strictly first-class liquor saloon" did not restrict the use of the premises to saloon business only, but merely restricted the character of that business conducted there, so that it should be first-class. In the opinion of *Daly, Ch. J.*, it was said: "It is only when the lessee is deprived, without his fault, of the use of the premises for any purpose, that rent ceases; and, if the lessee were deprived in this instance, it was his own fault, for he should have stipulated against the contingency of a refusal of a license."

In the English case of *Newby v. Sharpe*, L. R. 8 Ch. Div. 39, a landlord let the basement of a store to a tenant "with full and undisputed right and liberty to store cartridges therein," covenanted to keep the premises in proper repair and condition, so as to be available for storing cartridges, and also covenanted for quiet enjoyment. Other parts of the store were at that time let to other persons for storing gunpowder. Soon afterward what was known as the explosives act of 1875 was passed, making it illegal to store cartridges and gunpowder in the same building. The landlord, upon the act coming into operation, removed the tenant's cartridges out of the building. A correspondence ensued, and the landlord stated to the tenant that the basement was at the disposal of the latter, but that, if he stored cartridges there, the landlord must, to protect himself from liability, give notice to the authorities. The tenant thereupon commenced his action to restrain the landlord from obstructing the storing of his cartridges, and to compel him to do everything necessary to enable the plaintiff to store them there, and for damages. *Fry, J.*, held that the tenant was entitled to damages for the loss of the use of the demised premises, on the ground that the landlord's acts amounted to an eviction. On appeal it was held that judgment must be entered for the defendant, for that (1) there had been no eviction, the removal of the plaintiff's cartridges being only a trespass; and (2) there had been no breach of covenant by the defendant, for that the covenant to keep the premises in proper condi-

tion for storing cartridges only referred to their physical condition, and that the grant of liberty to store cartridges there did not impart a warranty of the legality of so storing them, nor did anything in the lease bind the landlord to procure licenses to make the storage legal. In *Nicholls v. Byrne*, 11 La. 170, the plaintiffs alleged that they leased a lot of ground in the city of New Orleans, fronting on the Mississippi river, for the purpose of breaking up flatboats and cutting and selling firewood and lumber; that, soon after they took possession, they were notified by Warfanger to cease using the premises for that purpose, in pursuance of a city ordinance passed after the date of the lease, which expressly prohibited the demolishing of flatboats, rafts, etc., within the limits of the city; and that, in consequence of such order, they were dispossessed of their lease, and were entitled to a cancellation of it, together with damages. The court held that "lessees have no right to complain of the city ordinances which restrict them in some of the uses of the leased property, provided such ordinances are legal; and, if illegal, the lessee can protect himself. It does not invalidate his lease by dispossession, or otherwise disturb him in the enjoyment of the leased premises. . . . The restriction of privileges in using leased property by city ordinances affords no justification in withholding rent." See also *Chase v. Turner*, 10 La. 19. In *Gazlay v. Williams*, 210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. Rep. 687, it was held that a sale by a trustee in bankruptcy of the bankrupt's interest was not forbidden by, nor was it a breach of, a covenant for re-entry in case of assignment by the lessee or sale of his interest under execution or other legal process, where there was no covenant against transfer by operation of law; thus distinguishing between the act of the law and the act of the party. See also *McLarren v. Spalding*, 2 Cal. 510; *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N. E. 509; *Baker v. Johnson*, 42 N. Y. 126; *Kellogg v. Lowe*, 38 Wash. 293, 70 L.R.A. 510, 80 Pac. 458; 24 Cyc. Law & Proc. p. 1133; 18 Am. & Eng. Enc. Law, 2d ed. pp. 627, 628.

The exact question here involved has not been determined in this state; but the analogies of the law point in the direction indicated above. Thus, Civil Code 1895, § 3135, declares that "the destruction of a tenement by fire, or the loss of possession by any casualty not caused by the landlord, or from defect of his title, shall not abate the rent contracted to be paid." In *Fleming Bowles v. King*, 100 Ga. 449, 28 S. E. 239, it was held that the tenant of a rented house is liable for the stipulated rent to the end of his term, although the house, before the ex-

piration of such term, may be destroyed by fire, unless the landlord does acts which in law amount to an eviction of the tenant, and that "erecting an inclosure around the rented premises and pulling down the walls of the burned building, these things being done by the landlord under orders of the municipal authorities, for the purpose of insuring safety to the public, are not such acts." While the word "casualty," as used in § 3135 of the Civil Code of 1895, does not include an effect arising from legislative action, the hardship is no greater in the latter case than in those covered by that section. In either case the tenant may protect himself by proper agreements in the lease. In *Fitzgerald v. Witchard*, 130 Ga. 552, 16 L.R.A. (N.S.) 519, 61 S. E. 227, the municipal authorities received the prescribed fee and issued licenses authorizing certain persons to engage in the sale of intoxicating liquors for the remainder of the year. Before the expiration of the year, the general assembly enacted a law requiring a much higher license fee for the right to sell liquors in the county where the city was located. The licensee thereupon ceased to engage in the sale of liquors, and applied to the municipal authorities for a return of so much of the money paid for his license as would be in proportion to the time in which he did not engage in such business. After the year covered by the license had expired, the mayor and council then in office granted the application, and resolved to refund the proportionate part of the money. Citizens and taxpayers filed an equitable petition to enjoin them from doing so. This court held that such a petition was not open to general demurrer. In delivering the opinion, Mr. Justice Atkinson said, if it be assumed that the licensees quit business because of the act of the legislature, "the agency which prevented the licensees from enjoying the privileges was the state law, separate and distinct from the municipal government."

It is urged that the facts in cases of the character cited above differ from those in the present case. This is true to some extent, but not so as to prevent the applicability of the principle involved in them to the case in hand. The mere fact that, when the tenant rented the property, it was thought that he could continue to sell liquor there, would not entitle him to a proportionate abatement of the rent because the legislature subsequently prohibited the sale of liquor in the state. If it would do so, why should not licensed druggists insist that they had been prevented from doing the business of filling prescriptions for liquors or for alcohol except under close restrictions? No doubt this was known to them and their landlords to be a profitable part of their business, which 19 L.R.A. (N.S.)

has been cut off by the act of the legislature; but it would hardly be contended that every druggist who occupies a rented store could claim a reduction in the rental on that ground. Similarly, many grocers who formerly sold wines and liquors were prevented from doing so further by the act of the legislature; but it could not be said that if, when they leased their stores, it was anticipated that they would continue such sale, they would be entitled to an abatement in the rent because of the legislative prohibition.

It was urged that the lease now involved specifically named the bar, and that its operation was a material consideration entering into the lease of the hotel. In the illustrations just given it could no doubt be frequently proved that both landlord and tenant knew that the latter was selling wines, alcohol, or liquors, and that this was a material part of the business. The mere use of the word "bar" in the lease did not amount to a covenant or warranty on the part of the landlord that the law would continue to allow the tenant to conduct the business of keeping a bar and selling liquors, or a covenant by the tenant that he would do so. The property rented was known as the "Albion Hotel." In describing it the following language was used: "The leased premises consist of the corridor, office, bar, barber shop, cigar stand, billiard room, on the first floor; boiler house and kitchen fronting on Ellis street; the second, third, fourth, and fifth stories of the hotel proper; the open court on the second floor; the open courts fronting on Ellis street, to which the tenants occupying stores fronting on Broad street are entitled to use in common with the tenant herein named." From the last clause quoted, as well as from a statement appearing in the correspondence between the parties in regard to the controversy, it would seem that the entire building was not rented to the lessee, but that there were some tenants of stores on the first floor not included in the hotel proper. The language quoted was merely descriptive of what was rented, not a covenant on the part of the tenant to conduct the business of keeping a barroom, or a warranty on the part of the landlord that the law would permit him to continue to do so. Nor did other portions of the lease have that effect. It would be no more proper to hold that the employment of the words "bar" and "barroom" amounted to a covenant to use the place thus designated for the sale of wines, beer, or liquors, and for no other purpose, than it would be to declare that the words "billiard room," "barber shop," and "kitchen" imported a covenant on the part of the tenant to use the rooms so described for billiard and pool

playing, barbering, and cooking, respectively, and for no other purpose, or that the place designated as the "office" should be put to no other use by the tenant than to keep an office there. And the provision in regard to keeping good order does not make a covenant of exclusive use for the business of selling liquors.

It was argued that, as to the bar, the tenancy was terminated; and cases were cited to the effect that where an apartment in a building is rented, and the building is destroyed, the tenancy ceases (*Gavan v. Norcross*, 117 Ga. 356, 360, 43 S. E. 771); also, to sustain the contention that, if there is a substantial destruction of the subject-matter of the lease by the act of God or the public enemy, rent ceases (9 Cyc. Law & Proc. p. 631); that eviction by the landlord results in suspension of rent, eviction by another from a portion of the premises, under paramount title, entitles the lessee to an apportionment of rent (24 Cyc. Law & Proc. pp. 1186, 1187); that, according to some authorities, if part of the premises are taken by condemnation under the power of eminent domain, the rent may be apportioned, and that to the general rule that a party to a contract is not discharged by subsequent impossibility of performance there is an exception where the performance becomes impossible by law (9 Cyc. Law & Proc. pp. 629-631; Civil Code 1895, § 3725). These propositions, as abstract rules, do not require discussion. They do not aid the plaintiff in error, because they do not apply to the facts of this case. Neither the leased premises nor any part of them have been destroyed. No act of Providence or of the public enemy has affected the status. The only act complained of is that of the Georgia legislature. There has been no eviction of the tenant from the premises by the landlord or by one holding paramount title, and no condemnation of any part of them. Nor has the law prevented the carrying out of the written contract between these parties. An underlying error in the contention of the plaintiff in error arises from dealing with the contract of lease as different from what it really was. The landlord leased to the tenant a certain hotel, including a bar-room, cigar stand, etc. The tenant contracted to pay certain rent, that the premises should be used for hotel purposes alone, and that it should be a first-class hotel, with other agreements not material now to recite.

The argument for the plaintiff in error treats the lease, so far as relates to the bar-room, as a lease of the "bar privilege" or the right to sell liquor. Such is not the effect of the written lease. The landlord leased the premises to the lessee. So far as he was

concerned as landlord under the law as it then stood, he gave the lessee the privilege of using a portion of them for a bar, or of subrenting. But he did not contract or warrant that the law would remain unchanged, or that there should be any diminution of rent if a change occurred. It may be unfortunate for the lessee that he did not anticipate the possibility of the passage of a prohibition law and provide for such a contingency; but that he did not do so does not alter the contract as made. The lessee is still entitled to the occupancy and use of the premises. The landlord, who had nothing to do with making the sale of liquor by the lessee impossible under the law, is entitled to his rent. The law has not made it impossible to perform the contract of rental of premises. That must not be confused with the prohibition by law of selling liquor on the rented premises. See, on incidental injury from police laws, *Menken v. Atlanta*, 78 Ga. 668, 2 S. E. 559; *State v. Griffin*, 69 N. H. 1, 41 L.R.A. 177, 76 Am. St. Rep. 139, 39 Atl. 260.

It might be remarked that, prior to the passage of the prohibition act, there existed in Georgia a local option law, and all persons were bound to know that there was a possibility that the sale of liquors might be prohibited in any county under an election held for the determination of that question: also the sale of liquors has, for a great many years, been the subject of legislation, regulating, restricting, or prohibiting the business in different localities, and this must have been known to all men. But the argument of notice from special facts is unnecessary. The sovereign state, in its police power, may pass laws restricting or prohibiting the sale of liquors. Landlords and tenants who make contracts of leases of premises are bound to know that the state has such a power, and, in the absence of any provision in a lease for an abatement of the rent in case of the exercise of it, or similar provision, the landlord will not be held to warrant against the possible action of the state in that regard, and the tenant who leases the premises will not be entitled to an abatement of rent because the state prohibits the sale of liquors.

Long before the passage of the prohibition law, a person desiring to conduct the business of selling intoxicating liquors had to obtain a license. The licensing authorities had certain powers in regard to granting or refusing it. Suppose that a landlord had rented a room to a tenant who expected to keep a bar there, the landlord agreeing to let him have the room, and the tenant agreeing to pay a stipulated rental therefor; but suppose, upon application, the tenant failed to obtain a license, and could not conduct

a bar on the premises; would it be contended that the landlord could not collect his rent? If the landlord delivered the rented premises to the tenant, and did not obstruct their lawful use by the tenant, the latter could not claim an abatement of rent because of his own inability to obtain a license. The landlord did not guarantee that the tenant could obtain a license, unless it was so expressed in the contract. The loss from inability to conduct a certain business would fall on the tenant desiring to do so, not on the landlord, who had nothing to do with causing such loss. So likewise if, after commencing the business of keeping a bar, the license of the tenant should be revoked, in the absence of an agreement on the subject, he would not be entitled to a diminution of the rent. And this would be true whether the revocation of the license by the authorities was on the ground of misconduct of the tenant, or in the lawful exercise of the police power on other grounds. Similarly, if the legislature substantially terminates all licenses, or prohibits the issuance of future licenses, or the conduct of such business, by the passage of a general prohibition law, the inability to procure a license or to conduct the business of selling liquors without it furnishes no reason in law for refusing to pay the rent agreed for the premises on the theory of an eviction, a breach of covenant, or a failure of consideration. If it was desired to provide against contingencies or possibilities of this character, such provision should have been made a part of the contract. Mere anticipation or expectation that the tenant will be able to procure a license, or to keep it, or that the state will not restrict or prohibit business of the character which he expects to conduct, does not, upon disappointment, cast the loss upon the landlord, unless it be so provided in the contract. The tenant can still use the premises for other purposes not prohibited by law or the contract.

It was argued by counsel for the defendant in error that the contract was entire, not severable; that the tenant retained possession of all of the rest of the premises, and only offered to surrender the barroom; and that this could not be done so as to claim an apportionment of the rent. As the case is controlled by what has been said already, it is unnecessary to deal with this contention. The doctrine of equitable mistake was also invoked by the plaintiff in error; but the case made was not such as to render it applicable.

2. The contract contained a provision that if, at any time, there should be any disagreement between the parties as to their rights and duties or those of either of them, or as to the meaning or construction of the 19 L.R.A. (N.S.)

contract, or if any dispute, difference, or issue should arise between them touching the effect of the contract or of any clause contained in it, "then every such dispute or matter in dispute shall be referred to the arbitration of two persons akin to neither of the parties, one arbitrator to be appointed by each party." The tenant requested an arbitration of the matter of apportioning the rent; and the landlord, instead of agreeing thereto, brought suit. The argument was that this was in violation of the stipulation quoted. In regard to this contention two points may be suggested: (1) The contract contains the following: "But nothing herein shall deprive, or be construed to deprive, the lessor of the right to resort to the courts for the enforcement of any rights hereunder, nor shall this contract be considered to deprive the lessor of any statutory or common-law remedy for the collection of rents or damages for the breach of the covenant herein stipulated." (2) The stipulation in a contract providing that, in case of difference between the parties, it shall be referred to arbitration, does not prevent either party from resorting to the courts in the first instance without such reference, unless such stipulation amounts to a condition precedent to the right to sue, or (what is substantially the same thing) makes such submission the only mode by which the amount of damage may be ascertained, or by which liability can be fixed. When an agreement having the effect of ousting the courts of jurisdiction might be against public policy is not now involved. *Leonard v. House*, 15 Ga. 473; *Liverpool, L. & G. Ins. Co. v. Creighton*, 51 Ga. 95; *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638; 2 Am. & Eng. Enc. Law, 2d ed. pp. 570-573. Judgment affirmed.

All the Justices concur.

VERMONT SUPREME COURT.

MARY SHUM, Admr., etc., of W. H. Shum, Deceased,
v.

RUTLAND RAILROAD COMPANY.

(— Vt. —, 69 Atl. 945.)

Evidence — presumption of care.

1. One killed at a railroad crossing under circumstances of which there was no witness cannot be presumed to have been in the exercise of due care in an action to hold the railroad company liable for his death, where the burden of showing due care is on the plaintiff.

Railroad — crossing accident — precautions — availability.

2. If a pedestrian struck on a railroad crossing by an engine running 60 miles an hour could, in approaching the crossing, have seen 165 feet along the track when 4 feet therefrom, it cannot be said, as matter of law, that any prudence he might have exercised in looking along the track would not have avoided the accident because of the excessive speed of the engine.

Appeal — directed verdict — view by jury — effect.

3. A verdict directed for defendant in an action against a railroad company for killing a person at a railroad crossing will not be reversed where nothing in evidence before the court tends to show the exercise of care by the person killed, or anything that in law would excuse it, merely because the jury viewed the premises and might have seen something not disclosed by the evidence which would have warranted a recovery.

(Hall, Superior Judge, dissents.)

(May 8, 1908.)

EXCEPTIONS by plaintiff to the direction by the Rutland County Court of a verdict in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Judgment affirmed.

The facts are stated in the opinion.

Messrs. Butler & Moloney for plaintiff.

Messrs. H. Henry Powers and P. M. Meldon, for defendant:

The absence of negligence on the part of the plaintiff, contributing to the injury, must be affirmatively shown by the plaintiff; and no presumption of freedom from such negligence arises from the happening of the injury.

Reynolds v. New York C. & H. R. R. Co. 58 N. Y. 248; Weston v. Troy, 139 N. Y. 281, 34 N. E. 780; Whalen v. Citizens' Gas-light Co. 151 N. Y. 70, 45 N. E. 363; Brooks v. Somerville, 106 Mass. 271; Allyn v. Boston & A. R. Co. 105 Mass. 77; Murphy v. Deane, 101 Mass. 455, 3 Am. Rep. 390.

If the traveler could have seen, or by listening could have heard, the train, it will be presumed, if a collision occurred, that he did not look or listen, or did not heed what

he might have seen or heard; and such conduct is negligence *per se*.

Oleason v. Lake Shore & M. S. R. Co. 143 Ind. 405, 32 L.R.A. 149, 42 N. E. 736; Chase v. Maine C. R. Co. 78 Me. 346, 5 Atl. 771; Seefeld v. Chicago, M. & St. P. R. Co. 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278; Brady v. Toledo, A. A. & N. M. R. Co. 81 Mich. 616, 45 N. W. 1110; Hyde v. Jamaica, 27 Vt. 465.

A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing in order to avoid collision; and if, by neglect of this duty, he suffers injury, he cannot recover from the company, although it may itself be guilty of negligence, or fail to give the signals required by statute, or be running at the time at a speed exceeding the legal rate.

Pierce, Railroads, p. 343; Butterfield v. Western R. Corp. 92 Mass. 532, 87 Am. Dec. 678; Reynolds v. New York C. & H. R. R. Co. supra; Weber v. New York C. & H. R. R. Co. 58 N. Y. 451; Horn v. Baltimore & O. R. Co. 4 C. C. A. 346, 6 U. S. App. 381, 54 Fed. 304; 3 Elliott, Railroads, §§ 1772, 1773; 4 Elliott, Railroads, § 1701; Beach, Contrib. Neg. p. 423; Chicago G. W. R. Co. v. Smith, 73 C. C. A. 164, 141 Fed. 930; Wabash R. Co. v. De Tar, 4 L.R.A.(N.S.) 352, 73 C. C. A. 166, 141 Fed. 932; St. Louis & S. F. R. Co. v. Chapman, 71 C. C. A. 523, 140 Fed. 129; Tucker v. New York C. & H. R. R. Co. 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; Rodrian v. New York, N. H. & H. R. Co. 125 N. Y. 526, 26 N. E. 741; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542; Cordell v. New York C. & H. R. R. Co. 75 N. Y. 330; Daniels v. Staten Island Rapid Transit Co. 125 N. Y. 407, 26 N. E. 466; Corcoran v. Boston & A. R. Co. 133 Mass. 507; Tyndale v. Old Colony R. Co. 156 Mass. 503, 31 N. E. 655; Wright v. Boston & M. R. Co. 74 N. H. 128, 8 L.R.A.(N.S.) 832, 124 Am. St. Rep. 949, 65 Atl. 687; Carter v. Central Vermont R. Co. 72 Vt. 190, 47 Atl. 797.

Munson, J., delivered the opinion of the court:

The plaintiff's intestate was killed in the Wallingford yard, at the first crossing north of the station, on Sunday, the 3d day of January, 1904, about a quarter past 5 in the afternoon, while walking westwardly directly across the track, by a "wild engine" coming from the south at a great speed, called by one witness full 60 miles an hour, and without a headlight or any signal other than a whistle nearly half a mile south of the station. There had been a considerable fall of light snow the day and night before,

Note. — Presumption of care of person killed at railroad crossing, see case note to Hanna v. Philadelphia & R. R. Co. 4 L.R.A.(N.S.) 344.

As to right to rely on presumption of self-preservation in an action for negligent killing, in order to prevent nonsuit, where there were no eyewitnesses, see case note to Adams v. Bunker Hill & S. Min. Co. 11 L.R.A.(N.S.) 844, 19 L.R.A.(N.S.)

and it was then very cold, with some wind from the north, and some snow in the air. The engine passed, with sounds described as unusually loud, emitting clouds of smoke and steam, which settled down and around it, and producing a jarring effect, noticeable in houses near the crossing, but not noticed by a witness, who stood on the west side of the crossing 7 or 8 rods from the track. Witness placed this in the edge of the evening,—just about dusk,—while it was light, but not as light as in broad day, and spoke of the objects testified to as plainly visible.

The line of the railway through this yard is a long curve with the bend to the west. The station is south of the crossing, on the easterly or inner side of the curve. The distance from the crossing to the station is not given, but one witness gives the distance to the water tank as 10 or 12 rods, and the station is said to be a little farther south. The size of the building does not appear. There is a side track east of the main track, extending from the station to and beyond the crossing, and east of the siding is a spur track, which ends 30 or 40 feet south of the crossing. Along the east side of the spur is a loading platform 5 feet high. Estimates of the space between the main track and the siding range from 5 to 10 feet. At the time of the accident there were 3 or 4 box cars on the siding south of the crossing, and 2 or 3 on the spur. The cars on the siding came within about 30 feet of the crossing, and the nearest car on the spur may have been anywhere from 10 to 50 feet further south. There is nothing to show how far the side of a box car projects over the rail. There was a pile of wood east of the platform, containing 15 or 20 cords, which extended north of the platform to within 10 or 15 feet of the crossing, and was about 8 feet high at the north end. Of the witnesses who gave their recollection of the number and location of the cars, one testified that the view of a person making a turn from the south onto the crossing would be so obstructed by the cars that he could not quite see to the main line, but that he could probably see down towards the depot between the cars; and another testified that a person 4 feet from the east rail of the main track could not see along that track to the south more than 10 or 12 rods. The radius of the curve is not given.

A street runs north from the station alongside the yard, with houses on the easterly side facing the tracks. The deceased lived in one of these houses, a little distance north of the crossing, and was employed in shops just over the railroad near the end of the crossing. He had lived and worked in these places for twenty years, and had passed over the crossing four times a day 19 L.R.A. (N.S.)

nearly every week day during that time. There have been a few regular trains on Sunday, and occasionally an extra, for several years. The passing of trains usually produced a jarring sensation in the vicinity of the crossing. The deceased was very deaf, and had been so for at least thirty years. He could not hear ordinary conversation, but could be communicated with by one standing close to him and speaking very loudly. His son was accustomed to attract his attention by stamping on the floor. He could hear a railroad whistle near by, and knew of the passing of trains by the jarring sensation produced.

The railroad crossing is in a street which runs east and west, crossing the street running north from the depot substantially at right angles. On the occasion of the accident the deceased came up the street from the south, and turned to the left to go over the crossing. A witness, who lived in the second house on the south side of the street running east, saw him from her window as he made the turn and approached the side track. She states that he wore a cap pulled down over his ears, and was walking rapidly, and looking straight ahead. The witness watched him until he had crossed the side track, and then looked south for the engine, and so was unable to say whether he looked to the right or the left before coming to the main track. Another witness, who lived in the first house on the south side of the street running east, saw him for a second while sitting by her window, and looked away, fearing an accident. She described him as between the two tracks going straight ahead, and could say no more. The deceased's cap had a flap that could be pulled down to cover the ears, and he was wearing it in that manner a few minutes before the accident. The cap was found the next morning between the main track and the siding, nearly 9 rods north of the crossing, with the flap turned down. The body was found soon after, in a dismembered condition, about a quarter of a mile from the crossing, on the same side of the track. A verdict for the defendant was directed on motion at the close of the plaintiff's case.

The general rules applicable in cases of this character are well settled. One who is about to cross a railroad track must look and listen for an approaching train, and must stop to listen if that is necessary to enable him to listen effectually. If his vision is obstructed, he must be specially vigilant as regards his hearing. If circumstances are such that his hearing cannot be relied upon, he must look with special care. He must continue to look and listen, as he approaches the track, until the last moment when the discovery of a train would avail

for his protection. *Manley v. Delaware & H. Canal Co.* 69 Vt. 101, 37 Atl. 279; *Carter v. Central Vermont R. Co.* 71 Vt. 190, 47 Atl. 797.

The plaintiff says it is to be presumed that the deceased was exercising the required care at the time he was killed; but the cases cited in support of this claim are from other states. The rule in this state puts the burden as to contributory negligence on the plaintiff. It is said in *Walker v. Westfield*, 39 Vt. 253, that to make a case upon which the plaintiff can safely rest he must submit evidence upon which the jury would be authorized to find affirmatively that no want of care on his part contributed to the accident. In *Bovee v. Danville*, 53 Vt. 189, the court declared this to be the doctrine of all our cases, and expressly repudiated any language that might seem to indicate the contrary. This court has applied the rule in cases where death has resulted from an unobserved accident. In *Hyde v. Jamaica*, 27 Vt. 445, the intestate was drowned while attempting to drive through a stream at a ford way. No one saw him after he entered the stream, and there was nothing to indicate the particular manner in which the accident occurred. It was assumed, in disposing of the case, that the intestate was not in fault in attempting to cross the stream. But it was considered that the law required the exercise of due care while in the stream, and that this could not be presumed, but was a fact for the plaintiff to establish. But it is not necessary that the evidence be that of an eyewitness. In *Lazelle v. Newfane*, 69 Vt. 306, 37 Atl. 1045, the plaintiff was so injured that he lost all recollection of what occurred, and the person riding with him was killed. The accident occurred on a bridge, and the injuries were caused by going over the log which formed a guard rail on the side of the bridge. The plaintiff had a gentle, manageable, and safe horse, with which he was familiar, and was driving towards the bridge on a walk when last seen. The wheel tracks showed that the horse came upon the bridge properly, and then cramped the wagon and backed it against and over the log. The court considered that these circumstances were evidence tending to show that the plaintiff was in the exercise of due care. The opinion says that from these facts "the jury might well infer that the plaintiff, presumably possessing the common instincts of self-preservation, did not contribute in any degree to the accident." The writer of this opinion dissented in that case, but his dissent failed to be noted. It would seem, however, upon a review of the opinion, that the clause quoted does not refer to a pre-

sumption in aid of the finding that the plaintiff was driving with due care, but to a presumption that the plaintiff, when suddenly imperiled by the backing of a horse without his fault, did all that he could to save himself. This view relieves the opinion of any erroneous suggestion that might otherwise be found in it. It certainly was not intended to limit the opening proposition of the opinion that the burden was on the plaintiff to show that he was not guilty of contributory negligence in any degree.

The *Lazelle Case* was cited in *Boyden v. Fitchburg R. Co.* 72 Vt. 89, 47 Atl. 409. In that case the intestate and his three companions were killed while attempting to cross a double-tracked road after the passage of a train on the nearer track, by a train coming from the opposite direction on the farther track. It was stated at the outset that the burden was on the plaintiff to show that the intestate and his companions were not guilty of contributory negligence. But, in passing upon defendant's motion that a verdict be directed for a failure in this respect, after referring to evidence which tended to show that the track could have been seen in the direction of the approaching train for a considerable distance, the court said: "It may be reasonably inferred from the circumstances, taking into consideration the disposition of persons to take care of themselves and avoid injury, that, while waiting for the freight train to pass, and until they started along, the decedent and his companions looked and listened to guard against any westbound train which might be approaching on the northerly track." This follows the *Lazelle Case*, as it might naturally be construed, but is clearly inconsistent with our established doctrines. The instinct of self-preservation cannot be made the basis of a presumption that due care was exercised, where the burden of proving due care is placed on the plaintiff. Nor do we consider this instinct entitled to a recognition inconsistent with our rule. The presumption that one who realizes his peril will do what he can to save himself is quite different from a presumption that one will be prudent and not incur danger. A multitude of accidents result from the occasional carelessness of people who are generally prudent. "The careless act usually precedes the moment when the natural instincts of self-preservation are aroused." *Chase v. Maine C. R. Co.* 77 Me. 62, 52 Am. Rep. 744. Moreover, the requirement of due care cannot be satisfied in this jurisdiction without looking and listening, and the performance of this duty cannot be inferred from the fact of opportunity without relieving the plaintiff from the burden of

showing the required care. We could not follow the courts which make an exception in cases where the injured party is killed and there is no evidence regarding his conduct, without departing from the holding in *Hyde v. Jamaica*. But, if the views expressed in the *Boyden Case* were held to be consistent with our decisions, the application made of them could not be sustained; for there were witnesses in that case who saw the occurrence, and all the authorities hold that there is no room for a presumption of due care when there is direct evidence on the subject. We conclude, therefore, that there is no presumption that plaintiff's intestate was in the exercise of due care, and that the case must be disposed of on the evidence submitted. The intestate was under observation as he approached the track, and almost until the moment of the accident. The undisputed testimony is that he was walking rapidly, and looking straight ahead as he passed along the crossing, and that, when last seen, he had entered the space between the siding and the main track, and was still looking and walking straight ahead. There is no circumstance disclosed by the evidence that tends to show that he was mindful of the risk incurred.

It is claimed, further, that the view was so obstructed by the cars, and the speed of the engine so great, that, if the deceased had looked for a train, his looking would have been of no avail. This leaves out of consideration the fact that the deceased, very hard of hearing at best, had his cap pulled over his ears. But the question will be taken up independently of this circumstance. It is said that, if the deceased had seen the engine, he would not have had time to get off the track. The question is rather whether he could and should have seen the engine in time to have kept off the track. The deceased was familiar with every feature of the situation. The case leaves the side track to the north unobstructed, so the last look should have been to the south. The deceased's movements were not dependent on the control of a team, and the arrest of his forward movement could have been practically instantaneous. There is no evidence that brings the end car on the siding nearer to the crossing than 30 feet. Here we are met by the fact that there is no evidence as to the degree of the curve. The only evidence in the case that covers this point, and thus completes the description of the location, is the testimony of two witnesses, who gave the position of the cars and their judgment as to the distance a person approaching the track could have seen to the south. The witness most favorable to the plaintiff stated

that in his judgment a person 4 feet from the east rail could not have seen down the track more than 10 or 12 rods. The plaintiff ignores this evidence, and bases her claim wholly upon mathematical calculations, in which assumptions supply the place of satisfactory information regarding the curve. But we have evidence sufficiently definite to enable us to use the estimate of the witness understandingly. If we treat the speed of the engine as 60 miles an hour, the highest estimate, and assume that a person walking rapidly covers 4 miles an hour, as is assumed by the plaintiff, the deceased would go 1 foot while the engine was going 15, or $2\frac{1}{2}$ feet, the ordinary step of a man walking rapidly, while the engine was going $37\frac{1}{2}$ feet. Then, if we assume that the deceased had just stepped over the east rail when struck, which is as far as the evidence can be claimed to indicate, the engine would have been 75 feet away when the deceased was 4 feet from the track, or 2 steps back from the position in which he was struck. Upon this basis it would seem that the deceased must have taken the step preceding that which brought him over the nearest rail, with the engine in plain view. If, instead of taking that step, he had taken a step to the rear, he would have remained in safety. But this treatment of the matter is not presented as the basis of our conclusion. The niceties and assumptions of the calculation are not essential; for if the deceased, when 4 feet from the rail, could have seen the track for the 10 rods estimated by the witness, 165 feet, it certainly cannot be said that, if he had been looking as he reached that point, his prudence would have availed him nothing.

It is also claimed that a verdict cannot be directed in a case where the jury have been permitted to view the premises, inasmuch as the things they have seen are evidence, and may embrace matters that are not, and perhaps could not be, included in the case as sent up. We cannot accept this view. If there is nothing in the case submitted to the court that tends to show an exercise of care, or something that in law excuses it, the court will not reverse the judgment on the conjecture that the jury may have seen something not shown by the exceptions.

Judgment affirmed.

Hall, Superior Judge, dissenting:

I am unable to assent to the opinion of the majority of the court, because in my view it fails to recognize a sound principle of law accepted by this court a decade ago, and, in effect, overrules two well-considered cases of this court. On trial of said cause, after plaintiff rested, the court, on motion

of defendant, directed a verdict for the defendant, upon the ground that the plaintiff had not shown that her intestate was free from contributory negligence. In considering the question whether the court erred, the evidence must be taken in its most favorable light for the plaintiff. *Boyden v. Fitchburg R. Co.* 72 Vt. 89, 47 Atl. 409; *Smith v. New York C. & H. R. R. Co.* 177 N. Y. 224, 69 N. E. 427. If there are opposing inferences to be drawn from the evidence and circumstances bearing upon the question of contributory negligence, it was the duty of the court to submit that question to the jury. This proposition has been too long and too well settled to call for authorities. The inferences which a court might draw from the evidence are not controlling. The question is, What inferences might a jury legitimately and reasonably draw therefrom? *Boyden v. Fitchburg R. Co.* 72 Vt. 85, 47 Atl. 409.

While the statement of facts in the majority opinion does not differ materially from the following, I have recited certain facts appearing in the record (not recited in the majority statement), especially with reference to the character, habits, and caution of plaintiff's intestate, which seem to me to have an important bearing upon the question of contributory negligence. At Wallingford yard on the date in question the defendant's main line ran northerly and southerly on a curve, with the bend towards the west,—the degree did not appear. On the east side of the main line, running to a point north of where the accident occurred, there was a switch track or siding. Running from the depot on the east side of the switch track to a point near the crossing where the accident occurred was a spur track. On the switch track or siding there were 3 or 4 box freight cars, on the south side of the crossing, the nearest within 30 feet of it. At the north side of the spur track there was a platform for loading cars. Beside it was a pile of pulp wood (the north end within 15 feet of the crossing) of 15 or 20 cords, ranging from 5 to 8 feet in height; and there were a few cars on the spur track. It did not appear how far it was from the spur track to the siding, but from the siding to the main track was about 10 feet. (The majority opinion adopts "5" feet. There was evidence tending to show that it was "5" feet and that it was "10" feet. I adopt that most favorable to plaintiff.) It was in evidence that you could not see southerly from the crossing, on the main line, until within 3 or 4 feet of it (and when within the zone of danger), and then only 10 or 12 rods. It did not appear how far south of the crossing the depot was, or the size of

exact location of it, except that it was on the east side of the main line. From south of the depot running along beside the spur was a traveled road leading north of the crossing, called "Railroad street." The crossing, where the accident occurred, was on a street called "Mill lane," running in an easterly and westerly direction.

On the evening of the accident, Sunday, January 3, 1904, it was cold and blustering, with the thermometer 20 degrees below zero, and the wind blowing from the north; there had been a fall of light snow, and snow was in the air; some lights had been lit. The accident occurred from a quarter to half past 5 in the evening. Defendant was running a "wild engine" towards the north very fast,—two witnesses say at the rate of a mile a minute; several witnesses, located at different places, say it was running very, very fast, that the fact was commented upon at the time,—and the engine did not slow up while passing through the village. There was no headlight and no warning by blowing a whistle (except at a crossing about $\frac{1}{2}$ mile below and southerly of the station) or ringing the bell. When the engine passed through the yard it was emitting clouds of smoke and steam, that settled down around it so that it could hardly be seen; the smoke and steam remaining for a minute or more after the engine passed. Some said there was a loud rumbling noise, but this was not noticed by a witness 7 or 8 rods west of where the accident occurred. He testified that clouds of steam and smoke were all around the engine; that the smoke and steam from the engine, when 7 or 8 rods away, was what attracted his and his brother's attention. While two regular trains ran through Wallingford Sunday, it was unusual to run "wild engines on Sunday." It must be conceded that, by reason of the location of the track, the pile of pulp wood and cars, as well as the curve that obstructed the vision until close to the main track, the speed at which this "wild engine" was run on Sunday evening, without headlight, not slowing up in the village, nor giving warning, was gross negligence.

The decedent was a man forty-six years old, sober, industrious, with a wife and three children, and a good provider. His son, who was nineteen years old when his father was killed, testified that, while he was deaf, they had no difficulty in conversing with him; that he was more cautious than people generally. In cross-examination he was asked, "So that any person about to cross that crossing would feel it jar?" He answered: "Yes, sir; and he (referring to his father) naturally would, because he was very cautious; he was more

cautious than people generally." In re-direct he said, "Always very cautious, any noise, when a train would be going by the house, he would always know just as quick as the rest of us." Decedent's house was a short distance east of the crossing, and he went over that crossing for years, four times a day to and from his work, and was perfectly familiar with it. On the night in question he left his house to get a Sunday paper, somewhere down on Railroad street. Returning, he started to cross the tracks, and his body was found, with the left leg severed, about $\frac{1}{2}$ mile north, on the following morning. No one saw him when the accident occurred, or could tell just how it occurred.

Railroad street was 4 or 5 rods wide at the crossing. A lady in the corner house on the east side, southeast of the crossing, looking diagonally through the north window, saw the back and side of a man for an instant only, but not plain enough to know who it was. She thought he was tall, but could not tell whether he was large or small,—she emphasizes that it was only a second by repeating that word several times. She thought he was between the main track and siding. She did not testify whether standing still or walking. She could not tell whether he had on a cap or not. She heard the engine, but did not see it. She was not much alarmed; for she thought if he went straight across he would get across, but if he did not go straight across, he might get hurt. Another lady, who was a witness, lived in the second house east of the corner, on Mill lane. She heard the engine, and got up and went and looked out of the window, and saw a tall, slim man, whom she did not know, going west towards the railroad crossing, almost onto the switch. When the engine passed, the smoke and steam hid him. The smoke and steam was down towards the track, and lingered for a minute or two. There was lots of fire as the engine passed, and the snow flew. She said the man she saw was walking fast, with his cap pulled down over his ears, with his hands in his pockets, looking straight ahead, so that he could see anything in his way. The thought came into her mind that he might be harmed by the engine. The witness before alluded to, who, with his brother, was a short distance west of the track, did not see Shum at all.

It cannot be claimed, in the circumstances, the location of the houses, the time in the evening, the casual seeing of a man whom they did not recognize, that the tenor of the evidence of the two ladies is very satisfactory, or that a jury would have found, from such evidence, that plaintiff's

intestate was guilty of contributory negligence. Still the majority opinion, with no other basis than the evidence of the two witnesses just referred to, who were in houses east of Railroad street, says: "The intestate was under observation as he approached the track, and almost until the moment of the accident. The undisputed evidence is that he was walking rapidly, and looking straight ahead as he passed along the crossing, and that, when last seen, he had entered the space between the siding and the main track, and was still looking and walking straight ahead." An instantaneous looking through a window, diagonally, without being able to distinguish the person, can hardly be called "observation." At the time these witnesses saw him it would have been absolutely useless to have looked south, for he could not have seen past the wood cars until he had walked several feet farther, and then only when so near the main line as to be in the "zone of danger." The fact is beyond cavil that no one saw him when decedent could have seen or apprehended danger.

Again, the majority opinion assumes that he was traveling at the rate of 4 miles an hour. If so, witness Pickett and his brother must have seen him. While one witness uses the word "rapidly" as applied to his walking, it must be borne in mind that it was very cold, the wind was blowing from the north, and the ground was frozen. It is submitted that 3 miles an hour would be rapid under such conditions. The engine was running at the rate of about 85 feet per second. It would only take two seconds from the time it came in sight, near the main track, for it to pass. The witnesses on the opposite side heard no signal, and their attention was attracted only by the escaping smoke and steam. Just what transpired in two or three seconds no one knows. As that "wild engine" came bowling along, surrounded by smoke and steam and snow, without warning plaintiff's intestate was caught, and carried to his death, just how no one can conjecture. We know that his left leg was cut off, his right arm broken, and he was badly bruised, but none of these injuries give a clue as to how he was struck or caught.

The burden of proof was upon the plaintiff to show that decedent was not guilty of contributory negligence. While in this state it cannot be presumed, as matter of law, that the decedent was in the exercise of due care and prudence, it must be conceded that, if the facts and circumstances tend to show that plaintiff's intestate was in the exercise of due care and prudence, that question should have been submitted to the jury. Dresser on Employer's Lia-

bility (page 376), referring to states where the rule is similar to our own, says: "It must in some way appear from the plaintiff's evidence that he exercised care. But . . . direct affirmative evidence of the plaintiff's care is not required, and his due care may, upon all the circumstances, be inferred from absence of fault." In *Mayo v. Boston & M. R. Co.* 104 Mass. 137, it is held that, "to sustain an action for an injury received by the plaintiff through the defendant's negligence, it is not necessary for the plaintiff to prove due care on his part by directly affirmative evidence, but the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received." Robinson, J., in *Pittsburgh, C. C. & St. L. R. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514, well says: "Slight, positive testimony, whether circumstantial or otherwise, when taken in connection with the instincts of self-preservation, and the desire to avoid pain or injury to one's self, may be sufficient to support a conclusion that one who suffers injury did not help to bring it upon himself;" and cites *Allen v. Willard*, 57 Pa. 374; *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Hopkinson v. Knapp & S. Co.* 92 Iowa, 328, 60 N. W. 653; *Greenleaf v. Illinois C. R. Co.* 29 Iowa, 14, 4 Am. Rep. 181; *Gay v. Winter*, 34 Cal. 153; *Evansville Street R. Co. v. Gentry*, 147 Ind. 408, 37 L.R.A. 378, 62 Am. St. Rep. 421, 44 N. E. 311; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. Rep. 67, 20 N. E. 287; *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *Citizens' Street R. Co. v. Ballard*, 22 Ind. App. 151, 52 N. E. 729.

What are the facts and circumstances making in plaintiff's favor? Negligence is a shortage of duty which one owes to another. It is not presumed. Contributory negligence has this additional feature: It is a shortage of duty which one owes to himself. If negligence cannot be presumed, how much less can contributory negligence. Mr. Shum approached that crossing with full knowledge as to conditions, so far as pulp wood, cars, and obstructed vision were concerned. This was a circumstance prompting care. He was of mature age, with a family dependent upon him, temperate, prudent, and "more cautious than men in general." While it is true that he was deaf, it is common knowledge that, when one faculty is impaired, others take up its work. And the evidence shows that "any noise, when a train would be going by the house, he would always know just as quick as the rest of us." His wife said he

always felt a jar; they attracted his attention by stamping on the floor.

It is said in the majority opinion that "the case leaves the side track to the north unobstructed, so the last look should have been to the south." I cannot subscribe to this. It is the calm deliberation of the jurist, not upon the ground, nor in the presence of danger, but in the quiet and security of his study. Such deliberation has never been, and, in my opinion, never should be, the test. No man is required to use greater caution than that of a man of ordinary care and prudence in the same circumstances. Had he looked south and seen nothing, and then looked north, during the time occupied, the engine would have been down upon him without warning.

The majority opinion says that "it is not necessary that the evidence be that of an eyewitness," and quotes from *Lazelle v. Newfane*, 69 Vt. 306, 37 Atl. 1045: "The jury might well infer that the plaintiff, presumably possessing the common instincts of self-preservation, did not contribute in any degree to the accident,"—but criticises and attempts to limit the scope of that decision. "In my opinion the quotation is a sound proposition, and the instinct of self-preservation should have been weighed with other evidence and circumstances in the case tending to show that plaintiff's intestate was not guilty of contributory negligence. Had this been done, who will question but what there were opposing inferences to be drawn from the evidence? What would a jury, whose special province it is to pass upon such questions, have said? The answer is self-evident. After the decision in *Lazelle v. Newfane*, supra, and the decision in *Boyd v. Fitchburg R. Co.* 72 Vt. 89, 47 Atl. 409, the profession understood that Vermont was placing herself in line with the decisions of other states, and that, if no one saw the decedent when killed, it would be presumed that he was exercising due care; but, if those cases are not to be construed as going to that extent, if the case at bar is to be measured by the standard of either, it should have been submitted to the jury upon the question of contributory negligence. Quoting from the opinion of Taft, J.: "To entitle the plaintiff to recover, it was not necessary that there should have been an eyewitness to the transaction, who can be called to testify to the circumstances attending the accident. The direct testimony of a person witnessing the accident is not required. The manner of the accident, the cause of it, and the fault, if any of either party, may be inferred from the facts shown and detailed by the witnesses."

In another part of the opinion the court

says: "The jury might well infer that the plaintiff, presumably possessing the common instincts of self-preservation, did not contribute in any degree to the accident." Again: "They could infer, from the circumstances shown by the testimony, the neglect of the town, the proximate cause of the accident, and that the plaintiff was without fault." In *Boyden v. Fitchburg R. Co. Watson, J.*, on page 94 of 72 Vt., after referring to the negligence of defendant, says: "It may be reasonably inferred from the circumstances, taking into consideration the disposition of persons to take care of themselves and avoid injury, that, while waiting for the freight train to pass, and until they started along, the decedent and his companions looked and listened to guard against any west-bound train which might be approaching on the northerly track." *Lazelle v. Newfane and Baltimore & O. R. Co. v. Griffith*, 159 U. S. 603, 40 L. ed. 274, 16 Sup. Ct. Rep. 105, are cited, and the court concludes, "and, not seeing nor hearing any, thought it safe to cross." Further on: "A jury might find from the evidence, and the legitimate and reasonable inferences therefrom, that, when the team started along, the express train had not come in view, with the track unobscured, and when approaching, the noise made thereby so mingled with or was drowned by the noise of the freight train that, in the absence of the usual warning by whistle or bell, the decedent and his companions were deceived into thinking there was no train approaching." The decisions in *Lazelle v. Newfane* and *Boyden v. Fitchburg R. Co.*, were apparently given after mature deliberation. More than a decade has elapsed since the first, and nine years since it was followed and quoted from with approval in the second case. In the first case *Start, J.*, submitted the question to the jury. The opinion of the court was by *Taft, J.*, and was concurred in by *Ross, Ch. J.*, and *Rowell and Tyler, JJ.* The opinion in the last case was by *Watson, J.*, and was concurred in by *Rowell, Tyler, Start, and Thompson, JJ.* While it is true that *Munson, J.*, appears as dissenting, no dissenting opinion was given by him.

The majority opinion, referring to these decisions, says they are "clearly inconsistent with our established doctrines. The instinct of self-preservation cannot be made the basis of a presumption that due care was exercised, where the burden of proving due care is placed upon the plaintiff. Nor do we consider this instinct entitled to recognition inconsistent with our rule." As I read the opinion, it does away with the settled and accepted law since *Lazelle v. Newfane* and *Boyden v. Fitchburg R. Co.*, but the majority opinion leaves the profes-

sion to speculate as to how much, if any, of the law laid down in those cases is still the law in this state. These decisions are in line with the judicial utterances of the highest court in the land, and with the later decisions of a large number of states, among which may be numbered the United States Supreme Court, the Federal courts, Maine, New Hampshire, Rhode Island, New York, Pennsylvania, Wisconsin, Michigan, Missouri, Illinois, Iowa, Maryland, Indiana, California, and others. If our decisions are in conflict with doctrines established by our court before the decisions were rendered, is that a reason why they should be reversed, the hands turned back upon the dial, and we go back to a decision that is arbitrary, and so severe that, regardless of the fact if there was no eyewitness to the circumstances attending death by negligence, the decedent's next of kin are without remedy, because they cannot show, by direct and positive evidence, freedom from negligence? *Mr. Wigmore*, in his work on Evidence (volume 4, § 2570), says: "The natural instincts of human conduct, with reference to care or negligence at the time of danger, may be considered."

It may be well to quote from some of the decisions. *Mr. Justice McKenna* in *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137, says: "There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked, and listened. The law was so declared in *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 366, 41 L. ed. 186, 192, 16 Sup. Ct. Rep. 1104. . . . The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation,—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundation than that expressed in the instruction."

Doe, Ch. J., in *Huntress v. Boston & M. R. Co.* 66 N. H. 185, 49 Am. St. Rep. 600, 34 Atl. 154, says: "When there is no evidence of insanity, intoxication, or suicidal purpose, and no evidence on the question of his care, except the instinct provided for the preservation of animal life, it may be inferred from this circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk." This opinion is criticized in *Wright v. Boston & M. R. Co.* 74 N. H. 128, 8 L.R.A. (N.S.) 832, 65 Atl. 687. The learned judge delivering the opinion concludes as follows: "Whether

the fact that the deceased in this case was traveling on foot, while in the *Huntress Case* the deceased was riding in a team, constitutes an important distinction between the two cases, it is unnecessary to inquire. If it does not, the *Huntress Case* must be overruled." Both opinions are cited that the profession may determine which contains the better reasoning. Many New Hampshire cases are in line with the *Huntress Case*. This presumption is in the nature of evidence, and may be weighed as such.

In *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976, it is held that, although proof of due care is essential for a nonsuit, upon the ground that the plaintiff had not shown that the deceased himself was free from contributory negligence. No witness saw the accident. The court said: "The absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration."

In *Johnson v. Hudson River R. Co.* 20 N. Y. 65, 75 Am. Dec. 375, the defendant moved for a nonsuit, upon the ground that the plaintiff had not shown that the deceased himself was free from contributory negligence. No witness saw the accident. The court said: "The absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration."

In *Broadbent v. Chicago & G. T. R. Co.* (1896) 64 Ill. App. 231, it was held that there is in all men a natural instinct of self-preservation, and such instinct is an element of evidence of which the jury may take notice, and, in the absence of all testimony upon the subject, find that a deceased party, in obedience to the ordinary instincts of mankind, exercised that care for his safety which a prudent man in the same circumstances would have made use of.

In *Way v. Illinois C. R. Co.* 40 Iowa, 345, the court said: "The instincts prompting to the preservation of life are thrown into the scale as evidence, like the presumptions of sanity and innocence."

In *Northern C. R. Co. v. State*, 29 Md. 438, 96 Am. Dec. 545, it is said: "These facts and all the circumstances of the case were proper to be considered by the jury; and, in connection with these facts and circumstances, it was competent to the jury to infer the absence of fault on the part of the deceased, from the general and known disposition of men to take care of themselves, and to keep out of the way of difficulty and danger."

In *Strong v. Stevens Point*, 62 Wis. 255, 22 N. W. 425, deceased was last seen approaching a bridge, in which was a hole, 19 L.R.A. (N.S.)

where he fell and was killed. It was held that the jury might find that the accident occurred without culpable negligence on the part of the deceased. This case is cited with approval in *Schrunk v. St. Joseph*, 120 Wis. 229, 97 N. W. 946.

In *Allen v. Willard*, 57 Pa. 375, it was held that the natural instinct, which leads men in their sober senses to avoid injury and preserve life, is an element of evidence.

In *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407, where one Weber was killed while crossing a track, the judge delivering the opinion says: "Whether he stopped or not before driving on the track is matter of mere inference or conjecture, and cannot with certainty be known. On the one hand is the presumption that he stopped to look and listen. He was well acquainted with the crossing, having been accustomed to drive over it every day, and must have known the time at which the regular trains passed. He had the highest motive to take the necessary precaution to insure his safety, and the presumption is that he did. On the other hand, it may be inferred from the circumstances that, if he had stopped to look and listen, he would have seen or heard the approaching train. But, whether he stopped or not, it was the province of the jury to determine as a question of fact, and not a matter of law for the decision of the court."

In *Gay v. Winter*, 34 Cal. 153, it is held that in cases where the negligence of the defendant is affirmatively shown, and there is no proof of the conduct of the deceased or person injured, the jury are at liberty to infer ordinary care and diligence upon his part, taking into consideration his character and habits as proved, and the natural instinct of self-preservation.

The case should have been submitted to the jury upon the point of no warning. Plaintiff's intestate had the right to believe that the defendant's engineer would obey the law by blowing the whistle or ringing the bell, but there was no evidence of any warning, except the blowing of the whistle more than half a mile away, with the wind blowing away from the crossing.

Watson, J., in *Boyden v. Fitchburg R. Co.* 72 Vt., at page 93, 410, says: "Although such negligence [failure to blow the whistle or ring the bell] on the part of a railroad company affords no excuse to the traveler upon the highway for his not exercising due care and prudence to avoid injury, yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care and prudence re-

quired or not; for negligence cannot be imputed to a person who is deceived under circumstances calculated to deceive a prudent man."

Collins, J., in *Hendrickson v. Great Northern R. Co.* 49 Minn. 245, 16 L.R.A. 261, 32 Am. St. Rep. 540, 51 N. W. 1044, says, in substance: "Assuming, then, as we must, for the jury might have so determined, that no cautionary or warning signals were given, it must be held that if, by reason of this omission or neglect, . . . Mr. Hendrickson was led to be less vigilant when drawing near to the railway, his view along the tracks being obscured until he reached a place or situation in which his life was jeopardized and finally lost, his want of vigilance cannot be pronounced culpable or concurring negligence as a matter of law."

In *Pennsylvania R. Co. v. Ogier*, 35 Pa. 71, 78 Am. Dec. 322, it is held, in substance, that if, by reason of the negligence of those in charge of the train, one is less vigilant, the company is not at liberty to impute the consequences of their acts to his want of vigilance, a quality of which they deprived him.

The case at bar is very similar to one in *Michigan*, in which an eminent jurist gave the opinion (in *Teipel v. Hilsendegen*, 44 Mich. 461, 7 N. W. 82, per Cooley, J.): "Nor is it necessary that the absence of contributory negligence should be shown beyond cavil or question. If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts. . . . In this case there were no eyewitnesses, and the injury resulted in death. . . . There was some evidence of negligence on the part of the defendant, and there was some ground for an opinion that intestate was negligent also. But the plaintiff put in such proofs of the attendant facts as were attainable under the circumstances, and from these it was by no means clear that the intestate was in fault at all. There was room for the conclusion that he was not. We think the case ought to have gone to the jury."

That other respectable authorities hold the converse view is not questioned, but the cases quoted from indicate the trend of the decisions, and are based upon sound reasoning and common sense. That this court made no mistake in going to the extent it did in *Lazelle v. Newfane* and *Boyden v. Fitchburg R. Co.* is amply confirmed by the decisions quoted from. The defense rely largely upon *Carter v. Central Vermont R. Co.* 72 Vt. 190, 47 Atl. 797,—a case entirely unlike the case at bar in its 19 L.R.A. (N.S.)

controlling facts. In that case the court lay down the same rule, contended for by the plaintiff in the case at bar, as to when it is the duty of the court to submit a case to the jury, and quote with approval from the opinion of Start, Ch. J., in *Scheiber v. Chicago, St. P. M. & O. R. Co.* 61 Minn. 499, 63 N. W. 1034: "This rule must be applied in practice with caution, lest the courts usurp the functions of the jury, and unwittingly deprive a party of his constitutional right to a trial by jury; and, if there is a fair doubt as to the inferences to be drawn from an admitted state of facts, the question must be submitted to the jury, but, in the absence of such fair doubt, it is equally the duty of the court to decide the question as one of law, and instruct the jury accordingly." It may not be out of place to say that, when two judges, honestly aiming to arrive at the truth, with the same opportunities for analyzing the evidence, arrive at different conclusions as to the inferences to be drawn therefrom, it is a strong indication that reasonable minds might draw different conclusions respecting the plaintiff's fault, and that, if so, the case should have been submitted to the jury. This view was taken in *Smith v. New York C. & H. R. R. Co.* 177 N. Y. 224, 69 N. E. 427. In the opinion of Werner, J., concurred in by Parker, Ch. J., and Bartlett, Martin, and Vann, JJ., decided January 19, 1904, the court says: "The facts of this case, fairly stated and considered in the light of the inferences most favorable to the plaintiffs, do not so clearly establish the contributory negligence of plaintiffs' intestate as to remove the question from the domain of doubt into the realm of undebatable fact. In support of this suggestion we have but to refer to the persuasive, if not conclusive, circumstance that learned judges have differed as to the effect of the evidence in this record."

I concur in the majority opinion that, notwithstanding the fact that the jury had viewed the premises, as the record stands the court might order a verdict if the case was not one which, in other respects, showed that it should have been submitted to the jury.

In my opinion the judgment should be reversed.

CALIFORNIA SUPREME COURT.

MADELINE L. EMERY, Resp.,
v.

SYLVESTER KIPP, Appt.

(— Cal. —, 97 Pac. 17.)

Judgment—jurisdiction—res judicata.

1. One made a party to a suit by sub-

stituted service of process, who, after judgment, appears and moves to set aside the judgment for lack of jurisdiction, which motion is denied, cannot raise such question in a collateral proceeding to quiet title to property involved in that suit.

Parties — nonjoinder — waiver.

2. Nonjoinder of the husband in a suit against a married woman is waived by her suffering a default judgment to go against her.

Same — married woman — name.

3. A judgment quieting title to real estate against a married woman is valid although she was sued in her maiden name, in which stood the title to the property,— especially where, for the purposes of the marriage contract, she had changed the form of her Christian name so that there was nothing of record to indicate that she had married or changed her name.

Writ — publication — married woman — name.

4. Jurisdiction of a married woman may be secured in an action to quiet title to real estate by publication of a summons against her in her maiden name, in which she took and held the title to the property.

(July 29, 1908.)

APPEAL by defendant from a judgment of the Superior Court for San Diego County in plaintiff's favor and from an or-

Case Note. — Publication of process against married woman in her maiden name.

An extensive search has disclosed but little authority upon this specific question, and there is some conflict among the few cases in point. The conclusion reached in *EMERY v. KIPP*, however, is supported by *Jones v. Kohler*, 137 Ind. 528, 45 Am. St. Rep. 215, 37 N. E. 399, in which it was held that a notice was sufficient which was given by publication to one Mary Jackson, a nonresident, whose whereabouts had been unknown to her friends and acquaintances in the state for about thirty-five years, though her former husband, Jackson, had died, and she had since married, and was at the time of the notice the wife of one Jones. The court said that, if a person was known by more than one name, it was the common rule that service of process by either name was sufficient, and that the person sought to be served by publication could not complain where a notice was given her in the only name by which she was known within the jurisdiction of the state, and the only name by which, as she well knew, she would be dealt with in the state, that name in which she would necessarily be notified of the pendency of legal proceedings, and that name which, when reading the notice, she would, of course, understand to apply to herself.

19 L.R.A.(N.S.)

der denying a new trial in an action brought to quiet title to real estate. Reversed.

The facts are stated in the opinion.

Messrs. Stearns & Sweet, for appellant:

The name in which respondent acquired and holds the title is sufficient, and she has no reason to complain if she was sued by that name in any case affecting that title.

Blinn v. Chessman, 49 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666; *Elting v. Gould*, 96 Mo. 535, 9 S. W. 922; *Nolan v. Taylor*, 131 Mo. 224, 32 S. W. 1144; *Mosely v. Reily*, 126 Mo. 124, 26 L.R.A. 721, 28 S. W. 895; *Waltz v. Barroway*, 25 Ind. 382; *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4; *Fanning v. Krapfl*, 68 Iowa, 244, 26 N. W. 135; *Peterson v. Little*, 74 Iowa, 225, 37 N. W. 169; *Mallory v. Riggs*, 76 Iowa, 748, 39 N. W. 886; *Wooster v. Lyons*, 5 Blackf. 60; 1 Black, Judgm. § 213; *Linton v. First Nat. Bank*, 10 Fed. 894; *Graham v. Eisner*, 28 Ill. App. 269; *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347; *Wilson v. White*, 84 Cal. 239, 24 Pac. 114.

Mr. L. L. Boone, for respondent:

The court obtains no jurisdiction by constructive service unless the party is sued by his right name.

Freeman v. Hawkins, 77 Tex. 500, 19 Am. St. Rep. 762, 14 S. W. 364; *Dunlap v. Southerlin*, 63 Tex. 38; *McRee v. Brown*, 45 Tex. 506; *Entrekin v. Chambers*, 11 Kan.

This conclusion, however, would seem to be opposed by *Morris v. Tracy*, 58 Kan. 137, 48 Pac. 571, which was an action for partition of lands, though the case contained the further element of an ambiguous description in the published notice of the lands sought to be reached. It was specifically held that service of summons by publication upon one Emma H. Morris was not a good service on Emma H. Durham, a married woman, who had borne the name of Durham for nearly twenty years, though her maiden name was Emma H. Morris. The court went on to say that it was not like a case where a personal service was made in a wrong name: but that, as the only service was by publication, the only information that the defendant could have that service on her was intended was derived from the name used and the description of property, and that, therefore, she was entitled to have the service set aside on her motion.

The conclusion reached in *Freeman v. Hawkins*, 77 Tex. 498, 19 Am. St. Rep. 769, 14 S. W. 364, sufficiently set forth in *EMERY v. KIPP*, would seem to be based upon a statutory requirement that notice by publication must contain the names of the parties to the action; and, as the law conferred upon the marriage of the defendant the surname of her husband, she must be sued in that name.

368; Clary v. O'Shea, 72 Minn. 105, 71 Am. St. 465, 75 N. W. 115; Turner v. Gregory, 151 Mo. 100, 52 S. W. 234; Journey v. Dickerson, 21 Iowa, 308; Fitzgerald v. Salantine, 10 Met. 436; Slasson v. Brown, 20 Pick. 436; Enewold v. Olsen, 39 Neb. 59, 22 L.R.A. 573, 42 Am. St. Rep. 557, 57 N. W. 765.

Henshaw, J., delivered the opinion of the court:

Plaintiff commenced this action to quiet title to lands situate in the county of San Diego. She obtained judgment, and from that judgment and from the order of the court denying defendant's motion for a new trial, he appeals.

Upon the trial the following facts were established without conflict: The maiden name of plaintiff, who is an Englishwoman by birth, is Madeline Louisa Munro. In England she was usually called Louisa. After coming to California she was usually called Madeline by her friends and family, although she was sometimes addressed and spoken of as Louisa. In 1888 one Phipson, the then owner of the land in controversy, executed a deed thereof to this plaintiff, naming her therein as Louisa Munro. In December, 1894, under the name of Madeline L. Munro, she married Alfred A. Emery, and continued to be his wife until the time of his death in 1903. In the marriage license she was named and designated Madeline L. Munro, and in the certificate of the minister who performed the marriage ceremony her name was written Madeline L. Munro. She had never executed any conveyance of the property, and, so far as her title is concerned, since the date of her deed, it has always stood on the records of the recorder's office in San Diego county in the name of Louisa Munro, and not in the name of Madeline Louisa Munro or Madeline L. Munro. Defendant's title comes by mesne conveyance from a judgment obtained in an action to quiet title to the land in controversy prosecuted by Nellie Rue against Louisa Munro. Proof of plaintiff's title having been made as above outlined, defendant, to establish his interest in the land, offered the judgment roll in the action of Nellie Rue v. Louisa Munro, and, upon objection of plaintiff, the judgment roll was refused admission in evidence. The soundness of the court's ruling upon this proffer embodies the questions presented for consideration upon this appeal. Respondents' objections to the admission of the judgment roll, while couched in different forms, resolve themselves into two: First, that the judgment is void because of the insufficiency of the facts set forth in the affidavit for publication of summons; second, that

the court acquired no jurisdiction of this plaintiff by the substituted process and constructive service, she being a married woman, and her husband not having been joined with her (Code Civ. Proc. § 370), and she not having been sued in her true name, which at the time of the commencement of the action of Rue v. Munro was Madeline L. Emery, and not Louisa Munro.

The first objection thus advanced needs little consideration. This plaintiff connected herself with the action of Rue v. Quinn, by making a motion therein, after judgment by default had been entered against her, to set the judgment aside upon the ground that it had been entered without any jurisdiction having been obtained over her person. The ground there urged was the same as that here presented, that the facts set forth in the affidavit for the publication of summons were entirely insufficient. The trial court granted her motion, but, upon appeal to this court, its order was reversed; it being here held that the affidavit was sufficient. Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. The ruling and determination in Rue v. Quinn have subsequently been approved in numerous cases. Weis v. Cain (Cal.) 73 Pac. 930; People v. Wrin, 143 Cal. 13, 76 Pac. 646; People v. Norris, 144 Cal. 424, 77 Pac. 988; Cargile v. Silsbee, 148 Cal. 260, 82 Pac. 1044; Shepard v. Mace, 148 Cal. 272, 82 Pac. 1046.

The questions presented under the second objection are both more interesting and more important. Preliminarily, it is to be borne in mind that the attack here made upon the judgment in Rue v. Emery is collateral, and, to be successful, it must be established that the judgment is void on its face. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Sharp v. Daugney, 33 Cal. 505; Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572; Van Fleet, Collateral Attack, §§ 3, 614, 616. That the judgment was not void for nonjoinder of the husband as party defendant is established by the case of Bogart v. Woodruff, 96 Cal. 609, 31 Pac. 618. The facts in that case were that a married woman, while a *feme sole*, had executed a promissory note. Suit was brought upon this promissory note against the maker. She was sued in her maiden name, and her husband was not joined. Personal service upon her was had, and judgment went for plaintiff upon her default. The original plaintiff then commenced another action to enforce the judgment against the wife sued under her married name; her husband being joined as defendant. There, as here, a collateral attack was made upon this judgment; it being contended that it was void, first, because of the misnomer of the mar-

ried woman defendant, and, second, because, being a married woman, her husband was a necessary party, without whom the court could not obtain jurisdiction of the person of the wife. The trial court took this view, but upon appeal the judgment was reversed by this court, holding that, when the wife suffered such a judgment to be given against her, either after trial on the merits or by default, the objection of the nonjoinder of the husband was waived, and holding further that the judgment was not void because of misnomer in describing her by her maiden name, the name under which she executed the contract; she being sufficiently identified by the name under which she was sued. The only distinction between the Bogart Case and the case at bar is that in the former personal service on the defendant was had, while in the latter substituted service by publication of summons was the mode adopted for acquiring jurisdiction. Whether or not any different conclusion is necessitated by reason of this fact is a matter for later consideration.

The rule as laid down in the Bogart Case, namely, that a judgment is valid when obtained against a married woman sued as a *feme sole* and in her maiden name, particularly upon any contract which she has executed in such name, is a rule of general acceptance. 1 Freeman, Judgm. § 150; Van Fleet, Collateral Attack, §§ 603, 616; Hartman v. Ogborn, 54 Pa. 120, 93 Am. Dec. 679; Winchester v. Everett, 80 Me. 535, 1 L.R.A. 425, 6 Am. St. Rep. 228, 15 Atl. 596; McCaffrey v. Corrigan, 49 Ind. 175. This is in consonance with the principle of common law that a man may change his name at will and sue or be sued in any name in which he is known and recognized. Linton v. First Nat. Bank (C. C.) 10 Fed. 894. So a person may adopt any name in which to prosecute business, and may sue or be sued in such a name. Graham v. Eiszner, 28 Ill. App. 269. This principle has been applied in this state, where it is held that, if the owner of property convey by any name, the conveyance as between himself and his grantee is valid and will transfer title. Fallon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 347; Wilson v. White, 84 Cal. 239, 24 Pac. 114. So, when it comes to examining the authorities dealing with actions affecting real estate, this same principle, it will be found, is universally applied. If a man chooses to take the title to real estate in a name other than his true name, so far as that property is concerned, he has assumed the name in which he takes title as his true name, and in suits affecting the property he may be sued by such designation. A leading and well-considered case upon this subject is that of Blinn v. Chess-

man, 49 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666. In that case the purchaser was George Chessman. He accepted a deed executed to him in the name of George Cheeseman, and the deed was so recorded. Thereafter an action was brought by one Leonard against George Cheeseman to determine adverse claims to the property. Summons was served by publication, and judgment by default was rendered in favor of Leonard that he was the owner of the property. In time plaintiff Blinn succeeded to Leonard's title and brought suit against George Chessman, and, as the court stated, the question presented in that case "was whether a judgment against Cheeseman was of effect as to this defendant Chessman as respects his title to the land." The reasoning of the court is full and convincing. It declares the presumption to be that a grantee who personally accepts, retains, and records a deed of conveyance does so with knowledge of its contents. It affirmed the trial court in holding that the Leonard judgment against Cheeseman was binding upon Chessman, who had taken title to the property in the name of Cheeseman, saying: "This conclusion is not based upon the ground of the likeness of the two names, either in spelling or in sound; but upon the ground—upon which also the decision of the court below was placed—that the defendant is to be deemed to have adopted the name of Cheeseman for the purpose of acquiring and holding the title to this land, and he can have no reason to complain that he is so designated in legal proceedings calling in question the validity of the title so acquired and held. From the fact that this was not his true name, it does not follow that the court did not acquire jurisdiction. If he had assumed this name, or any other, generally, and for all purposes; and especially if he had come to be known by the name assumed,—there would be no doubt that legal proceedings against him in such name would, in general, be sustained. The name is not the person, but only a means of designating the person intended; and where one assumes and comes to be known by another name than that which he properly bears, that name may be effectually employed for the purpose of designating him. . . . In this case it is probably true that the defendant did not intend to change his name, nor to adopt for general purposes the name of Cheeseman, but he did—if he knew the misnomer, as we must assume he did—most effectually assume that name for the purpose of taking and holding the title to this land. He not only accepted the conveyance made to himself by that name, but he placed it on record, for the purpose, and with the effect, presumably, of giving notice to the

world that the title had been so conveyed and was so held. . . . In proceedings concerning this land it would be at least quite as likely that the name disclosed by the record as the grantee would be used in a summons or notice intended to be addressed to such grantee as that the record should be disregarded, and the true name of the defendant used. Hence, there was as much reason why his attention should be arrested by the name of George Cheeseman in a published summons or notice as there would be if his true name were used. He had placed himself under the necessity of having regard to the former as well as the latter. He cannot well complain that the name in which he took the title, and which he put forth to the world by the records, as the name of the grantee, should be employed in proceedings instituted for an adjudication concerning that title." The same principle is enunciated by the supreme court of Missouri in *Elting v. Gould*, 96 Mo. 535, 9 S. W. 922. The court was passing upon a judgment obtained in a suit brought against R. O. Elting to enforce a lien for taxes upon his property. Judgment had been given against R. O. Elting, and the land was sold and conveyed by sheriff's deed. Upon the records of the county the land stood in the name of R. O. Elting, but Elting's name was Richard O. Elting, and he contended that a judgment rendered against him in the name of R. O. Elting was void. The service, as here, was by publication. The court upheld the judgment, saying that the patent to the land which was recorded and which was the only conveyance of title on record showed that R. O. Elting owned the land. "It is by this name and description that he is known in his title papers. We think it is sufficient."

Applying the principle of these cases to the facts in the case at bar, it appears that this plaintiff took title to the land in the name of Louisa Munro, that in her recorded certificate of marriage her name was given as Madeline L. Munro, that there was nothing of record to disclose that Louisa Munro was the same person designated as Madeline L. Munro, and consequently there was nothing of record to disclose that Louisa Munro had ever changed her name. So far as the real estate was concerned, she held title to it only as Louisa Munro. No steps, which a reasonable or prudent person might take would, under our existing laws, serve to give a party desirous of commencing an action any knowledge or information that Louisa Munro had married or had in any other way changed her name. The law does provide that any person in whom the title of real estate is vested who shall from any cause have his or her name changed shall,

upon any conveyance of real estate, set forth the name in which he or she derived title to such real estate. Stat. 1874, chap. 245, p. 345; Civil Code, § 1096. The law, too, might well have provided that, when a woman in whose maiden name title to real property stands shall marry, she shall cause recordation of the fact to be made in such manner as to give notice thereof to the world; but the law not having done this, it may not be said that a plaintiff is in fault who, after exhausting the means of information open to him, commences an action against a person holding such title by the same name in which the title is held. The inconvenience, and, indeed, the grave consequences, resulting from a different view, would render actions to quiet title by substituted process of little or no benefit. In nearly every state there are statutes authorizing the change of a man's name. A non-resident owner of land in California may legally cause his name to be changed in another state, and an adverse claimant in this state, after satisfying the court that after due diligence the nonresident owner cannot be found within the state, may commence an action against the party under the name in which his record title stands. If a judgment so obtained can be collaterally attacked by a showing that the nonresident claimant had legally changed his name, and that therefore jurisdiction was not acquired, which is the contention here made, the value of such an action is at an end.

But does the fact that in this case jurisdiction of the defendant was secured by published summons in any respect change the rule? We think not. In every case where service by publication is authorized, if the statutory requirements have been complied with, it is as effective for all purposes as personal service. The only distinction in this state is found in the privilege accorded by § 473 of the Code of Civil Procedure, which allows a defendant not personally served, on such terms as may be just, to appear within a year after the rendition of a judgment by default against him and answer to the merits of the original action. We have here a case where the claimant to the real estate is served by published summons under the name by which she took and recorded her title to the land. In *Blinn v. Chessman*, supra, the service was by publication, and, addressing itself to this question, the court there said: "If such a name is employed in legal process or notices, whether served personally or by publication,—where such service is authorized,—the notice is effectual; the person who has assumed the name is presumed to understand that the process or notice addressed in that name is addressed to him."

In *Mosely v. Reilly*, 126 Mo. 124, 26 L.R.A. 721, 28 S. W. 895, the same subject is considered; the court saying: "As has been said, the object of the publication is to give notice of the proceeding to the real person who is interested. The name is only used to identify such person, and may be the only means of identification; but, if the name as used is the same as the party himself uses and under which he is known, and the facts recited in the notice sufficiently identify the person intended, and advise him that his property is brought before the courts, we think that would be sufficient to give the court jurisdiction to render the judgment." "Notice by publication, though only allowable from necessity, is, when authorized, as effective as personal service. Everyone is presumed to have had opportunity to read these publications and to learn from them the nature and objects of the proceedings of which they give notice." In *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4, the supreme court of Minnesota declared that any notice which would give jurisdiction if personally served upon the party is good when served by publication if that publicity of the pendency of the action which the law intends is thereby given. See also *Van Fleet*, *Collateral Attack*, §§ 361, 367.

As against this reasoning and authority, our attention is called to but one conflicting case, that of *Freeman v. Hawkins*, 77 Tex. 498, 19 Am. St. Rep. 769, 14 S. W. 364. In that case land was conveyed to Mary E. Robison. She subsequently married a man by the name of Freeman. Thereafter suit was brought against her in the name of Mary E. Robison to quiet title. The court declared that Mary E. Robison upon marriage took the surname of her husband, saying: "A citation, whether to be served personally or by publication, must contain the names of the parties to the action. . . . We are of opinion that a citation by publication, requiring 'Mary E. Robison' to be cited and to appear, was not sufficient to give the court jurisdiction to render a judgment that would bind 'Mary E. Freeman.'" In this brief statement there is no consideration paid to the general rules which we have discussed, nor to the authorities which support them; and we think the conclusion reached by the Texas court is at variance with the otherwise universally accepted doctrine.

For the foregoing reasons, the judgment is reversed, with directions to the trial court upon a new trial to admit in evidence the proffered judgment roll.

We concur: Lorigan, J.; Shaw, J.
19 L.R.A. (N.S.)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

LENA CLARK, Plff. in Err.,
v.

COLORADO & NORTHWESTERN RAIL
ROAD COMPANY.

(— C. C. A. —, 165 Fed. 403.)

Carrier — guest on locomotive.

1. Neither the conductor nor the engineer of a train, nor the master mechanic of a railroad, has the implied authority to invite a person to ride in the cab of a locomotive without paying fare.

Same — assumption of hazard.

2. One who, without paying fare, voluntarily attempts to ride in the cab of a locomotive at the invitation of those in charge of the train, assumes the known hazards incident to such exposed position, and cannot hold the railroad company liable for injuries caused by the collision of the cab with a car negligently left on a side track so as not to clear the main track, where the negligence was not wanton, and no injury occurred to anyone else on the train.

Same — wanton negligence.

3. A switching crew is not guilty of wantonness or recklessness towards a passenger riding in an engine cab because it leaves a car on a switch, which does not clear the main track, where it does not know of his presence in the cab; nor are those in charge of the engine guilty of such negligence toward him when they do not know that the car does not clear the track, — so as to render the railroad company liable in case he is injured by the engine coming in contact with the car.

(November 7, 1908.)

ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment sustaining a demurrer to the petition in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. Affirmed.

The facts are stated in the opinion.

Argued before Van Devanter and Adams, Circuit Judges, and Philips, District Judge.

Messrs. Sterling B. Toney, Henry V. Johnson, and R. Burge Toney for plaintiff in error.

Messrs. E. E. Whitted and O. L. Dines, for defendant in error:

There is no presumption that the employees had authority to invite the deceased to ride in the locomotive.

Robertson v. New York & E. R. Co. 22

Note. — As to liability of railroad company for injury to person wrongfully on train by collision with a train employee, see case note to *Grahn v. International & G. N. R. Co.* 5 L.R.A. (N.S.) 1025.

Barb. 91; Powers v. Boston & M. R. Co. 153 Mass. 188, 26 N. E. 446; Eaton v. Delaware, L. & W. R. Co. 57 N. Y. 382, 15 Am. Rep. 513; Files v. Boston & A. R. Co. 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311; Texas & P. R. Co. v. Black, 87 Tex. 160, 27 S. W. 118; Whitehead v. St. Louis, I. M. & S. R. Co. 22 Mo. App. 60.

The deceased, in going upon the locomotive under the circumstances of this case, was guilty of contributory negligence, which bars a recovery.

Doggett v. Illinois C. R. Co. 34 Iowa, 284; Radley v. Columbia Southern R. Co. 44 Or. 332, 75 Pac. 212, 1 A. & E. Ann. Cas. 447; Wilcox v. San Antonio & A. P. R. Co. 11 Tex. Civ. App. 487, 33 S. W. 379; Texas & P. R. Co. v. Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086.

Phillips, District Judge, delivered the opinion of the court:

This is an action instituted by the widow of J. F. Clark against the defendant railroad company to recover damages for personal injury resulting in his death. The court sustained a demurrer to the petition, which presented two objections thereto: (1) That the petition does not state facts sufficient to constitute a cause of action; and (2) because it discloses that the deceased was guilty of negligence directly contributing to his injury. The plaintiff below declining to plead further, final judgment was entered on the demurrer.

The substantive facts disclosed by the petition are as follows: The defendant railroad was operated between the city of Boulder and the town of Eldora, in Boulder county, Colorado. On the 15th day of July, 1906, the said J. F. Clark was invited by the conductor, engineer, and master mechanic of the defendant company to ride in the cab of an engine drawing a train of cars on said road. While so traveling in said cab the engine collided with the end of a freight car which defendant's employees had run out on a siding of the railroad track, but left the end or corner of said car protruding onto the main track, so that the said engine in passing collided therewith, breaking in the side of the cab on which the said J. F. Clark was sitting or standing, whereby he was killed. The petition alleges "that deceased was not an employee of the defendant company and was not a passenger for hire; that is, was not required to pay for traveling on said car." The prayer of the petition is for \$25,000 damages.

It will be observed that, while the petition discloses that the engine in question was drawing a train of cars, it does not allege that it was a train of passenger cars, adapt-

able to and used for the carriage of passengers. *Non constat*, it may have been a freight train, which did not carry passengers at all. Therefore the case presented by the petition is that the deceased, without paying or agreeing to pay any fare, establishing a contractual relation between him and the carrier for his safe carriage, voluntarily entered into the cab of a locomotive engine to take a free ride for his own accommodation.

To avoid the obvious nonliability of the defendant railroad company for said Clark's death, the petition alleges that he was so much in their personal favor that he received simultaneously an invitation from the conductor, the engineer, and the master mechanic to ride in the engine cab. As the petition does not aver that either of said employees had authority to extend such invitation, the authority must arise, if at all, from mere implication. Most certainly no such authority can be assumed to have resided with the master mechanic, who had no connection whatever with the operation of the railroad train while running. Judge Caldwell, in *Condran v. Chicago, M. & St. P. R. Co.* 28 L.R.A. 752, 14 C. C. A. 508, 32 U. S. App. 182, 67 Fed., loc. cit. 523, said: "It is a matter of common knowledge, of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. They are not eleemosynary agencies. It is equally well known that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare."

So, Judge Sanborn, in *Purple v. Union P. R. Co.* 57 L.R.A. 703, 51 C. C. A. 567, 114 Fed., loc. cit. 126, said: "A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the agreement that the carrier will transport and the passenger will pay for the transportation, in the absence of a specific agreement or permission by the proper officer of the transportation company that the latter will carry the passenger without compensation. This contract of carriage may, it is true, be express or implied; but, if it does not exist in either form, the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards his destination. But it is equally true that, if one enters and rides under an express or implied agreement with a conductor, whom he knows or has reasonable cause to believe has no authority to make such a contract, that he

shall not pay his fare, but shall cheat the company out of the transportation, no contract of carriage is created; but the existence of such an agreement is conclusively negated by the actual fraudulent contract, so that it cannot exist."

As the petition alleges that the deceased was not a passenger for hire, he knew, what every man is presumed to know, that the railroad was being operated for hire. If so, he knew that he was cheating the railroad out of its rightful due, as he certainly understood that the men whose guest it is claimed he was were not to pay it for him. Every sensible man comprehends that, while a railroad conductor is in charge of the train, he is placed there by the company to collect fares from passengers, and, if he neglects this duty, he is wronging his employer. His very position and office as conductor advise every person who enters upon the train to be carried that, presumptively, he is without authority to carry him free of charge. He also knows that the engineer in his cab has nothing to do with the admission of a passenger to the train for carriage. Much less had either the engineer or the conductor authority to invite the deceased to take passage in the engine cab. The law imputed to him, when he entered the cab, knowledge of the fact that the railroad company had not constructed or designed such a place for the carrying of passengers. It is a place fashioned and intended alone for the engineer and fireman. It is equipped with a narrow seat on the right-hand side for the engineer, and a corresponding seat on the left-hand side for the fireman, with a small space between for the engineer when standing at the throttle of the engine and for the fireman when shoveling coal. It is necessarily exclusive of outsiders, who by their presence and talk are liable to divert the attention of the engineer and fireman from their required constant watchfulness. Public policy itself demands this rule, and forbids any deviation from its observance.

The authorities are in harmony in holding that in a place like an engine cab, drawing a train of cars, the person who voluntarily enters therein to ride is presumed to know that it is not designed for such use, and no presumption arises in favor of such person that the engineer and conductor have either express or implied authority to grant him such permission. *Robertson v. New York & E. R. Co.* 22 Barb. 91; *Powers v. Boston & M. R. Co.* 153 Mass. 188, 26 N. E. 446; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Files v. Boston & A. R. Co.* 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311; *Whitehead v. St. Louis, I. M. & S. R. Co.* 22 Mo. App. 60 While 19 L.R.A. (N.S.)

some courts have gone to considerable length in holding railroad companies responsible for the acts and assumptions of their employees while in positions of apparent authority, yet, when requested to hold that there is any presumption in favor of the authority of the employees to permit third persons to use places and instrumentalities obviously not designed therefor by the master, they come to a halt. If a conductor or engineer should invite a person to ride on the cowcatcher, a crossbeam in front of the engine, or on a brakebeam of a moving car, the foolhardy acceptor, receiving an injury thereby, would not be heard to say that he assumed the conductor or engineer had authority from the railroad company to invite him to ride there.

By voluntarily entering the engine cab to ride, the deceased assumed all the known hazards incident to such exposed position, because it is not a place designed by the railroad company for carrying passengers, and because it is a known place of increased danger. If a bridge be down, or any obstruction be on the track, the engine first encounters the danger and incurs the disaster. Danger lurks in such position. It was the side of the cab on which Clark stood or sat that first encountered the projecting end or corner of the car on the side track. The side of the cab was crushed in, which occasioned his injury. No derailment of, or other injury to, the train is alleged. So the fact is confronting that, had the deceased not chosen to ride where he did, no harm would have come to him. In voluntarily assuming such extrahazardous position he was guilty of contributory negligence. This proposition of law has recently been announced by this court in *Chicago G. W. R. Co. v. Mohaupt* (C. C. A.) 18 L.R.A. (N.S.) 760, 162 Fed. 665. It is reinforced by the following pertinent decisions: *Doggett v. Illinois C. R. Co.* 34 Iowa. 284; *Radley v. Columbia Southern R. Co.* 44 Or. 332, 75 Pac. 212, 1 A. & E. Ann. Cas. 447; *Texas & P. R. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086; *Files v. Boston & A. R. Co.* supra, and citations; *St. Louis, K. C. & C. R. Co. v. Conway*, 86 C. C. A. 1, 156 Fed. 234, 235.

Counsel for plaintiff in error placed great stress in argument upon the contention that, notwithstanding the deceased may have been in an improper place on the engine, he was not a trespasser, but a licensee, and therefore the company owed him the duty not to wantonly or recklessly injure him. This may be conceded. The contention of counsel is that the petition charges gross negligence in the switching crew of the defendant company leaving the end of the freight car on the siding so as to conflict with the

main track. In the first place, there is no allegation in the petition of wanton and reckless conduct by the defendant's employees. "The term 'gross,' in this connection, is nothing but an epithet. It means no more than the failure to exercise ordinary diligence in the circumstances of the particular case. It distinguishes no legal degree of negligence, and it is not error to refuse to apply it to the negligence for which a defendant may be liable, because its use merely tends to create doubt and to increase confusion." *Purple v. Union P. R. Co.* 57 L.R.A. 705, 51 C. C. A. 571, 114 Fed., loc. cit. 130.

Even had the petition charged wantonness or recklessness in the switching crew, as applied to the instance at bar it would not have helped the case. The following excerpt from the well-considered opinion in *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y., loc. cit. 394, 15 Am. Rep. 513, presents the correct rule: "But it is said that, by the act of the conductor, the plaintiff was lawfully on the train, and that for this reason the defendant was liable to him for the negligence of its servants. With due submission, this is simply begging the question. The plaintiff could only be 'lawfully' on the train by an authorized act of the conductor. The question still recurs: Had the conductor the authority to take the plaintiff on the train? If not, he could not lawfully be there. It is not necessary to consider whether he was a trespasser. It is enough to hold that a duty to be careful toward him could only spring up on the part of the defendant by an act on the conductor's part coming within the scope of his authority."

The switching crew did not know that the deceased was on the engine, and had no reason to anticipate that any passenger would be in such exposed position. Nor did the engineer or conductor know or have reason to anticipate that the freight car extended onto the main track. While it is to be conceded that it was a culpable, negligent act on the part of the switching crew in not taking pains to see that the freight car cleared the main track, the deceased, in voluntarily riding in the engine cab,—a place not designed for the carriage of passengers, and in which he would obviously be exposed to first encounter any obstruction that might be on the track,—was none the less guilty of contributory negligence.

Counsel for plaintiff in error rely chiefly upon the case of *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502. It is deemed sufficient to say of that case that the pronouncements therein are predicated of a state of facts distinctively distinguishable from the case at bar: (1) The cab there spoken of, in which the injured party

was riding, was evidently not such an engine cab as the one here in question. It was a carrying car, constructed and designed for the president and officials of the railroad on inspection tours, and the like, and was, therefore, a place for carrying passengers. (2) The injured party was a stockholder in the company, and was invited by the president thereof, who had apparent authority therefor, to ride with him in the place designed for the carriage of persons. (3) The employees of the company in charge of the track had special instructions to keep it clear of obstructions because of the coming, on this specially equipped car, of the officials of the road, who could be expected to be where they were riding when the car came.

Other decisions cited in the brief of counsel for plaintiff in error are not in point in their facts, and are not of controlling authority.

It results that the judgment of the Circuit Court must be affirmed.

ILLINOIS SUPREME COURT.

JOHN BRADBURY AND WIFE, Appts.,
v.
VANDALIA LEVEE AND DRAINAGE
DISTRICT.

(236 Ill. 36, 86 N. E. 163.)

Pleading — parties — excessive statements.

1. A declaration to recover damages for the construction of a levee which causes the water to set back on plaintiff's lands is not demurrable because it alleges that the levee caused the water to rise higher than normal on the opposite side of the river from and above the levee, which would

Case Note. — Liability of drainage district for flooding land.

This note includes only those cases in which the action was brought for damages due to floods necessarily resulting from the construction of the drainage works. The question of liability for negligence in construction will therefore not enter into the discussion.

In *Elmore v. Drainage Comrs.* 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010, discussed at some length in the above opinion, there seems to have been a claim for damages due to overflow waters aside from the cause of action for negligent construction, for the court said: "If, however, by the enlargement of the district, an additional burden of water was precipitated upon his lands, to his detriment, it would seem that, prior to the discharge of such additional water upon the lands, the damages consequent upon such enlargement

show injury to lands of others than plaintiff, where the allegation is made simply to show the injury to plaintiff's land.

Water — damming back — liability — drainage district.

2. A drainage district which constructs a levee along a river and from the river to the highlands, in such a way as to obstruct the natural flow of the flood water of the river and cast it back on property farther up the stream, is liable for the injury thereby caused, where the Constitution provides that private property shall not be taken or damaged for public use without compensation.

Same — public corporation.

3. A drainage district cannot escape liability for injury done by its improvements, to lands lying out of its limits, on the theory that it is an involuntary quasi public corporation not liable to respond in damages for any of its acts, where its organization depends upon a petition of those living within its limits, and the statute provides that lands lying within the district shall be liable for any and all damages which shall be sustained by any land lying above such district by the construction of its works.

Same — police power.

4. The drainage of lands to improve them for agricultural purposes cannot be regarded as an exercise of the police power, so as to exempt the land so drained from liability for injury caused by the improvement to other land not within the district.

(October 26, 1908.)

should have been assessed by a jury and paid by the district. . . . But in respect to the damages claimed in the declaration, they were either caused by the tortious act of the drainage commissioners in discharging the new and additional waters, which were not had in contemplation in the original assessment of damages against the district, upon the premises of appellant, or occasioned by negligence or misconduct on the part of the commissioners, and the remedy must be personally against the commissioners. It would, as we have already seen, be inconsistent with the fixed rules of law to hold the district liable for the consequences of the illegal acts of such commissioners."

A reclamation district organized for the purpose of reclaiming swamp land lying along a river is not liable to a lower owner for damages caused by the overflowing of his land due to the works of the defendant district. Such damages are *damnum absque injuria*. Nor are damages recoverable on the theory that the reclamation district is a municipal corporation acting under the authority of the state and liable for taking the land under the power of eminent domain, such damages being indirect, remote, and consequential, and in no sense constituting a taking within the constitutional limitation. *Lamb v. Reclamation Dist. No. 19 L.R.A. (N.S.)*

APPEAL by plaintiffs from a judgment of the Appellate Court, Fourth District affirming a judgment of the Circuit Court for Fayette County in defendant's favor in an action brought to recover damages for injury to plaintiffs' lands by the construction of a levee. Reversed.

The facts are stated in the opinion.

Messrs. Brown & Burnside, for appellants:

Independent of statutory enactment, a riparian proprietor has a right to recover damages for the building of a dam along the side of a river, which causes the waters of the stream to overflow and damage his land.

Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247; *Gerrish v. Clough*, 48 N. H. 9, 2 Am. Rep. 165, 97 Am. Dec. 561; *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489; *Byrne v. Minneapolis & St. L. R. Co.* 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339; *Pinkstaff v. Steffy*, 216 Ill. 406, 75 N. E. 163.

A drainage district organized under the "levee act" is a public corporation, and has the power to exercise the right of eminent domain, and hence cannot damage private property without making just compensation.

Cleveland, C., C. & St. L. R. Co. v. Polecat Drainage Dist. 213 Ill. 83, 72 N. E. 684; *Hutchins v. Vandalia Levee & Drainage Dist.* 217 Ill. 561, 75 N. E. 354; *Joliet v.*

108, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625.

A constitutional provision which denies a recovery for damages to land "because of its being left outside a levee" is applicable only to damages which accrue to lands from the ravages of the river because not protected against it by the levee, and does not preclude recovery for flood damage resulting from the construction of the levee. *Duncan v. Levee Comrs.* 74 Miss. 125, 20 So. 838. See also *Ham v. Levee Comrs.* 83 Miss. 534, 35 So. 943.

In *Drainage Comrs. v. Waeltz*, 41 Ill. App. 575, it was held that no recovery could be had for damages from overflow, where the action was based upon the tortious acts of the commissioners. It was suggested that a recovery might have been allowed in this case had the suit been based upon the statutory liability, which was as follows: "Provided, that the lands embraced in such drainage district shall be liable for any and all damages which may be sustained by any lands lying above such drainage district, by the construction of any levee, ditch, or drain in such district under this act."

Lewis Twp. Improv. Co. v. Royer, 38 Ind. App. 151, 76 N. E. 1068, was an appeal from an assessment for damages awarded for overflowing lands due to the construc-

Spring Creek Drainage Dist. 222 Ill. 441, 78 N. E. 836.

A drainage district is a public corporation, and limited in its rights to take or damage property in the same way and to the same extent as any other public corporation.

Wabash R. Co. v. Cool River Drainage & Levee Dist. 194 Ill. 310, 62 N. E. 679; Juvinall v. Jamesburg Drainage Dist. 204 Ill. 106, 68 N. E. 440; Joliet v. Spring Creek Drainage Dist. *supra*; Smith v. Clausen Park Drainage & Levee Dist. 229 Ill. 155, 82 N. E. 278.

Messrs. B. W. Henry and Albert & Matheny and Gray, for appellee:

A drainage district is an involuntary quasi public corporation, and no action can be maintained against it for damages.

Elmore v. Drainage Comrs. 135 Ill. 277, 25 Am. St. Rep. 363, 25 N. E. 1010; McGillis v. Willis, 39 Ill. App. 315; Drainage Comrs. v. Waeltz, 41 Ill. App. 575; Heffner v. Cass & Morgan Counties, 193 Ill. 450, 58 L.R.A. 353, 62 N. E. 201; People ex rel. Slusser v. Gary, 196 Ill. 327, 63 N. E. 749; Smith v. People, 140 Ill. 358, 29 N. E. 676; Mason & T. Special Drainage Dist. Comrs. v. Griffin, 134 Ill. 338, 25 N. E. 995.

The state, by virtue of its police power, may direct the reclamation of swamp and overflow land by means of levees; and damages and injuries occasioned thereby are *damnum absque injuria*.

18 Am. & Eng. Enc. Law, pp. 739, 743,

tion of a levee. The award was affirmed, and, in sustaining the allegations of the complaint, the court said: "It is also claimed that the complaint does not allege that the appellant, in its proceedings to construct said levee, was negligent. This is not a suit for the negligent construction of a levee, but an appeal from an assessment of damages under the statute; and in this appeal all damages, present and prospective, must be assessed, because it will be presumed that all matters affecting the land were considered when the original assessment was made. . . . Neither an individual, nor a private corporation, without legislative authority, can interfere with a running stream to the damage of others, whether negligent or not, without being liable. The legislature could have no power to grant a corporation, in the original taking of property, the privilege of taking land under the right of eminent domain without just compensation."

In Meriwether v. St. Francis Levee Dist. 165 Fed. 317, equitable relief by way of an injunction was denied to one whose lands had been flooded as the result of the construction of a levee, because the Constitution and statutes gave a full and complete remedy at law. The following *dictum* is upon the point of our inquiry: "If his 19 L.R.A. (N.S.)

750; Green v. Swift, 47 Cal. 536; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109.

One landowner may levee against overflow waters of a river, and prevent the same from overflowing his lands, without being liable in damages to another landowner because of increasing the overflow on such other lands.

McDaniel v. Cummings, 83 Cal. 515, 8 L.R.A. 575, 23 Pac. 795; Edwards v. Charlotte, C. & A. R. Co. 39 S. C. 472, 22 L.R.A. 246, 39 Am. St. Rep. 746, 18 S. E. 58; Gray v. McWilliams, 98 Cal. 157, 21 L.R.A. 593, 35 Am. St. Rep. 163, 32 Pac. 976; Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; Schlichter v. Phillips, 67 Ind. 201; Benthall v. Seifert, 77 Ind. 302; Cairo & V. R. Co. v. Houry, 77 Ind. 364; Shelbyville & B. Turnp. Co. v. Green, 99 Ind. 205; Rathke v. Gardner, 134 Mass. 14.

Cartwright, Ch. J., delivered the opinion of the court:

The circuit court, of Fayette county sustained the demurrer of appellee, the Vandalia Levee and Drainage District, to the amended declaration of appellants, John Bradbury and Mary Bradbury, filed in this action of trespass on the case for damages to appellants' lands, resulting from the construction by appellee of a levee along the Kaskaskia river and across the bottom lands to the bluffs bordering on the same.

land had been overflowed or injured as a direct result of the building of the levee, that amounts to a 'taking' or 'injury' within the meaning of the constitutional provision which protects private property from public use without compensation; and at common law, as well as under the express provision of the statute just quoted, the plaintiff could maintain an action for his damages though no direct proceeding had been taken to condemn the land by eminent domain."

But damages resulting because a levee prevents water from flowing off land as it otherwise would, and deepens the water thereon in time of overflow, are consequences of the situation, and the authorized effort to promote the general good by the construction of the levees, and may not be recovered in an action against the levee commissioners. Richardson v. Levee Comrs. 68 Miss. 539, 9 So. 351. See also Levee Comrs. v. Harkleroads, 62 Miss. 807.

And, where a landowner granted to a levee district a right of way over his land for the construction of a levee, he cannot recover from the district damages resulting from floods due to the levee if it was constructed in a skilful manner. Daniels v. St. Francis Levee Dist. 84 Ark. 333, 105 S. W. 578.

Appellants stood by their declaration, whereupon judgment was rendered against them for costs, and on appeal to the appellate court for the fourth district the judgment was affirmed. From the judgment of the appellate court, this appeal was taken.

The declaration contains four counts, the first of which avers that the plaintiffs are the owners of and in possession of a tract of land containing about 18 acres, on the west side of the Kaskaskia river, which flows in a southwesterly direction through the county of Fayette; that, before the building of the levee by defendant, the lands were not subject to overflow by the freshets or floods of said river, and were valuable farming lands; that the defendant is a drainage district organized on or about September 9, 1902, under the act entitled "An Act to Provide for the Construction, Reparation, and Protection of Drains, Ditches, and Levees, across the Lands of Others, for Agricultural, Sanitary, and Mining Purposes, and to Provide for the Organization of Drainage Districts," in force May 29, 1879 (Laws 1879, p. 120), together with the amendments thereto; that the plan of the improvement, as fixed by the decree of the county court of said county, including the construction of a levee along the east side of the Kaskaskia river, beginning at the mouth of Lynn creek, about a quarter of a mile down the river from the plaintiffs' lands, and extending down the river about 12 miles, and also a levee from the mouth of said creek in an easterly direction to the bluffs; that, during the summer of 1904, the defendant caused said levee to be erected about 8 feet in height and 4½ feet wide on top, with no outlet from the river into the lands lying on the east side; that at the time of floods and freshets said river overflows its banks and inundates a strip of land about 2 miles in width; that, by reason of the construction of the levee, the flood channel below the lands of plaintiffs is narrowed and in some places does not exceed 300 feet; that, by reason of the construction of the levee, the waters of the river were caused to rise much higher on the west side of the river and above the levee, and to thereby overflow the plaintiffs' lands in time of freshets; that their lands were damaged and injured, the crops growing thereupon were destroyed, the soil was washed away, and the lands rendered unwholesome and unhealthy and depreciated in value, and that, by reason of § 2 of said act under which the defendant was organized, it became liable to pay the plaintiffs their said damages. The third count is substantially the same as the first, and the second and fourth contain the same averments as the first respect-

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ing the plaintiffs' lands, the organization of the district, and the effect of the levee as an obstruction to the flow of the waters; but they charge that the defendant wrongfully caused the levee to be constructed, and that, before the building of the levee, the plaintiffs' lands were only overflowed in times of extreme floods, whereas, since that time they are overflowed and damaged and rendered unwholesome in times of only moderate floods and freshets. The demurrer is both general and special, and alleges as special ground of demurrer that the declaration charges that other lands besides those of the plaintiffs have been damaged. The declaration avers that the levee caused the waters of the river to rise much higher on the west side and above the levee, which might include lands not owned by the plaintiffs; but there is no averment of damage to any lands except those of the plaintiffs, and no cause of action is stated, or attempted to be stated, as to any other lands. The lands of the plaintiffs are on the west side of the river above the levee, and the averments as to raising the water on that side and above the levee are only made in connection with those lands. The declaration is not obnoxious to the special ground stated.

The declaration states facts showing injury and damage to the plaintiffs' lands resulting from the act of the defendant in building the levee below them, and thereby obstructing the natural flow of the waters of Kaskaskia river in times of floods and freshets so as to hold the same back upon said lands, and the substantial question raised by the demurrer is whether the defendant is liable for such damage. If an individual owner of the land where the levee was constructed had done the same acts as the defendant, he would be liable for the consequent damage. He would have no right to build a levee which would prevent the escape of the flood waters, and thereby flood the lands of the plaintiffs. In *Stout v. McAdams*, 3 Ill. 67, 33 Am. Dec. 441, the court said: "There can be no doubt that every flowing back or throwing water upon the land of another is such an act as entitles the individual injured to his action." That case arose from the obstruction of a natural water course by a dam, and the principle has been applied by this court alike to obstructions to the natural flow of surface waters and natural water courses. *Gillham v. Madison County R. Co.* 49 Ill. 484, 95 Am. Dec. 627; *Gormley v. Sanford*, 52 Ill. 158; *Ohio & M. R. Co. v. Webb*, 142 Ill. 404, 32 N. E. 527; *Rock Island & P. R. Co. v. Krapp*, 173 Ill. 219, 50 N. E. 663; *Pinkstaff v. Steffy*, 216 Ill. 406, 75 N. E. 163. In *Gillham v.*

Madison County R. Co. the doctrine of the civil law by which the owner of lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped was adopted; and in *Gormley v. Sanford* it was held that there was no difference in principle whether the water comes from the clouds above or has fallen upon remote hills and comes thence in a running stream. The court said (page 162 of 52 Ill.): "The cases asserting a different rule for surface waters and running streams furnish no satisfactory reason for the distinction."

The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws." Again, in *Pinkstaff v. Steffy* it was considered that there could be no difference whether the water that submerged the land of Steffy came from the hills above the land or from the overflow of the stream along the same.

Under the rule of the civil law adopted by this court, the right of drainage is governed by the law of nature, and the lower proprietor cannot do anything to prevent the natural flow of surface water and cast it back upon the land above (30 Am. & Eng. Enc. Law, 2d ed. p. 326); and this court recognizes no distinction between surface waters and those flowing in a natural water course. In *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247, it was contended that a riparian proprietor may lawfully protect his property from floods by erecting a dike or other obstruction on his own land, though its necessary effect may be to turn the superabundant water on the land of his neighbor; but the court said: "Such a distinction between the ordinary and extraordinary flow of a stream is not laid down or recognized by any elementary writer nor in any adjudged case, so far as I have seen. The utmost extent to which the authorities seem to go in that direction is that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change of the natural state of the stream and to prevent its old course from being altered (Angell, *Water Courses*, § 333); but he has no right, for his greater convenience and benefit, to build anything which in times of ordinary flood

will throw the water on the grounds of another proprietor so as to overflow and injure them."

The question in this case is whether an aggregation of landowners can, by voluntarily accepting the privileges conferred by the levee act and organizing a drainage district, erect a levee which obstructs the natural flow of water and injures the land of another and the district incur no liability. It is contended that there is no such liability because the drainage district is an involuntary quasi public corporation, which is neither liable for its own torts nor the wrongs or negligence of its officers. It is first to be observed that in this case it is not necessary to the maintenance of the action that the corporation or its officers should have been guilty of either wrong or negligence. The first and third counts aver that the scheme of the improvement as fixed by the decree of the county court included the construction of the levee, which was erected in accordance with said decree. Under those counts, the damage resulted, not from negligence or improper construction, but from the adoption of the plan of drainage to benefit the lands within the district; and in *Stout v. McAdams*, supra, which was an action on the case, it was held that, although the act of one person may be in itself lawful, yet if, in its consequences, it necessarily damages the property of another, the party occasioning the damage is liable to make reparation commensurate to the injury he has caused. The defendant has power to exercise the right of eminent domain and to have the damage to lands occasioned by the construction of its works determined. Lands taken or damaged by a drainage district for its purposes are taken or damaged for a public use, and compensation must be made therefor. *Wabash R. Co. v. Coon Run Drainage & Levee Dist.* 194 Ill. 310, 62 N. E. 679; *Juvinall v. Jamesburg Drainage Dist.* 204 Ill. 106, 68 N. E. 440. If a drainage district actually takes land, compensation must be made before the land is appropriated, and, if the district concedes that damage will result to lands, such damages may be assessed under the law of eminent domain; but, if the district does not concede, in the first instance, that damage will result, an action on the case is an appropriate remedy to determine the question whether lands will be damaged and to recover the damages. Under the Constitution private property cannot be taken or damaged for a public use without just compensation, and this gives a right of action. The demurrer admits that plaintiffs' lands have been damaged for a public use, and that the damage has not been ascertained or paid.

On the proposition that the defendant is an involuntary quasi public corporation, and for that reason not liable to respond in damages for any of its acts, the case of *Elmore v. Drainage Comrs.* 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010, is relied upon. That was a suit by an owner of lands included in the district who had been assessed for draining his lands, and after the payment of his assessment the district, without his knowledge or consent, enlarged the boundaries and discharged so much water into the ditches on his land that the ditches would not carry it, and also did the work so carelessly and negligently as to overflow and submerge his lands. There was a judgment against the plaintiff on a general demurrer, and the charge of the declaration was negligence in the construction of the drains and in connecting the drains and ditches of the added territory with the drains on plaintiff's lands without enlarging such drains sufficiently to carry off the increased volume of water. The substantial grounds of the decision were that it would be presumed that the plaintiff was fully compensated in the original assessment for his lands taken for the ditch and all damages consequent upon its construction for the original purpose; that, if, by the enlargement of the district, an additional burden of water was cast on his lands, the consequent damages should have been assessed by a jury and paid by the district, but that the damages claimed in the declaration were either caused by the wrongful act of the commissioners in discharging the new and additional waters upon the plaintiff's premises, or occasioned by negligence or misconduct on their part for which the remedy must be against them personally. Under that decision, the landowner was not bound to suffer the injury, but could have enjoined the district until his damages on account of the additional burden of water had been assessed and paid. The court held that the drainage district was not a private corporation, formed by voluntary agreement for private purposes, which was undoubtedly correct. It was also said that, while drainage districts had been classed as municipal corporations in *Commissioners of Havana Twp. v. Kelsey*, 120 Ill. 482, 11 N. E. 256, and other cases, there were substantial grounds of distinction, and that they were to be regarded as mere public involuntary quasi corporations, and therefore not liable to respond in damages to an individual injured by the negligent or wrongful act of their officers, agents, or servants. That doctrine was repeated in *Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 58 L.R.A. 353, 62 N. E. 201, but it is quite evident that it needs

some revision or limitation. The ground of distinction between corporations which are liable for the negligent or wrongful act of their agents or servants and those which are not is that public involuntary quasi corporations are mere political or civil divisions of the state created by general laws to aid in the general administration of the government, and are not so liable, while those which are liable have privileges conferred upon them at their request, which are a consideration for the duties imposed upon them. *Kinnare v. Chicago*, 171 Ill. 332, 49 N. E. 536. Neither the state, nor any part of it, is divided by the legislature into drainage districts, nor do they have public duties thrust upon them without their consent. The organization of a drainage district is for the sole and exclusive benefit of the territory within the district (*Union Drainage Dist. No. 3 Comrs. v. Highway Comrs.* 220 Ill. 176, 77 N. E. 71), and the lands within the district are assessed to pay the whole costs on the theory that they alone are benefited. A drainage district can only be organized upon the petition of a majority of the owners of lands within the proposed district who shall have arrived at lawful age and who represent one third of the area of the lands to be reclaimed or benefited, and the organization is not different in principle from the organization of cities, villages, or towns under a general law, on a petition of a certain proportion of the legal voters within the territory. It is correct to say that a drainage district is a quasi corporation if the act under which it is organized does not make it a corporation in fact; but it is not created for political purposes or for the administration of civil government. Undoubtedly a drainage district is not liable for the unauthorized acts of its commissioners for which they are personally liable; but the district is clothed with the power of eminent domain for the purposes of its organization, and is prohibited by the Constitution from taking or damaging lands without making compensation therefor. If no means were furnished with which to pay such damages, that fact would furnish no authority for causing such damage, and the obvious result would be that acts causing damage to others could not be performed at all. That is not the case, however, as to this district. Section 2 of the act under which the defendant is organized provides that lands embraced in drainage districts organized under it shall be liable for any and all damages which may be sustained by any lands lying above such drainage district by the construction of any levee, ditch, or drain in such district under the act. The statute declares

the liability and the law contemplates that it shall be enforced by an assessment upon the lands. No other kind of action could be brought to charge the lands in the district with the damages to plaintiffs' lands than the one adopted here, and, if damages should be recovered, they are to be collected by assessment against the lands.

But it is further contended that the defendant is not liable because the injury resulted from the exercise of the police power of the state through the district, as a mere governmental agency. The removal of large bodies of stagnant water which produce malaria and breed disease is conducive to the health and welfare of the public, and such removal is within the police power of the state (*Green v. Swift*, 47 Cal. 536), and there have been cases where the drainage of lands for that purpose was referred to the police power residing in the state. The basis for the law under which the defendant is organized, however, is found in § 31 of article 4 of the Constitution, which provides that "the general assembly may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary, or mining purposes, across the lands of others, and provides for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains, and ditches, and to keep in repair all drains, ditches, and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby." The act under which the defendant is organized provides for drainage for agricultural or sanitary or mining purposes, to be maintained by special assessment upon the property benefited thereby. If the county court finds that the proposed drains, ditch, or ditches, levee, or other works is or are necessary or will be useful for the drainage of the lands proposed to be drained thereby for either agricultural or sanitary or mining purposes, the district is to be organized. It is not contended that any other than sanitary purposes come within the undefined limits of the police power, and districts formed under the act are not necessarily organized as a police regulation to drain lands which would be a menace to public health or a breeder of malaria and disease. So far as appears, this district, with its scheme for a levee, was organized for the purpose of improving the lands within the district for agricultural purposes, which is not an exercise of the police power; and it was organized upon the petition of a majority of the owners of lands in the belief that they would be benefited by the organization. To deny to the plaintiffs a

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recovery of the damages which they have suffered by the effort of the owners of lands within the district to benefit themselves would be against natural right and every sentiment of justice, and we find no sufficient reason for exempting the district from liability, whether the levee is regarded as a wrongful obstruction to the waters of the river or as a lawful one under the decree of the county court.

The circuit court erred in sustaining the demurrer and the appellate court erred in affirming the judgment. The judgments of the Appellate Court and Circuit Court are reversed and the cause is remanded to the Circuit Court, with directions to overrule the demurrer.

IOWA SUPREME COURT.

C. E. HARDY

v.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Appt.

(— Iowa, —, 115 N. W. 8.)

Master — warning servant — blasting.

A master is not negligent in failing to warn an adult employee of ordinary intelligence, who has had several months' experience in drilling holes for blasting, and in actually firing the blasts, of the danger of putting powder into a drill hole in which the dynamite has been exploded, before the fire from the fuse and wrappings has had time to burn out.

(February 14, 1908.)

Case Note. — *Duty to warn servant engaged in blasting of dangers therefrom.*

As suggested by the title, this note is confined to the question of the necessity of warning one engaged in blasting of the dangers arising from the use and discharge of explosives; and does not include the duty to warn others, not so engaged, of transitory dangers from the firing of blasts, or of the danger of working about unexploded charges.

It is gross negligence to introduce the use of a new and highly dangerous explosive without warning a servant of its properties and the mode of use, irrespective of the master's knowledge or want of knowledge of its dangerous properties. *Smith v. Oxford Iron Co.* 42 N. J. L. 467, 36 Am. Rep. 535; *Spelman v. Fisher Iron Co.* 50 Barb. 151.

So, it is negligence to substitute blasting powder containing 40 instead of 27 per cent of nitroglycerin which was more dangerous to handle than the latter, without giving notice of the change to a servant who

A PPEAL by defendant from a judgment of the District Court for Johnson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Carroll Wright and J. L. Parrish, for appellant:

A servant, in entering the employment of a master, impliedly represents that he is competent to perform the duties he undertakes, and appreciates the perils incident thereto.

Bailey, *Personal Injuries Relating to Master & Servant*, 1st ed. p. 113; *Mayes v. Chicago*, R. I. & P. R. Co. 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Hanson v. Hammell*, 107 Iowa, 175, 77 N. W. 839; *Tuttle v. Detroit*, G. H. & M. R. Co. 122 U. S. 194, 30 L. ed. 1116, 7 Sup. Ct. Rep. 1166; *Peterson v. New Pittsburg Coal & Coke Co.* 149 Ind. 260, 63 Am. St. Rep. 289, 49 N. E. 8.

The duty of the master to instruct only

arises as to dangers the master knows or has reason to believe the servant is ignorant of.

Yeager v. Burlington, C. R. & N. R. Co. 93 Iowa, 5, 61 N. W. 215; *Newbury v. Getchel & M. Lumber & Mfg. Co.* 100 Iowa, 451, 62 Am. St. Rep. 582, 69 N. W. 743; *McCarthy v. Mulgrew*, 107 Iowa, 78, 77 N. W. 527; *Hanson v. Hammell*, 107 Iowa, 175, 77 N. W. 839; *American Wire Nail Co. v. Connelly*, 8 Ind. App. 398, 35 N. E. 721; *Arcade File Works v. Juteau*, 15 Ind. App. 460, 40 N. E. 819, 44 N. E. 326; *Mielke v. Chicago & N. W. R. Co.* 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 23.

Mr. A. E. Swisher also for appellant.

Messrs. Wade, Dutcher, & Davis, for appellee:

The law imposes an affirmative duty upon the master to instruct an inexperienced person whom he employs for a dangerous occupation, as to the dangers incident thereto which are not obvious to the servant.

Labatt, Mast. & S. § 395; *Leary v. Bos-*

is ignorant thereof. *Chambers v. Chester*, 172 Mo. 461, 72 S. W. 904.

And it is an imperative duty, when a more rapidly-burning blasting fuse is substituted for a slower, to inform a servant thereof, where the difference is not discernible to an experienced miner. *Hedlum v. Holy Terror Min. Co.* 16 S. D. 261, 92 N. W. 31.

Where it appears that an unexploded blast should never be withdrawn, and that it was against the master's orders to do so, he will be liable for the negligence of his foreman in placing an ignorant and unskilled foreigner, though of mature years, who is not aware of such order, at such work, without warning him of its dangers, other than to tell him to pour water into the blast hole. *Peters v. George*, 83 C. C. A. 408, 154 Fed. 634.

So, it is negligence to set a man of twenty-two years who is without experience as a miner, at blasting, without any warning as to the dangerous character of the employment, and how safely to perform the work. *Pence v. California Min. Co.* 27 Utah, 378, 75 Pac. 934.

To place a youth of seventeen who is unfamiliar with the work of blasting, at work hammering upon a drill with which a mine foreman is drilling out an unexploded charge of dynamite, without warning of the danger, is actionable negligence, although, in reply to the youth's query why the drill sank so rapidly into the rock, the former stated he was drilling out an unexploded charge, and to the further inquiry if it was dangerous to do so, replied "No," when an explosion almost immediately occurred. *Burrows v. Ozark White Lime Co.* 82 Ark. 343, 101 S. W. 744. For a somewhat similar case see *Archer-Foster Constr. Co. v. Vaughn*, 79 Ark. 20, 94 S. W. 717. 19 L.R.A. (N.S.)

And whether such youth was aware of his danger is for the jury to determine, where he admitted he had seen some blasting done, and knew that it was dangerous to handle explosives, as it may reasonably be concluded that he was not fully advised as to how the explosive could be discharged, or of the danger of attempting to drill out an unexploded charge. *Burrows v. Ozark White Lime Co.* supra.

So, it is for the jury to determine whether an inexperienced servant was sufficiently cautioned of the danger of pouring a keg of powder into a hole in which a preliminary blast had been exploded but five minutes before, by being told to be careful, as the hole might be too hot, without being instructed how to test the hole, it further appearing that the servant was ignorant of the fact that it was customary and necessary to wait thirty or forty minutes after the preliminary explosion, for the hole to cool. *Holman v. Kempe*, 70 Minn. 422, 73 N. W. 186.

And it is for the jury to determine, under such circumstances, whether the servant was guilty of contributory negligence, or assumed the risk of an explosion. *Ibid.*

So, the failure of one in charge of blasting to warn an inexperienced servant of the danger of thawing frozen dynamite will render the master liable. *Pinney v. King*, 98 Minn. 160, 107 N. W. 1127; *Lofrano v. New York & Mt. V. Water Co.* 55 Hun. 452, 8 N. Y. Supp. 717, affirmed without opinion in 130 N. Y. 658, 29 N. E. 1033.

Especially when the injured servant is not employed for that service. *Lafrano v. New York & Mt. V. Water Co.* supra.

It is the duty of a master to warn and instruct a common laborer, ignorant of the English language, of the danger of an explosion when attempting to disengage and

ton & A. R. Co. 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; Sullivan v. India Mfg. Co. 113 Mass. 396; Wheeler v. Wason Mfg. Co. 135 Mass. 294; Rummel v. Dilworth, P. & Co. 131 Pa. 519, 17 Am. St. Rep. 827, 19 Atl. 345, 346; Anderson v. Daly Min. Co. 15 Utah, 22, 49 Pac. 126; Illinois C. R. Co. v. Price, 72 Miss. 862, 18 So. 415.

The material question is not whether the servant was aware of the conditions which produced the danger, but whether he understood the danger itself.

McDonald v. Chicago, St. P. M. & O. R. Co. 41 Minn. 439, 16 Am. St. Rep. 711, 43 N. W. 380; Coombs v. New Bedford Cordage Co. 102 Mass. 573, 3 Am. Rep. 506; McGowan v. La Plata Min. & Smelting Co. 3 McCrary, 393, 9 Fed. 861; Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464.

Where there are latent defects or hazards incident to an occupation, of which the master knows, or ought to know, it is his duty

to warn the servant of them fully; and this rule applies even where the danger or hazard is patent, if, through youth, inexperience, or other cause, the servant is incompetent fully to understand and appreciate the nature and extent of the hazard.

Union P. R. Co. v. Fort, 17 Wall. 553, 21 L. ed. 739; Cayzer v. Taylor, 10 Gray, 274, 69 Am. Dec. 317; Henry v. Brady, 9 Daly, 142; Honor v. Albrighton, 93 Pa. 475; Mountain Copper Co. v. Pierce, 69 C. C. A. 148, 136 Fed. 150; May v. Smith, 92 Ga. 95, 44 Am. St. Rep. 84, 18 S. E. 360; Holman v. Kempe, 70 Minn. 422, 73 N. W. 186.

An employee does not assume the risk of a danger of which he has no knowledge, or which, as a reasonably prudent person, he is not bound to anticipate, or a danger which he is not in a situation fully to appreciate.

Vohs v. A. E. Shorthill Co. 124 Iowa, 471, 100 N. W. 495; Stomne v. Hanford Produce Co. 108 Iowa, 137, 78 N. W. 841; Olson v. Hanford Produce Co. 111 Iowa, 347, 82 N. W. 903, 118 Iowa, 55, 91 N. W. 806; Sankey

straighten wires attached to explosive caps, notwithstanding the servant's usual duty was to explode blasts, and he knew that they would explode when operated in the usual manner by electricity, but denied any knowledge of the fact that they would explode by friction or the application of external force. Lavia v. Kountz Bros. Co. 31 Pa. Super. Ct. 481.

But it is unnecessary to warn an experienced servant of mature years of the dangers of blasting if the master has no notice that the former is not fully acquainted with the dangers thereof. King v. Morgan, 48 C. C. A. 507, 109 Fed. 446; Welch v. Grace, 167 Mass. 590, 46 N. E. 387.

So, a failure to warn a youth of seventeen who, for upwards of five years, has been employed drilling and blasting, of the dangers of using dynamite, with which he is familiar, is not negligence. Northern Alabama Coal, Iron, & R. Co. v. Beacham, 140 Ala. 422, 37 So. 227.

Where ordinary care requires that an unexploded blast be withdrawn in the same manner whether the fuse be wet or dry, a failure to warn a servant that the fuse is wet is no breach of the master's duty, where an explosion was due solely to the negligent manner in which the charge was withdrawn. Henderson v. Williams, 66 N. H. 405, 23 Atl. 365.

The act of a gang boss in directing one employed to break rock and drill holes to withdraw an unexploded charge of dynamite being that of a fellow servant, the master is not liable for the former's failure to warn the servant of the danger of an explosion, notwithstanding he had no experience in the use of such explosive. Vitto v. Farley, 15 Misc. 153, 36 N. Y. Supp. 1105.

So, the failure to warn an inexperienced

servant of the dangers of blasting does not constitute actionable negligence where an explosion is due solely to the negligence of an experienced servant. O'Brien v. Buffalo Furnace Co. 68 App. Div. 451, 73 N. Y. Supp. 830.

And it is not necessary for a master to warn a servant, although but little experienced in using dynamite, of the probable dangers arising from the negligent use thereof by a fellow servant. Klos v. Hudson River Ore & Iron Co. 77 App. Div. 566, 79 N. Y. Supp. 156.

A master is not liable for the failure to warn an inexperienced servant of the danger of blasting, which he is not employed to perform, where he was wrongfully placed at such work by a fellow servant, as he thereby assumed the risk of injury. Kopf v. Monroe Stone Co. 133 Mich. 286, 95 N. W. 72.

The master's duty to warn an inexperienced servant of the dangers inherent to the work of blasting cannot be delegated, so as to relieve the former from liability for breach thereof. Burrows v. Ozark White Lime Co.; Archer-Foster Constr. Co. v. Vaughn; and Pinney v. King.—supra; Lo-frano v. New York & Mt. V. Water Co. 55 Hun, 452, 8 N. Y. Supp. 717, affirmed without opinion in 130 N. Y. 658, 29 N. E. 1033; Peters v. George, supra.

As the failure to warn is a breach of the master's absolute duty, he is not relieved from liability by the fact that the negligent foreman was working as a fellow servant with the injured youth at the time the explosion occurred. Burrows v. Ozark White Lime Co. 82 Ark. 343, 101 S. W. 744.

As to the duty of a master generally to instruct and warn a servant as to the perils of his employment, see the subject note to James v. Rapides Lumber Co. 44 L.R.A. 33.

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v. Chicago, R. I. & P. R. Co. 118 Iowa, 39, 91 N. W. 820; Carver v. Minneapolis & St. L. R. Co. 120 Iowa, 346, 94 N. W. 862.

Bishop, J., delivered the opinion of the court:

The accident out of which grew the injuries of which plaintiff complains occurred in July, 1902, and the circumstances leading up to and immediately attendant upon the same were these: The defendant was engaged in cutting through a natural surface elevation preparatory to laying a line of its railroad track. To facilitate the removal of earth and rock, explosives (dynamite and powder) were used. Incident to the work, holes 2 inches in diameter were drilled from the surface down to a depth of several feet, varying according to the elevation. In such holes several sticks of dynamite were dropped, and each of these sticks was inclosed with common wrapping paper. On the last stick to be dropped was placed an explosive cap, and thereto was attached a fuse some 2 feet in length. As we understand it, the fuse is tubelike in appearance. It consists of a cotton wrapper filled with some form of ignitable powder. As the stick to which the cap and fuse were attached was about to be dropped into the hole, the extreme end of the fuse was lighted with a match. The burning of the fuse down to the cap would result in an explosion, involving, of course, all the sticks in the drill hole. As the force of dynamite is exerted downward, the result of the explosion would be to break up the rock and loosen up the earth at the bottom of the drill hole, and this process was called "springing the hole." Following this, the drill hole was filled with blasting powder, and this was exploded by means of a wire charged with electricity from a battery. Plaintiff, a young man about twenty-two years of age, was in the employ of defendant as a dynamiter, or powderman, so called, and, on the day of the accident, had dropped dynamite into a drill hole and exploded it in the usual way. Thereafter, and within a few minutes, he proceeded to pour powder into the hole, and this was followed immediately by an explosion, resulting in the personal injuries of which complaint is now made. The action is bottomed on negligence. Several grounds were alleged, but only one was submitted to the jury,—that of the alleged failure on the part of defendant to instruct and warn plaintiff respecting the dangers incident to the work in which he was employed. At the close of the evidence for plaintiff, the defendant moved for an instructed verdict on the grounds: First, the evidence failed to show negligence on the part of defendant; second, the evidence convicted plaintiff of

contributory negligence. The motion was overruled. After verdict the like matters were again presented by a motion for new trial, and such motion was overruled. In these rulings lies the error principally contended for.

Necessary, of course, to a determination of the questions presented by the several motions, is the evidence. Plaintiff, as a witness, detailed the circumstances of his employment and of the accident, and we shall have the facts before us in the light most favorable to him by quoting from his testimony, using his own language. On direct examination he testified: "I commenced working for the railway company in April, 1901. Before that worked as a day laborer. During the summer I worked in the pit. In September I worked at drilling holes for about four days, and then again in the pit until Christmas, after which I again helped in drilling holes. James Nesmith was giving directions to the men during all that time. I loaded rock and worked in the dirt and used dynamite to break up frost. Before that I had no experience with powder or dynamite, but had seen holes loaded with dynamite. Later I went to another branch, where we shot frost with dynamite. In April, 1902, went to Fairport, where I took the job of dynamiter. Nesmith came to me and wanted to know if I would be dynamiter, to use the dynamite, and I told him I would if I could be Sunday watchman. He said I had better take it, and I said I would if I didn't have to do any drilling, and could be Sunday watchman. Up to that time I don't think I ever had experience in handling powder; had not had experience in springing holes with powder or dynamite; didn't know anything about the effect of dynamite as an explosive, or about the effect of powder, except what I saw there; did not know whether blasting with dynamite at the bottom of a hole would leave sparks. The ordinary practice was to spring the holes as quick as ready, and then they would be exploded as soon as the dirt was needed. To spring the holes several sticks were dropped in, after which a stick having a cap and fuse was dropped down on top of the others. I would light the fuse, drop the stick down in the hole, and then get away. The explosion would not show on the surface, except that some dust and dirt would come out at the top. At the bottom the effect would be to give it more cavity for the powder. Nesmith told me to use a fuse. We exploded the powder with a battery. At that time I did not know of the liability of sparks in the hole after the explosion. The dynamite sticks were wrapped with yellow wrapping paper, and were put down in the hole

with the paper on them. Nesmith gave me directions in regard to the shooting. The powder and dynamite would not fill the hole to the top, but we would fill the hole clear up with rock and dirt. Nesmith never told me how long to wait between the time of springing the hole and pouring in the powder. I did not know of danger in pouring in powder within a short time after springing the hole. July 11th Nesmith started for Davenport. We had started drilling two holes, and he told Tom Nesmith to get those holes ready to shoot when he came back. The next morning I started at the first hole and drilled until the train came; then I took the drill out and started another hole. I went down to get some dynamite. That was about the time the train pulled in. I then went to the car to get the powder off the train. James Nesmith asked if I had the holes ready and I said: 'I just sprung them.' He said: 'Go ahead, and load them. We want to get something done. We are late.' I started to load the hole. I did not know that there was any sparks down in the hole at the time. Nesmith didn't tell me the work was dangerous, or ask me if I had had experience in this field of labor. He did not tell me anything about there being sparks from the paper around the dynamite. I think about five minutes elapsed between the springing of the hole and the time I poured the powder in."

On cross-examination he testified: "After September, 1901, I was drilling holes for the purpose of loading them with dynamite and powder and exploding them. I used explosives at Fairport. I saw them use it there. I did not assist in exploding any of the holes, or see them light the fuse, or know why it was done. From that time until Christmas they used explosives, and as the work was carried on I was there as usual. I saw them drill and explode holes during that time. I knew how it was done. I knew that from observing how the other fellows did it. I saw them get ready to discharge the dynamite, and with the rest would get out of the way. After Christmas I went to work in the pit, and then Tom Nesmith helped me load some holes. Sometimes I would light a fuse, and sometimes he did. I knew when I lit the fuse it would burn and be followed by an explosion. When the fuse was lit, the fire was communicated to the wrapper outside. It was April or May when we came to Fairport and I took the position of powderman as the result of a conversation with James Nesmith. The reason I did not want to drill was that I had done enough of that. I had been drilling ever since I was on the job excepting what little work I did in the

pit. After that I had charge of the drilling and exploding loads, and charge of the powder and dynamite up to the time of the accident; but it was under the supervision of James Nesmith. I had quite a number of men at work with me in connection with the drilling and loading holes off and on. Nesmith got the dynamite and powder somewhere, but it was unloaded in the pit, and I got it there. When I wanted powder and dynamite I went down after it myself, but sometimes one of my men had to get it. Sometimes we would spring a hole with dynamite twice before I loaded it with powder. I was in charge of the dynamite, and I examined the holes, and I would put in the charges and explode them. When I got ready to load the hole I went or sent down for the powder. I determined the question of how much powder should be put down, but not always. It depended on what Nesmith wanted. I did not wait every time to have him tell me about it. Sometimes I did it as I thought it ought to be done, and went down and got as many cans as I thought necessary, using my own judgment. I do not remember of asking Nesmith about how many cans of powder to put in a hole more than once or twice. In springing the hole it would depend on how soon they wanted it about my loading it with powder. I cannot tell how much time would elapse between the springing of the hole and the loading of it. I sprung the holes as soon as they were drilled. I did that to get the work off my hands and have it in shape for loading. I did not know that the reason for springing the holes as soon as they were drilled was that there might be sufficient time elapse between the springing and the loading of them with powder to let any refuse matter left in the hole burn out and the hole cool off. I did not put the powder in right after springing the hole, because I did not think there was any need of it. I did not suppose there would be any fire in the hole after springing with dynamite. We did not put powder in right away every time, but did as soon as they were ready for the hole. I do not know whether it was 10 minutes or half an hour. Outside of this one time I do not know whether we put powder in within half an hour after the hole was sprung. After May we would spring holes five or six times a week. I knew that fire would explode powder, but did not know that, if there was fire down in the hole, it would ignite powder. I did know that if I had a burning fuse made of cotton which came in contact with powder there would be an explosion, and I knew that the fuse burned slowly, and I knew that there was paper around dynamite, and that it had

the appearance of being oily. On the Fourth of July I took home some of the sticks of dynamite and some fuses and used them in my celebration."

On redirect examination, he testified: "About the blasting, Nesmith told me what to do. No one told me when to shoot the holes, but Nesmith gave me instructions about the blasting. I do not mean to be understood as having any men at work under me. I knew the fuse and the paper on the dynamite would burn, but did not know whether the fuse remained in the hole or was blown out by the dynamite. I don't know whether or not the dynamite would set fire to paper and cause an explosion."

On recross-examination he testified: "I have often celebrated on the Fourth of July, and have fired all kinds of firecrackers. I had observed that firecrackers after being exploded very frequently retained fire. Some of the firecrackers will burn after being exploded, and I have sometimes lit a new firecracker from the burning parts of the old ones. This was before the accident."

On redirect examination he testified: "I don't know what firecrackers are made of, or if there is any dynamite in them. Powder will set fire to anything that burns. I don't know whether dynamite will or not."

Stated generally, the duty of a master to warn and instruct his employees arises when the existence of danger is, or should be, in the exercise of reasonable care, known to him, and the existence of such danger is either unknown to them, or is not discoverable by them, in the exercise of reasonable care, or when the danger is such in character as not to be properly appreciated by them by reason of their lack of experience, their youth, or general incompetency or ignorance. 4 Thomp. Neg. § 4055. In taking an adult servant into his employ in a particular capacity, the master has the right, generally speaking, to presume competency on the part of such servant, and that he appreciates the dangers ordinarily incident to the work he undertakes to do. Of course, if the master knows, or has reason to believe, that the servant is ignorant, the duty to warn and instruct exists. Yeager v. Burlington, C. R. & N. R. Co. 93 Iowa, 5, 61 N. W. 215; McCarthy v. Mulgrew, 107 Iowa, 76, 77 N. W. 527. It has never been considered, however, that the duty to warn and instruct extends to those dangers incident to a particular employment which are obvious. And, having regard for the character of the employment, an obvious danger is one that is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety. Newbury v. Getchell & M. Lumber & Mfg. Co. 100 Iowa, 19 L.R.A. (N.S.)

451, 62 Am. St. Rep. 582, 69 N. W. 743; Hanson v. Hammell, 107 Iowa, 171, 77 N. W. 839.

With these rules—fundamental in the law of negligence—in mind, let us analyze the evidence on which the single charge of negligence is sought to be supported. Plaintiff was an adult, and no question is made but that he was a young man of ordinary perceptive faculties and intelligence. He had been in the service of the defendant in and about the work of blasting and removing earth and rock for a year before he took the job of dynamiter or powderman. During that year he had drilled the preliminary holes, and had observed the work of blasting as it was being carried on. On numerous occasions he had assisted in the work, and says that he knew how it was done. During the three or four months that he acted as powderman he was in charge of the work, under Nesmith, he says; but it seems that the oversight did not extend beyond giving instructions as to the time and place of blasting. There was but one way to do the work. It was simple, and plaintiff says that he acted on his own initiative in doing it. He knew what material the sticks of dynamite were covered with, and of what a fuse was composed, and that such were inflammable. He knew that he was introducing fire into the drill hole when he dropped a lighted fuse therein, and he knew that fire was likely to cling to a shattered fuse for some length of time following the process of springing the hole. He knew that powder, when brought into contact with fire, would explode. Indeed, had Nesmith on the morning of the accident assumed to warn plaintiff of the possibility of particles of smoldering fire remaining in a hole recently sprung, and of the danger of pouring powder into such hole before the lapse of sufficient time to make sure that the fire had died out, it would be incredible that he should be met with any other statement than that "I know that as well as you do." Moreover, plaintiff ought not to be heard to say that he did not know. He had undertaken the work voluntarily. Confessedly, he knew that he was dealing with dangerous materials, and that a proper handling thereof was absolutely essential to safety. It became his duty, therefore, to familiarize himself with all the dangers incident to the work. And, without doubt, this must be held to include knowledge respecting the length of time which, in the interests of safety, should be allowed to intervene between the operation of springing a hole and the insertion of a powder charge. And we think it must be said that he did know all that anyone could have known. Of course, no one could fix in advance and

with exactness the length of time necessary; but, knowing the nature and character of the substance being dealt with, it would seem that common sense alone would indicate that safety required more than a few minutes of time. It is not material that Nesmith did not, on the particular occasion in question, warn plaintiff of the danger in loading the hole with powder within a few minutes after such hole had been sprung. It is to be borne in mind that the conduct of Nesmith on the occasion is not before us for consideration as an act of negligence. Whatever bearing it has is on the question of the right of plaintiff to be warned and instructed. Now, if plaintiff knew, or ought to have known, of the danger incident to charging a hole with powder within a few minutes after springing the hole, he was not entitled of right to a warning. "The master is therefore under no duty of warning or instructing a servant as to dangers which are discoverable by the exercise of ordinary care on his part, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing that he possesses." 4 Thomp. Neg. § 4063.

We conclude that a case of negligence on the part of defendant is not made out by the record; and, not only this, but that plaintiff has failed to show that he acted in the premises with the degree of care that, under all the circumstances, was demanded of him. It follows that the judgment must be reversed and a new trial ordered.

Petition for rehearing overruled.

KENTUCKY COURT OF APPEALS.

JOHN ALLYN et al., Appts.,

v.

LOUISVILLE SCHOOL BOARD et al.

(— Ky. —, 115 S. W. 206.)

School books—Illegal change—right of publisher.

Publishers of school books cannot enjoin discontinuance in a particular school of the books published by them because the school board has not complied with the provisions of the statute in making the change, where they have no contract with the patrons of such school to furnish it with their books.

(January 15, 1909.)

APPEAL by plaintiffs from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County sustaining a demurrer to the petition in an action brought to restrain defendants 19 L.R.A. (N.S.)

from discontinuing the use of certain textbooks in the public schools of Louisville. Affirmed.

The facts are stated in the opinion.

Messrs. Kohn, Baird, Sloss, & Kohn, for appellants:

The effort of the school board to substitute other books for appellants' was in violation of the statute.

Ky. Stat. §§ 2949, 2951, 2957; Louisville v. Hyatt, 2 B. Mon. 177, 38 Am. Dec. 574, 5 B. Mon. 199.

The publishers have a right to supply their books to the public schools, and the action of the board violates that right, and injures the complainants, who are therefore entitled to enjoin the board from putting in force its threatened, unauthorized, and illegal order, to their injury.

Johnson v. Ginn, 105 Ky. 655, 49 S. W.

Case Note. — Who may complain of noncompliance with statute in adopting or changing text-books in schools.

In Ginn & Co. v. School Book Board, 62 W. Va. 428, 59 S. E. 177, a publishing house, upon the expiration of a contract to furnish text-books, sought a mandamus to compel the defendant school board to renew the contract where the provisions of the statute had not been complied with in making a change of books. The provision of the statute violated was one requiring a certain vote for more than one change of books, and the court held that it was to prevent frequent and extensive changes, entailing on the public outlay for new books; and that its object was not to subserve the ends of publishers, but solely the interests of the public. Mandamus was accordingly refused.

Atty. Gen. ex rel. Marr v. Board of Education, 133 Mich. 681, 95 N. W. 748, was a consolidated action in which the publishers of text-books sought to enjoin a change of text-books in the public schools of Detroit; the law required that books should not be changed under five years, except under certain conditions which had not been complied with; there was no contract with the publisher. It was held that they were not entitled to the relief sought, the law having been enacted, not for the protection of book dealers, but for the protection of the public.

The case of Lenhart v. Board of Education, 5 Ohio N. P. N. S. 129, was an action to enjoin the defendant board and its co-defendant, a publishing house, from placing certain books in the schools. While the decision does not squarely present the question under discussion, it is included because an injunction was granted at the suit of a citizen and taxpayer to prevent the change of books, because such change had been provided for by an order adopted contrary to the statute.

See also the *dictum* in School Dist. No. 1 v. Shadduck, 25 Kan. 407.

470; *American Book Co. v. McElroy*, 25 Ky. L. Rep. 960, 76 S. W. 850; *State ex rel. Roberts v. Springfield*, 74 Mo. 21; *State ex rel. Flowers v. Board of Education*, 35 Ohio St. 368; *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946; *Heath v. Johnson*, 36 W. Va. 782, 15 S. E. 980; 2 High, Inj. § 1310; 5 Pom. Eq. Jur. § 322; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Underhill v. Murphy*, 117 Ky. 640, 111 Am. St. Rep. 262, 78 S. W. 482, 4 A. & E. Ann. Cas. 780; *American School v. McAnnulty*, 187 U. S. 95, 47 L. ed. 91, 23 Sup. Ct. Rep. 33; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Pratt Food Co. v. Bird*, 148 Mich. 631, 118 Am. St. Rep. 601, 112 N. W. 701; *Wong Wai v. Williamson*, 103 Fed. 1; *Mutual L. Ins. Co. v. Boyle*, 82 Fed. 705; *Mutual L. Ins. Co. v. Prewitt*, 32 Ky. L. Rep. 298, 105 S. W. 463; *Nelson v. State Board of Health*, 108 Ky. 769, 50 L.R.A. 383, 57 S. W. 501; *Denny v. Bosworth*, 113 Ky. 785, 68 S. W. 1078; *Young v. Beckham*, 115 Ky. 247, 72 S. W. 1092; *Mason v. Byrley*, 26 Ky. L. Rep. 487, 84 S. W. 767; *People ex rel. Ayres v. State Auditors*, 42 Mich. 422, 4 N. W. 274; *State ex rel. Snow v. Farney*, 36 Neb. 537, 54 N. W. 862; *Citizens' Gaslight Co. v. Louisville Gas Co.* 81 Ky. 263.

Messrs. Forcht & Field and Wallace A. McKay, for appellees:

A right of action for breach of duty imposed by statute upon public officers accrues only to those for whose benefit the duty is imposed and who have an absolute right to and interest in its performance, within which rule the publishers are not entitled to bring the action.

Civil Code, § 18; *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203; *Burnside v. Lincoln County Ct.* 86 Ky. 423, 6 S. W. 276; *Com. v. Porter*, 113 Ky. 575, 68 S. W. 621; *Eakins v. Eakins*, 14 Ky. L. Rep. 562, 20 S. W. 285; *Haggard v. Com.* 79 Ky. 366; *Norman v. Boaz*, 85 Ky. 557, 4 S. W. 316; 2 Dill. Mun. Corp. 916; *Keith v. Johnson*, 109 Ky. 421, 59 S. W. 487; *Roberts v. Louisville*, 92 Ky. 97, 13 L.R.A. 844, 17 S. W. 216; *Frantz v. Jacob*, 88 Ky. 525, 11 S. W. 654; 2 Spelling, Inj. § 1177; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Catlettsburg v. Kinner*, 13 Bush, 334; *Register Newspaper Co. v. Yeiser*, 117 Ky. 1013, 80 S. W. 478; *Lowe v. Phelps*, 14 Bush, 642; *People ex rel. Bishop v. Walker*, 9 Mich. 328; *Brownell v. Gratiot County*, 49 Mich. 414, 13 N. W. 798; *Thomas v. Hamilton*, 101 Mich. 387, 59 N. W. 658; *State ex rel. Post v. Benton*, 31 Neb. 44, 47 N. W. 477; *People ex rel. Sayles v. Fitzgerald*, 128 N. Y. 620, 28 N. E. 254; *Portland Stone-ware Co. v. Taylor*, 17 R. I. 33, 19 Atl. 19 L.R.A. (N.S.)

1086; *Territory ex rel. Graves v. Cole*, 3 Dak. 301, 19 N. W. 418; *State ex rel. Starrett v. James*, 14 Wash. 82, 44 Pac. 116; *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557; *Strong v. Campbell*, 11 Barb. 135; *Colorado Paving Co. v. Murphy*, 37 L.R.A. 630, 23 C. C. A. 631, 49 U. S. App. 17, 78 Fed. 283; *High, Extr. Legal Rem.* 92; *Com. ex rel. Snyder v. Mitchell*, 82 Pa. 343; *Kelly v. Chicago*, 62 Ill. 279; *State ex rel. State Journal Co. v. McGrath*, 91 Mo. 386, 3 S. W. 846; *Douglass v. Com.* 108 Pa. 559; *Madison v. Harbor Board*, 76 Md. 395, 25 Atl. 337; *Detroit v. Wayne Circuit Judge*, 128 Mich. 439, 87 N. W. 376; *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946; *Iverson v. School Comrs.* 39 Fed. 735; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Effingham v. Hamilton*, 68 Miss. 523, 10 So. 39; *State ex rel. Phelan v. Board of Education*, 24 Wis. 683.

O'Rear, J. delivered the opinion of the court:

The Louisville School Board is a body corporate, charged by law with public education in the city of Louisville. The statute (§ 2957, Ky. Stat. 1903) imposes these duties upon the board: "The board shall prescribe the branches of education to be taught, and the text-books to be used. Text-books once adopted shall not be changed, except by unanimous consent of the board, until notice of said proposed change shall be given and entered upon the records of the board one scholastic year, and then only by the affirmative vote of not less than two thirds of the members. Schools may be opened as part of said school system to teach children of the ages of four, five, and six years by the kindergarten method. Nothing contained in this section shall be construed as affecting in any way the present method of taking the school census or as increasing or reducing the *pro rata* of the school fund to be received from the state of Kentucky by the school board of cities of the first class, nor to be construed as conflicting with or changing in any way §§ 166 and 189 of the act for the government of cities of the first class, being now §§ 2949 and 2974 of chapter 89 of the Kentucky Statutes." In 1901 and 1903 the board had adopted, as part of the course of studies in certain of the public schools of Louisville, Scott & Chute's Elementary English Compositions and Carhart & Chute's High School Physics. Those books are published by appellants, who are nonresidents of Louisville. In 1907 the board, not all the members being present, adopted a resolution changing the course of study in certain particulars in the public schools of Louisville,

substituting for the two books named Lockwood & Emerson's Composition and Rhetoric and Milliken & Gayle's First Course in Physics. Those last named are not published by appellants.

This action was brought by appellants seeking an injunction against the school board and the superintendent of the schools of Louisville, restraining them from discontinuing the use of appellants' books, and from adopting the others in lieu of them, as well as to compel the appellees to continue the use of appellants' two books in the public schools of Louisville till they were legally changed. It was charged that the board was powerless to make the change unless all its members concurred, or unless after one year's notice as many as ten of its members voted to change. A special demurrer was filed to the petition, on the ground that plaintiffs were without power to maintain the suit. The demurrer was sustained, and the injunction was denied, and, appellants having declined to plead further, their petition was dismissed.

Appellants have not a contract to furnish their books to patrons of the Louisville public schools. They are not bound to do so. Indeed, they may refuse to do so, or may cease to publish the books altogether without liability to the patrons of these schools or to the school board. The legislation which requires the establishment by public authority of a uniform system of education by adopting and maintaining, till deliberately changed by adequate public authority, such text-books as may have been selected in the public schools of the city, is a measure solely for the benefit of the public,—the patrons of the schools. The publishers are not the subject at all of the legislative action. It was never intended by it to confer any right upon them, or to allow them to interfere in the matter in any way. If a patron of the school feels aggrieved at the action of the school board, the courts are open to hear his complaint, because his rights would be affected, and it was his rights and interest that formed the subject of legislation.

Appellants contend that the statute creates a status which they, engaged in the business of publishing and selling these school books, have the legal right to have the advantage of; that their right to prosecute their business in this locality is affected by the adverse illegal action of the school board, and it being illegal, as they contend, and affecting their business, it infringes their right, which they may have re-

pressed in the courts. It may be conceded that appellants have the right to publish the books and to sell them to whomsoever they can. It may also be conceded that the action of the school board in this affair incidentally affects their business, in that it diminishes their sale of books. But their right is not one attaching to the conduct of the schools of Louisville, and has no legal connection with it. No more so than the clothier who sells the children wearing apparel, or the materialmen who sell supplies to build the schoolhouses. The law requires the public schools to be conducted so many months each year. If they are not opened, it would follow that those who would be pupils need not supply themselves with books. Could appellants maintain mandamus against the school board to compel the schools to be conducted for the statutory period, in order that they might sell their books to the pupils? The law also is compulsory that all children between certain ages should attend the public or some other school. If any number of the children of Louisville within the school age were not attending any school, would injunction lie against the children to compel them to attend, so that appellants might have a market for their books? All these are matters that legally concern the local public. Appellants have not such rights as entitle them to maintain this action. *Strong v. Campbell*, 11 Barb. 135; *Colorado Paving Co. v. Murphy*, 37 L.R.A. 630, 23 C. C. A. 631, 49 U. S. App. 17, 78 Fed. 28; *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946; *Iverson v. School Comrs. (C. C.)* 39 Fed. 735; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501. *Johnson v. Ginn*, 105 Ky. 655, 49 S. W. 470, and *American Book Co. v. McElroy*, 25 Ky. L. Rep. 960, 76 S. W. 850, cited by appellants, do not apply. *Ginn & Company* and the *American Book Company* were under contracts and bond with the state to supply the books on their lists on file with the state board of education, and the local communities had no option but to buy them after they had been selected by the county boards. The relation of the parties was one based upon contract, and we held in the cases just cited that the rights of the booksellers, created by their contract, might be enforced. Without deciding any of the other questions presented in briefs, it is ordered that the judgment of the Circuit Court sustaining the special demurrer to appellants' petition and dismissing the petition be affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

HARRIET E. FRENCH

v.

MERCHANTS & MINERS TRANSPORTATION COMPANY.

(199 Mass. 433, 85 N. E. 424.)

Carrier — baggage — limited liability.

1. A provision on a transportation ticket that the carrier is not to be responsible for the destruction of baggage by fire is binding on the passenger in its application to fires not caused by the carrier's negligence, although it is in print so fine that the passenger cannot, because of defective sight, read it, if the printed provisions on the ticket are sufficiently conspicuous to charge

Case Note. — Limitation of carrier's liability for passenger's baggage.

The cases very generally hold that it is a part of a carrier's duty to carry the baggage of its passengers, subject, of course, to certain restrictions as to quantity and character. The question whether a common carrier may limit his liability for baggage is ordinarily determined by the same general principles of law that apply to carriers' contracts generally. It is therefore sometimes difficult to determine the correct rule in a jurisdiction from an examination confined to the cases involving baggage, as the rule may have become firmly established in that jurisdiction by its application in cases involving the carriage of freight, and followed without any discussion. The apparent anomaly presented by the fact that in most of the cases involving stipulations purporting to exonerate the carrier from all liability such stipulations have been upheld even as to negligent losses or injuries, whereas many cases involving stipulations limiting the amount of liability have been declared invalid as applied to negligent losses or injuries, is accounted for by the fact that the cases presenting the first question happened to arise in those jurisdictions which were committed, by decisions in respect to freight, to the doctrine that it is not against public policy for a carrier to stipulate against its own negligence, while many of the second class of cases arose in jurisdictions committed to the contrary doctrine.

In the great majority of the cases the limitation, or attempted limitation, is made by means of printed stipulations upon the passengers' tickets, and in very many cases the decision turns upon the question whether the acceptance of a ticket containing such stipulations constitutes a contract or not. In all such cases there is, of course, an implied ruling that the carrier may limit his liability, but such cases have not been included in this note, which is limited to those cases expressly passing upon the question, May a carrier limit its liability for loss or injury to a passenger's baggage?

Cases involving the right of a carrier to 19 L.R.A. (N.S.)

him with notice that they contain a contract.

Same — negligence — delay in transportation.

2. Mere delay in forwarding baggage from an intermediate station is not the proximate cause of its destruction by fire while there, so as to render the carrier liable therefor on the ground of negligence in permitting the delay.

(June 19, 1908.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover the value of baggage lost while in defendant's possession for transportation,

limit his liability for merchandise carried as baggage have also been excluded from this note, as the cases generally hold that the carrier is under no obligation to carry merchandise as baggage, and cases of that character would therefore present a different question.

The phrase "limitation of liability," as applied to the carriage of baggage, is frequently used in two senses: First, in the sense of exonerating the carrier from all loss; and, second, in the sense of exonerating him from loss beyond an agreed amount; but cases in which the facts present one question are not necessarily authority for those presenting the other. For instance, a court which holds that a carrier may not limit its liability so as to exonerate itself from all loss might consistently hold that a stipulation limiting the liability of a carrier to a fixed amount, which was to be deemed the fair value of the goods, would be reasonable and valid. This distinction, however, is not recognized in all of the cases, and in some cases there are not sufficient facts given to determine to which class the case really belongs. But so far as possible the cases will be grouped along these lines.

The great majority of the cases hold that a carrier cannot, by contract, limit his liability for losses due to his negligence. Some cases, however, hold that he may so limit his liability; and from that extreme position to the other extreme, that a carrier cannot even by express contract limit his strict common-law liability, the cases involving the right of a carrier to limit his liability take practically every possible position. And the same is true generally of the cases involving the right of a carrier to limit his liability as to the passenger's baggage, although almost all of the cases are those involving a negligent loss. Where, however, the loss was not due to the carrier's negligence, the fact will be noted.

It may be well to call attention at this point to two rules as to stipulations limiting carriers' liability, of very general application, which are suggested by some of the cases considered below, but the discussion of

which resulted in a verdict in defendant's favor. Overruled.

The facts are stated in the opinion.

Messrs. Thomas R. Bateman and Harold W. Brown, for plaintiff:

A baggage check is not a contract, but a mere voucher.

Moore, Carr. p. 721; Isaacson v. New York C. & H. R. R. Co. 94 N. Y. 278, 40 Am. Rep. 142; Atchison, T. & S. F. R. Co. v. Brewer, 20 Kan. 669; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Hyman v. Central Vermont R. Co. 66 Hun, 202, 21 N. Y. Supp. 119; Hickox v. Naugatuck R. Co. 31 Conn. 281, 83 Am. Dec. 143; Wilson v. Chesapeake & O. R. Co. 21 Gratt. 654; Marmorstein v. Pennsylvania R. Co. 13 Misc. 32, 34 N. Y. Supp. 97; Griffith v. Atchison,

T. & S. F. R. Co. 114 Mo. App. 591, 90 S. W. 408.

Passengers are not bound by printed notices of limitation of liability unless they are aware of the same when they purchase their ticket; and the burden of proving assent to such conditions is on the carrier.

Rawson v. Pennsylvania R. Co. 48 N. Y. 212, 8 Am. Rep. 543; Brown v. Eastern R. Co. 11 Cush. 97; Mauritz v. New York, L. E. & W. R. Co. 23 Fed. 765; The Majestic, 23 L.R.A. 746, 9 C. C. A. 161, 20 U. S. App. 503, 60 Fed. 624; Wilson v. Chesapeake & O. R. Co. supra; Malone v. Boston & W. R. Corp. 12 Gray, 388, 74 Am. Dec. 598; Jacobs v. Central R. Co. 208 Pa. 535, 57 Atl. 982; John Hood Co. v. American Pneumatic Service Co. 191 Mass. 27, 77 N. E. 638; Camden

which is without the scope of this note: First, a carrier cannot contract against the effects of his wilful or wanton negligence; second, any stipulation in any way limiting a carrier's liability must be reasonable to be upheld.

Immunity from liability.

As was suggested above, the expression "limitation of liability" as applied to the carriage of baggage is frequently used in the sense of exonerating the carrier from all loss, and not merely for loss over a certain amount. As was said above, the cases involving this phase of the question have arisen for the most part in jurisdictions permitting a carrier to limit its liability even for negligence.

Thus, in *Prentice v. Decker*, 49 Barb. 21, the court said: "These principles must be deemed settled; namely, that common carriers of goods may, by express stipulation, limit their liability for the loss of goods occurring from even the negligence of their agents and servants, or wholly exempt themselves from such liability; and that the acceptance by the bailor, from the bailee, in the ordinary course of business, of a receipt for the goods, containing such a stipulation, creates a binding contract."

And in *Nevins v. Bay State S. B. Co.* 4 Bosw. 225, it was held that a carrier might limit his liability as to baggage, in whole or in part, by express contract.

So, in *Peninsular & O. Steam Nav. Co. v. Shand*, 3 Moore, P. C. C. N. S. 272, it was held that it was open to carriers to limit their liability for loss or damage to baggage so as to exonerate themselves from all loss, —even that due to their own negligence.

In *Stewart v. London & N. W. R. Co.* 3 Hurlst. & C. 135, it was held that the stipulation that a certain amount of luggage would be carried free at owner's risk exonerated the carrier from a loss due to its own negligence. And this case is cited with approval in *Bate v. Canadian P. R. Co.* 15 Ont. App. Rep. 388.

And in *Dixon v. Richelieu Nav. Co.* 15 10 L.R.A. (N.S.)

Ont. App. Rep. 647, affirmed in 18 Can. S. C. 704, it was held that the words upon the ticket, to the effect that all baggage must be at the owner's risk against all casualties, protected the carrier against all contingencies except wanton negligence.

But in *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481, it was held that in Pennsylvania it was ruled that the common-law liability of a carrier might be limited or abridged by general notice that the baggage of the passenger is at the risk of the owner, provided that the notice is clearly brought home to the passenger; but a carrier cannot discharge himself from liability for loss due to lack of the ordinary care of a bailee for hire.

In *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L.R.A. 340, 25 Am. St. Rep. 660, 27 N. E. 665, where the contract purported to exonerate the carrier from all liability for the plaintiff's baggage, the court, after determining that the contract was to be governed by the law of England, said: "The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy."

As to refusal to give effect to foreign contract exempting carrier from liability, see case note to *Lake Shore & M. S. R. Co. v. Teeters*, 5 L.R.A. (N.S.) 425; and also the general question of conflict of laws in relation to carriers' contracts, see case note to *Southern Exp. Co. v. Gibbs*, 18 L.R.A. (N.S.) 874.

The same question frequently arises where the passenger is riding upon a free ticket or pass.

Thus, in *Holly v. Southern R. Co.* 119 Ga. 767, 47 S. E. 188, it was held that one who received of a railroad company a gratuitous pass over its line, which, by its terms, is "issued only on condition that the person accepting it assumes all risks of accidents, and expressly agrees that the company shall

& *A. R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481; *Little Rock & H. S. W. R. Co. v. Record*, 74 Ark. 125, 109 Am. St. Rep. 67, 85 S. W. 421.

Messrs. A. Nathan Williams and George F. Manson, for defendant:

A common carrier can, by stipulation in a special contract, exonerate itself from losses arising from causes over which it has no control and to which its own fault or negligence in no way contributes.

Cox v. Central Vermont R. Co. 170 Mass. 129, 49 N. E. 97; *Fonseca v. Cunard S. S. Co.* 163 Mass. 553, 12 L.R.A. 340, 25 Am. St. Rep. 660, 27 N. E. 665; *Graves v. Adams Exp. Co.* 176 Mass. 280, 57 N. E. 462; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *Arthur v. Texas & P. R. Co.* 204 U. S. 505, 51 L. ed. 590, 27 Sup. Ct. Rep. 338.

One who accepts a contract, and proceeds to avail himself of its provisions, is bound by the stipulations and conditions expressed in it, whether he reads them or not.

Fonseca v. Cunard S. S. Co. and Graves v. Adams Exp. Co. supra; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205; *Cox v. Central Vermont R. Co.* supra.

The proximate cause of the loss of the plaintiff's trunk was not the delay in transportation, but, the fire which destroyed it and its contents, and for which the defendant was not responsible under the terms of its contract with the plaintiff, the fire not happening through any negligence or want of care on the part of the defendant.

Hoadley v. Northern Transp. Co. 115 Mass. 304, 15 Am. Rep. 106; *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec.

not be liable, under any circumstances, for any injury to the person, or loss or damage to the property of the person using it," cannot recover of the company the value of baggage lost while traveling on such pass.

And in *Hutto v. Southern R. Co.* 75 S. C. 295, 55 S. E. 445, where the passenger was traveling on a free pass or ticket, it was held that the carrier might stipulate upon what terms it would carry the passenger and his baggage, but could not stipulate that it would not be liable for the consequences of gross misconduct or wantonness.

So, in *The Stella* [1900] P. 162, it was held that a stipulation on a free ticket, exonerating the carrier from loss or damage however caused, was valid, and would bar a recovery even for a negligent loss.

And in *Illinois C. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260, it was held that a stipulation on a free ticket that the carrier should not be liable under any circumstances for any loss was valid so far as ordinary negligence was concerned, but invalid as to gross negligence.

But in *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607, it was held that the relationship of common carrier and passenger existed between the plaintiff and the defendant notwithstanding that the former was riding upon a free ticket, and public policy forbade that the carrier should be allowed to contract for exemption from liability for damage occasioned by the negligence, wilful default, or tort of himself or servants.

Amount of liability.

The rule is followed in many cases that a stipulation limiting the amount of the carrier's liability is invalid as applied to a negligent loss, under the general rule that a carrier cannot contract for exemption from the consequences of his own negligence.

Thus, in *Thomas v. Southern R. Co.* 131 N. C. 590, 42 S. E. 964, where the carrier had stipulated that he would not be liable 19 L.R.A. (N.S.)

for losses over a certain amount, the court adhered to and applied the following rule taken from 2 Fetter on Carriers of Passengers, § 627: "A common carrier of a passenger's baggage may, by express contract, relieve himself from his common-law liability as insurer; but by the weight of authority he cannot exempt himself from liability for the negligence of himself or his servants."

And in *Coward v. East Tennessee, V. & G. R. Co.* 16 Lea, 225; 57 Am. Rep. 227, it was held that a stipulation limiting the amount of the carrier's liability was invalid as applied to a negligent loss. The court said: "A common carrier may relieve himself from the strict liability imposed on him by the common law by a special contract, but he cannot contract for exemption from the consequences of his own or his agent's negligence."

So, in *International & G. N. R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541, it was held that a stipulation in a ticket limiting the liability of the carrier to a fixed amount was void as to a negligent loss, as a common carrier cannot contract against the consequences of its own negligence.

A stipulation limiting the amount of the defendant carrier's liability for losses due to its negligence was held invalid in *Cohen v. South Eastern R. Co.* L. R. 2 Exch. Div. 253, affirming L. R. 1 Exch. Div. 217.

In *Williams v. Central R. Co.* 93 App. Div. 582, 88 N. Y. Supp. 434, affirmed in 183 N. Y. 518, 76 N. E. 1116, it was held that the New Jersey statute permitting carriers to limit the amount of their liability was to be construed as limiting the carrier's liability as insurer, and was inapplicable to a negligent loss, as the New Jersey courts had held that it was contrary to public policy for a carrier to contract against the results of his own negligence.

A few cases, while not denying the general rule that a carrier cannot stipulate against its own negligence, nevertheless hold

645; Chicago, St. P. M. & O. R. Co. v. Elliott, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949.

Loring, J., delivered the opinion of the court:

It is stated in the bill of exceptions that the plaintiff did not "contend that this fire was due to any negligence whatsoever on the part of the defendant, nor that the defendant was lacking in diligence in trying to control and extinguish said fire." This ended the plaintiff's case unless it was taken out of the usual rule by the fact that the jury were warranted in finding from the testimony of the plaintiff that she "could see large objects, but could not read print and had not been able to read for over a year previous to this trip."

We do not think that the plaintiff's case would have been taken out of the usual rule

that a stipulation limiting the amount of the liability is valid, upon the theory that such a stipulation is not a contract against negligence, but is rather in the nature of an agreement as to the value of the goods shipped.

Thus, in Louisville, N. A. & C. R. Co. v. Nicholai, 4 Ind. App. 119, 51 Am. St. Rep. 206, 30 N. E. 424, in which case, from the facts, negligence on the part of the carrier was necessarily presumed, the court said: "The great weight of authority in this country now is in favor of excluding negligence as an element of contract between the carrier and the employer, and of holding the former to a rigid responsibility for any degree of negligence, without the power by contract to divest itself of it. . . . The rule which we have thus referred to applies, also, to contracts limiting the liability of the carrier to a certain sum in case of loss, unless that sum is agreed upon as the value of the goods or baggage, and the charges or rates of freight are ascertained and fixed upon the basis of such agreed valuation. In such a case the weight of authority seems to be that the shipper would be estopped from afterwards alleging that the value was more (even if there should be loss by the negligence of the carrier), for there would be no justice in allowing the shipper to be paid a larger value than that deliberately agreed upon, for an article which he had induced the carrier to take at a rate lower than would otherwise have been charged."

And in The Kensington, 183 U. S. 276, 46 L. ed. 196, 22 Sup. Ct. Rep. 102, it was held that a stipulation in a steamship passenger's ticket, which compels him to value his baggage at a certain sum, far less than it is worth, or, in order to have a higher value put upon it, to subject it to the provisions of the Harter act, by which the carrier would be exempted from all liability therefor from errors in navigation or management of the vessel or other negligence, is unreasonable and in conflict with public policy. The court 19 L.R.A. (N.S.)

if the jury had believed the plaintiff and found that her eyesight was what she testified it to be.

The usual rule is that a passenger who accepts a ticket on which the contract of transportation is stated is bound by its terms whether he reads it or not. *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L.R.A. 340, 25 Am. St. Rep. 660, 27 N. E. 665; *Cox v. Central Vermont R. Co.* 170 Mass. 129, 49 N. E. 97; *Graves v. Adams Exp. Co.* 176 Mass. 280, 57 N. E. 462; *John Hood Co. v. American Pneumatic Service Co.* 191 Mass. 27, 77 N. E. 638.

The ticket here in question must be taken on this bill of exceptions to contain on its face nearly two quarto pages of printed provisions. It must have been apparent, even

said that the conditions in the ticket did not bring the case within the principles of *New York C. & H. R. R. Co. v. Fraloff*, cited below, nor of *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, in which the court said: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

So, in *Jacobs v. Central R. Co.* 208 Pa. 535, 57 Atl. 982, it was held that a carrier might, by notice duly brought home to him, limit the amount of its liability as to the passenger's baggage. The court said: "This is not an attempt on the part of the common carrier to relieve itself from the consequences of its negligence, as it cannot, but is a limitation by express contract of its liability for the passenger's baggage which it carries without extra pay." And this decision was followed in *Mogill v. Central R. Co.* 25 Pa. Super. Ct. 164.

Still other cases hold that a stipulation limiting the amount of liability is valid even in the case of a negligent loss, without dis-

to a person who can see only "large objects," that the ticket contained a contract, and the plaintiff was bound to have it read to her if she could not read it herself.

By the terms of the contract between the plaintiff and the defendant, the defendant is not to be liable for injury to baggage arising from fire. The legal result of such a contract is that it is not liable for fire unless negligent. *Grace v. Adams*, supra; *School Dist. v. Boston*, H. & E. R. Co. 102 Mass. 553, 3 Am. Rep. 502; *Pemberton Co. v. New York C. R. Co.* 104 Mass. 144, 151; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 305, 15 Am. Rep. 106. What was said by this court in *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 557, 12 L.R.A. 340, 25 Am. St. Rep. 660, 27 N. E. 665, and in *Cox v. Central Vermont R. Co.* 170 Mass. 129, 137, 49 N. E. 97, means that such a contract is invalid if it is construed to be a contract exempting the carrier when he is negligent. It was not meant that, where the contract exempts the carrier generally without reference in terms to the subject of negligence, it is invalid altogether. Such a

contract is construed to be a contract exempting the carrier unless the passenger proves that he was negligent.

The plaintiff therefore is thrown back on her contention that the jury were warranted in finding that the defendant agreed to carry her trunk from Savannah to Boston and was negligent in holding her trunk in Baltimore from June 4th until June 13th, when it was destroyed by fire. For the natural and probable consequences of that delay the defendant would be liable if such a finding was warranted on the evidence. But the destruction of the trunk by fire was not the natural and probable consequence of not forwarding it promptly, and, since the only liability of the defendant is for delay, it is not liable for its loss. *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106. See also, in this connection, *Whitcomb v. Bacon*, 170 Mass. 479, 482, 64 Am. St. Rep. 317, 49 N. E. 742; *Hurley v. Packard*, 182 Mass. 216, 65 N. E. 64.

Exceptions overruled.

cusssing the question whether or not such a stipulation is a contract exempting the carrier from negligence.

Thus, in *The Priscilla*, 106 Fed. 739, reversed on other grounds in 52 C. C. A. 470, 114 Fed. 836, where the loss was due to the negligence of the defendant, the recovery was limited to the amount of the stipulation, the court holding that it was competent for a carrier to restrict its liability to a reasonable amount, unless an additional compensation was paid for a larger risk; and, when that distinctly formed a part of the contract, it was binding upon the passenger.

And in *Tewes v. North German Lloyd S. S. Co.* 186 N. Y. 151, 8 L.R.A. (N.S.) 199, 78 N. E. 864, 9 A. & E. Ann. Cas. 909, it was held that the insertion in a steamship ticket of a provision limiting the liability of a carrier for loss of baggage to a certain amount unless the true value is declared and excess paid for at regular freight rates will operate to relieve the carrier from liability for such loss, even when due to his own negligence.

And in *Rose v. Northern P. R. Co.* 35 Mont. 70, 119 Am. St. Rep. 836, 88 Pac. 767, it was held that a carrier had a right to limit its liability for loss or injury to baggage to a certain amount, if such limitation was reasonable, even though the loss was due to its own negligence.

So, in *The New England*, 110 Fed. 415 (appeal dismissed in 62 C. C. A. 684, 129 Fed. 1006), it was stated that a reasonable limitation as to the amount of the baggage would be upheld, even though the loss was due to the negligence of the carrier; upon the facts of the case, however, the limitation was held unreasonable.

And in *Weinberger v. Compagnie Générale* 19 L.R.A. (N.S.)

Transatlantique, 146 Fed. 516, where the loss was due to the negligence of the carrier, certain stipulations as to amount of liability were declared not binding upon the ground that they were unreasonable.

So, in *Nevins v. Bay State S. B. Co.* 4 Bosw. 225, where the loss was due to negligence, it was stated generally that a carrier might limit his liability as to baggage, in whole or in part, by express contract.

And in *Bingham v. Rogers*, 6 Watts & S. 495, 40 Am. Dec. 581, it was held that a carrier may, by express contract, limit the amount for which he shall be liable, even in case of a negligent loss.

Miscellaneous cases.

The following cases are not very explicit in the holding upon this point.

In *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531, the court said: "It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk." But this was *dictum*, as it does not appear that there was any limitation.

In *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470, the decision was to the effect that a carrier could not limit his common-law liability for baggage by notice brought home to the passenger, but implied that it might by express contract; but in a dissenting opinion by Judge Cowen it was vigorously

argued that carriers could not limit their common-law liability even by express contract. This case was cited with approval in *Jones v. Voorhees*, 10 Ohio, 145, where it was held that common carriers could not limit their responsibility by notice brought home to the owner; but the court said: "But any substantial distinction between a notice brought home and an express special contract to limit responsibility is not easily perceived."

A release of liability for plaintiff's baggage, signed by her agent, which recited that the trunk in question was broken and unlocked, was held valid in *Kanevsky v. New York, O. & W. R. Co.* 53 Misc. 564, 103 N. Y. Supp. 727.

In *Glovinsky v. Cunard S. S. Co.* 4 Misc. 266, 24 N. Y. Supp. 136, affirmed in 6 Misc. 388, 26 N. Y. Supp. 751, it was held that \$283 was a reasonable amount for the plaintiff to carry as baggage for herself and two children; and, in an action for its loss, a verdict for that amount would not be disturbed, although upon plaintiff's ticket the defendant's liability was fixed at \$50. The court further held that the reasonableness of the limitation was properly submitted to the jury. It does not appear in the last two cases whether or not the loss was due to the negligence of the carrier.

In *Wensky v. Canadian Development Co.* 8 B. C. 190, while it was not denied that a carrier might limit its liability for loss of baggage, yet a limitation in a ticket would be held to apply only to the regular baggage up to \$100, and would not apply to excess baggage for which the plaintiff had paid extra rates.

Hand baggage.

Any limitation of liability as to baggage is generally held not to apply to hand baggage, the distinction between the two classes being that the passenger retains more or less of control over the baggage he carries with him to his stateroom or berth and the liability of the carrier as to such baggage is akin to that of an innkeeper.

Thus, in *Holmes v. North German Lloyd S. S. Co.* 184 N. Y. 280, 5 L.R.A. (N.S.) 650, 77 N. E. 21, it was held that a stipulation in a steamship ticket limiting liability for baggage to a certain amount did not apply to baggage intended to be taken by a passenger to the stateroom for use during the voyage. And to the same effect was the decision in *Macklin v. New Jersey S. B. Co.* 7 Abb. Pr. N. S. 229.

And in *Runyan v. Central R. Co.* 61 N. J. L. 537, 43 L.R.A. 284, 41 Atl. 367, it was held that a stipulation limiting the amount of the carrier's liability as to loss of baggage was valid, but did not apply to hand baggage.

So, a railroad company was held liable for the loss of hand baggage delivered by a passenger to a porter on entering a train, in *Louisville, N. & G. S. R. Co. v. Katzenberger*, 16 Lea, 380, 57 Am. Rep. 232, 1 S. W. 44, although the ticket stated that "wear-

ing apparel or baggage placed in the car will be entirely at the risk of the owner."

In *Stevenson v. Pullman Palace-Car Co.* (Tex. Civ. App.) 26 S. W. 112, it was held that it was the duty of the sleeping-car company to use reasonable care to guard its passengers from the depredations of thieves while they slept, and, if it did not exercise such care in regard to appellant's valise, and it was stolen, the company was liable; and this duty could not be evaded by any words printed on the check given the passenger, or by being posted up in the cars. Though the court was not obliged to decide the effect of an express contract as to the baggage, the language indicates that even an express contract would not exonerate the carrier from the effects of his negligence.

Statutes prohibiting limitation.

In some states a statute provides that a carrier cannot, by contract, limit his common-law liability. This provision, of course, applies to contracts concerning baggage.

In Texas the statute provides that a carrier cannot limit his common-law liability. Under this statute, contracts limiting the amount of the liability of the carrier as to baggage were held invalid in *Houston, E. & W. T. R. Co. v. Seale*, 28 Tex. Civ. App. 364, 67 S. W. 437; *Mexican Nat. R. Co. v. Ware* (Tex. Civ. App.) 60 S. W. 343; *Galveston, H. & S. A. R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234. And the fact that the plaintiff was riding upon a pass or free ticket does not change the rule. *White v. St. Louis Southwestern R. Co.* (Tex. Civ. App.) 86 S. W. 962.

So, in *Chesapeake & O. R. Co. v. Beasley*, 104 Va. 788, 3 L.R.A. (N.S.) 183, 52 S. E. 566, it was held that a contract limiting the amount of the liability of a carrier for property loss while in its possession is void, where the statute makes invalid any contract by the carrier for exemption from liability for such loss.

And in *Davis v. Chicago, R. I. & P. R. Co.* 83 Iowa, 744, 49 N. W. 77, it was held that, under the statutes of that state, a limitation of liability of the defendant to the amount of \$100 for baggage, and no more, was ineffective.

Upon the question, Does stipulation exempting carrier from liability for passenger's baggage, or limiting amount thereof, cover losses due to negligence? see case note to *Tewes v. North German Lloyd S. S. Co.* 8 L.R.A. (N.S.) 199.

NEBRASKA SUPREME COURT.

CHARLES C. WHITNACK

v.

CHICAGO, BURLINGTON, & QUINCY
RAILROAD COMPANY, Appt.

(— Neb. —, 118 N. W. 67.)

Bill of lading — parol testimony.

1. When a bill of lading has been issued

Headnotes by Good, C.

by a common carrier, signed and accepted by the shipper, it constitutes the contract for the shipment of merchandise therein described; and its terms cannot be altered or varied by parol testimony.

Same — construction — void conditions — effect.

2. The language used in a bill of lading is subject to the same rules of construction which govern other contracts; and, while the instrument is to be construed as a whole, invalid conditions will not necessarily render the contract invalid, and it may be enforced so far as it is valid.

Initial carrier — liability.

3. Where a common carrier accepts goods for shipment, to be delivered to a connecting carrier, the first carrier will be liable for any damages to the goods resulting directly from the negligence of such carrier,

Case Note. — Liability of carrier of property for loss occurring on connecting line, but due to its own negligence.

Cases where loss was due wholly to the negligence of the connecting carrier on whose line it occurred are not within the scope of this note, and have been excluded.

The doctrine in *WHITNACK v. CHICAGO, B. & Q. R. Co.*, making an initial carrier responsible for losses resulting directly from its negligence, although the losses may not have actually occurred until after the property had been delivered to a second and connecting carrier, is generally recognized. This rule has been enforced in the following cases relating to the carriage of live stock:

Alabama G. S. R. Co. v. Thomas, 89 Ala. 297, 18 Am. St. Rep. 119, 7 So. 762, where the initial carrier itself loaded the cattle in a negligent manner in a car at the connecting point, without giving the consignor an opportunity to load and unload, as provided by the contract.

Galveston, H. & S. A. R. Co. v. Ivey (Tex. Civ. App.) 23 S. W. 321, where the initial carrier failed to feed and water cattle upon a transfer to the connecting line.

Ft. Worth & D. C. R. Co. v. Daggett, 87 Tex. 322, 28 S. W. 525, where there were delays in a shipment of cattle, and mixing of them in the loading of the train after they had been classified for market, and failure to feed and water them while in transit.

In *Texas C. R. Co. v. O'Loughlin*, 37 Tex. Civ. App. 640, 84 S. W. 1104, where the first carrier failed properly to bed the cars in which cattle were shipped over its lines, and transferred them in the same cars to a connecting line.

Norfolk & W. R. Co. v. Sutherland, 89 Va. 703, 17 S. E. 127, where the negligence of the initial carrier in mixing the cattle of one shipper with those of another entailed a delay in delivery after reaching destination until the cattle could be separated, during which there was a considerable loss of weight.

So it was held in *Louisville & N. R. Co. 19 L.R.A. (N.S.)*

although the loss may not actually occur until after the goods are delivered to the second carrier.

Same — separating cars — care taker.

4. A common carrier undertook, during extreme cold weather, to carry two car loads of potatoes, and deliver them to a connecting carrier. The contract provided that the shipper should furnish a care taker to accompany the shipment, and keep fires in the car to prevent the potatoes from freezing. The carrier separated the two cars while they were in transit and on its lines of railway, so that the care taker was prevented from attending to one car of the potatoes, and they were thereby permitted to freeze. Held, that the first carrier was liable even though the potatoes may not have frozen until after they were delivered to the second carrier.

v. Duncan, 137 Ala. 446, 34 So. 988, that the initial carrier would be liable for the loss sustained by reason of the delay in consequence of its negligence in routing a car by an unnecessarily long and circuitous route after refusal of the connecting carrier named in the bill of lading to receive the shipment, of which refusal the consignor was not notified.

The same rule was applied in *Felton v. McCreary-McClellan Live Stock Co.* 22 Ky. L. Rep. 1058, 59 S. W. 744, where the initial carrier, in violation of its contract that the live stock should be carried to destination in the original car, transferred them from a roomy palace stock car to a smaller and ordinary car at the connecting point.

And in *Eckert v. Pennsylvania R. Co.* 211 Pa. 267, 109 Am. St. Rep. 571, 60 Atl. 781, where the carrier, in violation of its contractual duty to deliver live stock in a properly constructed car to a connecting carrier, transferred them to a car utterly unfit for their safe transportation.

And in *Galveston, H. & S. A. R. Co. v. Herring* (Tex. Civ. App.) 24 S. W. 939, where a railroad company undertook to transport a car load of mares and colts over its line, and deliver them to a connecting railroad company to transport to destination, but, before starting them on the journey, negligently switched around the cars after loading them, and further delayed the start for several hours, following which it failed to feed the stock at the junction before delivering them to the connecting carrier, and, because of such illtreatment, it was found, upon reaching destination, that the animals were in bad condition, bruised, and wounded.

So, in *Texas & P. R. Co. v. Stephens* (Tex. Civ. App.) 86 S. W. 933, it was held that an initial carrier was liable for death or injuries to horses, caused by rough and improper handling on its own line, whether the injuries became known before or after the horses had been transferred to the connecting line.

In *Rock Island & P. R. Co. v. Potter*, 36 Ill. App. 590, the initial carrier, having

Same — burden of proof.

5. Where a common carrier's contract contemplates keeping two car loads of merchandise together, in charge of a care taker, and it separates the two cars so that the care taker is prevented from attending to one of them, and loss thereby ensues, the burden of proof is upon the carrier to prove that there was sufficient cause for separating the two cars. The fact of the separation of the two cars under the circumstances imports negligence.

(October 22, 1908.)

APPEAL by defendant from a judgment of the District Court for Lancaster County in plaintiff's favor in an action brought to recover damages for injuries to potatoes delivered to defendant for transportation,

been grossly negligent in side-tracking a car load of hogs for three hours at the connecting point, was held liable for the value of the hogs that were found dead when the car was delivered two hours later by the connecting carrier at destination, which was two or three miles from the connecting point.

So the rule was applied in Indianapolis, B. & W. R. Co. v. Strain, 81 Ill. 504, where the initial carrier, in violation of its implied agreement to furnish a proper car, which was to be transported to destination, furnished a defective car, in consequence of which hogs escaped while in transit over the connecting line; and in International & G. N. R. Co. v. Aten (Tex. Civ. App.) 81 S. W. 346, where bees escaped while being transported over a connecting line, in consequence of a defective car furnished by the initial carrier.

And in Jones v. St. Louis & S. F. R. Co. 115 Mo. App. 232, 91 S. W. 158, and on almost the same state of facts as those in the Strain Case, the court rendered a like decision, commenting on and commending that case, and, in referring to the defects of the car in the case at bar, called particular attention to the fact that here there was to be no unloading upon the transfer being made to the connecting road, and that accordingly the danger of losing the hogs by reason of the negligence of the first carrier in furnishing a defective car "did not end with its delivery to the second carrier, but continued throughout the entire route."

And the same rule was applied in Norfolk & W. R. Co. v. Harman, 91 Va. 601, 44 L.R.A. 289, 50 Am. St. Rep. 855, 22 S. E. 490, where lambs died after transfer to a connecting carrier's line, in consequence of drinking salt water in the initial carrier's stock yards before being loaded.

The general rule as to the initial carrier's liability has also been applied in a number of cases involving claims for losses to shipments of fruits and vegetables.

As where an initial carrier undertook to transport a car load of apples over its own line and also over the line of a connecting

which were alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Frank E. Bishop, Fred M. De-weese, and Arthur R. Wells, for appellant:

The contract of shipment contained in the bill of lading, exempting the defendant from liability for loss or damage which occurred after delivery to the connecting carrier, is valid.

Fremont, E. & M. Valley R. Co. v. New York C. & St. L. R. Co. (Union State Bank v. Fremont & M. Valley R. Co.) 66 Neb. 159, 59 L.R.A. 939, 92 N. W. 131; Miller Grain & Elevator Co. v. Union P. R. Co. 138 Mo. 658, 40 S. W. 894; Myrick v. Michigan

railroad to the destination point, but neglected to furnish a reasonably safe and suitable car, and also refused a request made by the consignor, to permit him, as the rules of the company allowed, to put a man in the car in charge of a stove and fire to keep the apples from freezing in transit, the thermometer being then below zero. Popham v. Barnard, 77 Mo. App. 619.

And in Fox v. Boston & M. R. Co. 148 Mass. 220, 1 L.R.A. 702, 19 N. E. 222, an initial carrier whose contract, made with reference to the mildness of the weather, required it to transport a car load of apples to a connecting point in time for a freight train which left that point early the next morning, was held liable for damages by the freezing of the apples while on the connecting carrier's line in consequence of a fall of temperature following its negligent delay in delivering the apples at the connecting point, in consequence of which they missed the train referred to. The court held that the negligence of the initial carrier must be considered the proximate cause of the loss.

But the existence of the relation of proximate cause and effect under a very similar state of facts was denied in Michigan C. R. Co. v. Burrows, 33 Mich. 6, although the court was also of the opinion in that case that there was no negligence on the part of the initial carrier.

The general rule as to the initial carrier's responsibility was also followed in the case of Davis v. New York, O. & W. R. Co. 70 Minn. 37, 72 N. W. 823, where a large loss resulted from the negligent loading of a shipment of boxes of lemons piled in an improper and unskilful manner by the first carrier in its cars, in which they were transported over its own line and connecting lines to their destination; "and although," as the court said, "the deterioration in the quality of the lemons would be continuous and progressive from one end of the entire route to the other, so that, in a certain sense, injury and loss occurred after the cars had been delivered by defendant [initial carrier] to its connecting carrier . . . but the primary proximate cause of total damage

C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330; 1 Hutchinson, Carr. 3d ed. §§ 226, 233.

The failure of the connecting carrier to protect the car from cold was a new intervening cause which relieves defendant from liability.

1 Thomp. Neg. §§ 52, 54, 55; Union P. R. Co. v. Evans, 52 Neb. 55, 71 N. W. 1062.

Mr. J. E. Kelby also for appellant.

Messrs. George W. Berge and Morning & Ledwith for appellee.

Good, C., filed the following opinion:

The plaintiff, Charles C. Whitnack, recovered a judgment against the defendant railway company for damages to a shipment of potatoes while in transit from Omaha, Nebraska, to Ft. Worth, Texas, alleged to have been sustained by reason of defendant's negligence. The defendant has brought the case to this court on appeal. In February, 1905, plaintiff shipped from Omaha, over defendant's line of railway, two car loads of potatoes consigned to himself at Ft. Worth, Texas. Defendant's line of railway extended no further than Kansas City, Missouri, and from that point the potatoes were

was the defendant's [initial carrier] negligence."

In Missouri, K. & T. R. Co. v. Mazzie, 29 Tex. Civ. App. 295, 68 S. W. 56, it was held error to refuse a requested charge relieving the delivering carrier from liability except for such damages as it could have prevented from the decay of grapes, which began while they were in the initial carrier's possession, owing to the improper manner in which they were packed and transported by it.

So the rule was applied in Kibby v. Michigan C. R. Co. 142 Mich. 313, 105 N. W. 769, where the initial carrier was bound by its contract to furnish a suitable car for the entire trip, and the potatoes were injured by rain during the transportation on the connecting line, in consequence of defects in the car.

And the rule was applied in St. Louis, I. M. & S. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802, to a similar state of facts, the injury in this case resulting from the rain, in combination with the filth on the floor, although the defect in the car was known to the shipper. As to the effect of the shipper's knowledge that the car is defective, see case note to Duncan v. Great Northern R. Co. ante, 952.

And in St. Louis, I. M. & S. R. Co. v. Coolidge, 73 Ark. 112, 67 L.R.A. 555, 108 Am. St. Rep. 21, 83 S. W. 333, 3 A. & E. Ann. Cas. 582, where delay on both the initial carrier's and connecting carrier's lines contributed to the rotting and heating of potatoes, although the injuries did not develop until the potatoes were on the connecting carrier's line.

The decision in St. Louis Southwestern R. Co. v. Myer, 75 Ark. 159, 86 S. W. 999, is simply to the effect that the last carrier was not liable for damages in consequence of the freezing of potatoes while in a car delivered by a preceding carrier, the court remarking that, if there was any negligence in the case, it was in the furnishing of a defective car, for which the last carrier was in no wise responsible.

And the initial carrier was held liable in Houston & T. C. R. Co. v. Wilkerson Bros. (Tex. Civ. App.) 82 S. W. 1069, where a car load of cabbages was damaged and partially destroyed by reason of the initial carrier's failure to provide a suitable car for their

transportation over its own and the connecting line, and to see that it was properly and sufficiently furnished with ice. To the same effect is International & G. N. R. Co. v. Welbourne (Tex. Civ. App.) 113 S. W. 780.

The same rule was applied in San Antonio & A. P. R. Co. v. Thompson (Tex. Civ. App.) 66 S. W. 792, where an initial carrier was held liable for the natural consequences of its delay and the loss ensuing therefrom, either in starting from the shipping point or while on its way to destination, of a car load of vegetables which it had undertaken to transport over its own line, and to transfer to a connecting line.

And the same rule as to the responsibility of an initial carrier for its negligence was followed in the case of Michigan C. R. Co. v. Curtis, 80 Ill. 324, where, by reason of the unreasonable delay in transportation and delivery by an intermediate carrier to a connecting carrier of certain fruit trees and shrubbery, it could not, by reasonable diligence, transport them to destination and deliver them to the consignee before their injury or destruction by frost or cold weather, all of which might have been prevented had there not been such delay in the first instance on the part of the intermediate carrier.

In Alabama & V. R. Co. v. Searles, 71 Miss. 744, 16 So. 255, where in consequence of the improper condition of cars furnished by the initial carrier a shipment of oats was injured by rain while on the connecting carrier's line.

And in Hunt v. Nutt (Tex. Civ. App.) 27 S. W. 1031, where the damage to a quantity of corn meal shipped over the line of the initial and connecting carrier was due to the condition of the car in which it was shipped, which was furnished by the first carrier, and which was so defective, unsuitable, and uncleanly that the meal was contaminated and injured in value by some substance left on the car floor, although the car presented the appearance of being very clean upon being loaded.

And in the case of Houston & T. C. R. Co. v. Bath, 40 Tex. Civ. App. 270, 90 S. W. 56, where it was held that it was no defense to an action for damages resulting from the carrier's negligence in allowing a shipment

to be carried over the line of the Missouri, Kansas, & Texas Railroad. The weather was very cold, and, to prevent the potatoes from freezing, it was arranged that a care taker should accompany the shipment, and keep a fire in each of the cars. The potatoes, which were in bags, were so placed in the cars as to leave an open or vacant space in the center of each car. In these vacant spaces oil stoves were placed and lighted to keep the cars warm. A. C. Brown was employed by the plaintiff as care taker to accompany the potatoes and to attend to the stoves, and see that they were kept filled and burning. The potatoes in charge of Mr. Brown reached

St. Joseph, Missouri, in good condition. At this point the train was stopped for some time. Mr. Brown refilled the stoves, and adjusted the wicks preparatory to continuing the journey. As the train was leaving St. Joseph, Brown discovered that one of the cars was missing from the train. He made inquiries of the train crew, but received no information as to the missing car. The train was in motion, and he was informed that, if he was going on that train, he must get aboard. He got aboard the train, and proceeded on the journey with but one car. The other car having been cut out of the train at St. Joseph, was left be-

of cotton to become wet while it was being transported over its line, that the last carrier was guilty of negligence in failing to prevent the development of the injuries after receiving the cotton, since the first carrier's negligence was at least a contributing cause, and it would be responsible for all the damages proximately resulting therefrom.

And in the case of *Texas & P. R. Co. v. Warner*, 42 Tex. Civ. App. 280, 93 S. W. 489, which was an action brought against two common carriers for damages to a printing outfit, including machinery and type cases, where it was held that it was proper for the court to instruct the jury that, if the initial carrier, in reloading the shipment from one car to another on its own line, did not exercise ordinary care, and such failure was the proximate cause of damage to the goods while on the line of the terminal carrier, the jury should find for the terminal carrier over against the initial carrier such damages for injuries as occurred on the terminal carrier's line, and that, if a part of the damage occurred on each of the roads, the jury should find against each defendant the damages that occurred on its line without the fault of the other.

The cases of *Ft. Worth & D. C. R. Co. v. Byers* (Tex. Civ. App.) 35 S. W. 1082; *Texas & P. R. Co. v. Smith*, 34 Tex. Civ. App. 571, 79 S. W. 614, and *Texas & P. R. Co. v. Slaughter*, 37 Tex. Civ. App. 624, 84 S. W. 1085, present a different state of facts from the preceding cases in this note, as in these cases the conduct of the initial carrier of live stock, its delay in transportation or in furnishing cars ordered therefor, combined with some delay on the part of the connecting carrier, resulted in the arrival of the shipment at its destination and market after a decline in the market price, though the delay would not have occurred had there been no negligence on the part of the initial carrier. In each of these cases the court held an initial carrier responsible for the loss sustained by the consignor as a natural and proximate result of its negligence, and although the negligence and delay of a connecting carrier might have combined with that of the first carrier to produce the loss.

In some of the cases already cited, the con-

tract between the consignor and the initial carrier provided that such carrier should be responsible only for losses or injuries occurring on its own lines, or that it should be relieved from liability of every kind after the property transported by it had left its line; but the court, notwithstanding these provisions of the contract, held the initial carrier liable for losses occurring on the connecting line, although due to the negligence of the initial carrier; such cases are the following: *Indianapolis, B. & W. R. Co. v. Strain*, 81 Ill. 504; *Felton v. McCreary-McClellan Live Stock Co.* 22 Ky. L. Rep. 1058, 59 S. W. 744; *Kibby v. Michigan C. R. Co.* 142 Mich. 313, 105 N. W. 769; *Davis v. New York, O. & W. R. Co.* 70 Minn. 37, 72 N. W. 823; *Alabama & V. R. Co. v. Searles*, supra; *Jones v. St. Louis & S. F. R. Co.* 115 Mo. App. 232, 91 S. W. 158; *Galveston, H. & S. A. R. Co. v. Ivey* (Tex. Civ. App.) 23 S. W. 321; *Galveston, H. & S. A. R. Co. v. Herring* (Tex. Civ. App.) 24 S. W. 939; *Texas C. R. Co. v. O'Loughlin*, 37 Tex. Civ. App. 640, 84 S. W. 1104; *Texas & P. R. Co. v. Stephens* (Tex. Civ. App.) 86 S. W. 933; *Butterick Pub. Co. v. Gulf, C. & S. F. R. Co.* 39 Tex. Civ. App. 640, 88 S. W. 299.

The case of *Butterick Pub. Co. v. Gulf, C. & S. F. R. Co.* supra, is also quite like the foregoing cases and was similarly decided, but it involved the transportation of a quantity of wool to market over an initial and connecting carrier's line, the wool reaching the market after a decline in prices, and after negligence on the part of the initial carrier similar to that in the foregoing cases.

In all of such cases it is somewhat difficult, from the facts given, to determine whether the loss in market value following the first carrier's negligence had occurred while the property transported was in the hands of the connecting carrier, or after it had been delivered by it at its destination; but it has been deemed best to here include the cases as given. It is not, however, intended to include in this note cases in which the loss resulting from the negligence of an initial carrier occurred after transportation by a connecting carrier and delivery by it, upon reaching the destination point.

hind. Brown reached Ft. Worth with the one car of potatoes in good condition. The other car load of potatoes with which we have to deal in this case reached their destination several days later, badly frozen and wholly worthless.

The plaintiff contends that the contract for the transportation of the potatoes was for a through shipment, while the defendant contends that the contract of the defendant was to carry the potatoes to Kansas City, and turn them over to the connecting carrier. The only act of negligence pleaded by the plaintiff was that the defendant negligently separated the cars at St. Joseph, whereby the care taker was prevented from taking care of the potatoes in the car that was left at St. Joseph, and that, by reason of that negligence, the potatoes were permitted to freeze. The evidence shows that the car load of potatoes, after being detained at St. Joseph for a few hours, was carried to Kansas City and turned over to the connecting carrier from twelve to fifteen hours after the fires had been attended to at St. Joseph. Defendant contends that the freezing of the potatoes did not occur while on its lines or in its possession, and contends that the potatoes froze after they were delivered to the connecting carrier, and that, under the contract of shipment, which will be referred to hereafter, the defendant was not liable for the loss sustained. Defendant relies upon the bill of lading as the contract of shipment, while the plaintiff contends that the contract for the shipment was oral, and that he is not bound by the provisions contained in the bill of lading. The evidence shows that on the day previous to the loading of the potatoes for shipment plaintiff arranged with the defendant for their transportation to Ft. Worth. At this time it was arranged that the potatoes should be loaded the next day by A. C. Brown, who would accompany the potatoes as the agent of the plaintiff. The freight rate, the kind of cars to be furnished, and the route were agreed upon. Plaintiff further admits that he understood and knew that a written contract or bill of lading was to be executed, and that he authorized Brown, as his agent, to ship the potatoes and sign such a contract. Brown also testified that he was authorized to, and did, sign the bill of lading. The greater part of this instrument is printed matter, and it clearly shows that it was originally designed as a contract for the shipment of live stock. Most of its provisions relate to live stock shipments, and can have no application to a shipment of potatoes. There are other provisions of a general nature which might apply to such merchandise as potatoes as well as to live stock. It is clear 19 L.R.A. (N.S.)

that many of the provisions relating to the shipment of live stock must be disregarded. In the printed form, and following the words "Cars loaded with," occurs the word "potatoes." The names and number of the car are written in their appropriate places. This contract was used by Brown to secure his free passage as care taker on the train.

The question is: Does the bill of lading constitute the contract of shipment, or may the plaintiff rely upon the prior oral agreement which preceded the making of the written contract? No doubt exists that an oral contract for the transportation of freight would be valid, but the question is not whether an oral contract would be valid, but whether a written contract was made. That such a one was made is beyond question. May a written contract be disregarded and set aside when it contains many provisions which cannot be given effect because they are wholly inapplicable to the subject-matter of the contract? The rule of law is general that, where a written contract has been made between the parties, it cannot be altered or contradicted by parol, and that all oral negotiations leading up to the making of the written contract are merged therein; and this rule is applicable to bills of lading. 6 Cyc. Law & Proc. p. 427. It was clearly the intention of the parties that there should be a written contract, and one was deliberately made and entered into. The fact that the contract contains many provisions which cannot be given effect, and which it is apparent were never intended to be given effect, does not appear to be any sufficient reason for holding the contract invalid, or to justify setting aside and disregarding the provisions which are applicable to the subject-matter of the contract. A bill of lading is an instrument issued by a carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination. 6 Cyc. Law & Proc. p. 417, and cases there cited. The language used in a bill of lading is subject to the same rules of construction which govern other contracts; and, while the instrument is to be construed as a whole, invalid conditions will not necessarily render the contract invalid, and it may be enforced so far as it is valid. *Grieve v. Illinois C. R. Co.* 104 Iowa. 659, 74 N. W. 192; 6 Cyc. Law & Proc. p. 418.

The bill of lading in the case at bar contains the following provision: "Nor shall said railway company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line." The defendant contends that the evidence shows that the loss or damage complained of occurred after the

delivery of the potatoes to the Missouri, Kansas, & Texas Railway Company at Kansas City, and that, under the provisions of the contract above quoted, it is not liable to the plaintiff in this case. The evidence shows that the oil stoves used to keep the potatoes warm would ordinarily burn about twelve hours, and the evidence shows that the stove in the car that was left at St. Joseph was filled and lighted about twelve or fourteen hours previous to its being turned over to the connecting carrier at Kansas City. The defendant argues that the presumption is that the stove continued to burn and keep the car warm, and that the potatoes were not frozen while in its possession. The evidence also shows that the potatoes remained in the yards of the connecting carrier at Kansas City for several days, and that the car, when received by it at Kansas City, was in bad condition; that several of the boards constituting one end of the car were broken, thus exposing the interior of the car to the cold air. The weather was shown to have been extremely cold during the time the potatoes were in the yards of the connecting carrier at Kansas City. It is not clearly shown from the record when the potatoes froze; whether they suffered from the cold prior to the time they were delivered to the connecting carrier or afterwards. We do not think, however, that this is material. The rule both at common law and in this state is that a common carrier is not liable for the negligence or default of the connecting carrier in the absence of a contract making it liable therefor. *Fremont, E. & M. Valley R. Co. v. New York, C. & St. L. R. Co. (Union State Bank v. Fremont, E. & M. Valley R. Co.)* 66 Neb. 159, 59 L.R.A. 939, 92 N. W. 131. But this rule does not relieve the initial carrier from liability on account of its own negligence. The first carrier may, by its own negligence in dealing with the goods, render itself liable to the shipper, even though the actual loss resulting is not apparent until the goods are in the possession of the second carrier. The real question is, Did the loss occur as the direct result of the negligence of the initial carrier? If so, then its negligence was the proximate cause, and it would be liable. *Selma & M. R. Co. v. Butts*, 43 Ala. 385, 94 Am. Dec. 694; *Norfolk & W. R. Co. v. Sutherland*, 89 Va. 703, 17 S. E. 127; *Fox v. Boston & M. R. Co.* 148 Mass. 220, 1 L.R.A. 702, 19 N. E. 222. Under our Constitution, as interpreted by this court, a railroad company cannot, by contract with the shipper, limit its liability as a common carrier, nor may it by contract relieve itself from the consequences of its negligence as a common carrier. *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 222, 3 L.R.A. 129, 41

N. W. 998; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 403-471, 22 L.R.A. 335, 4 Inters. Com. Rep. 494, 56 N. W. 957. In the instant case it may be admitted, for sake of argument, that the potatoes did not freeze until after they were delivered to the connecting carrier at Kansas City. But this would not relieve the defendant from liability if its negligence was the proximate cause of the freezing of the potatoes. The contract of shipment bound the defendant, not only to deliver the potatoes to the connecting carrier, but to deliver them with a care taker in charge. In this defendant failed. By its act in separating the two cars it made it impossible for the care taker to remain in charge of both cars. The care taker could not maintain the fires in the car left behind, and thereby the potatoes in that car were permitted to freeze. This was sufficient to justify the jury in finding that the loss was sustained in consequence of defendant's negligence.

Defendant urges that the record is silent as to what cause the defendant may have had for separating the cars, and, as there may have been a sufficient cause, that negligence is not proved by showing the mere separation of the cars. The cars were in good condition when started from Omaha. It was contemplated by the contract that the two cars should be kept together. If any fact existed which would justify defendant in separating the cars, we think it was its duty to notify the care taker. At any rate, we do not think plaintiff should be required to prove absence of any act that would be a justification. Such a rule would be harsh and unreasonable, and would practically result in a denial of justice.

The trial court instructed the jury in effect that if one suffers damage as the proximate result of the concurrent negligence of two other parties, and if the damage would not have occurred from the negligent act alone of either party, then both would be liable to the party injured. Defendant assails this instruction which submitted the question of concurrent liability, because no concurrent negligence of the defendant and the connecting carrier was pleaded. It is apparent from the pleadings and the evidence that the defendant attempted to shift the responsibility for the damage to the connecting carrier, and it was doubtless to meet this phase of the case that the instruction was given. We think it is immaterial that the plaintiff did not plead concurrent negligence on the part of the connecting carrier, nor is it necessary for us to determine whether the evidence disclosed any negligence upon the part of the connecting carrier. The instruction placed no greater burden upon the defendant than the law re-

quired. Under this evidence, the defendant could not be held liable unless it was negligent, and then only in the event that the loss would not have occurred except for the negligence of the defendant. The instruction, as an abstract proposition of law, appears to be sound, and we are unable to perceive wherein it was prejudicial to the defendant; and, in view of the defendant's attempt to shift the responsibility for the loss to the connecting carrier, we think the instruction was properly given.

Defendant has criticized the rulings of the trial court in the giving and the refusal of several other instructions, but the question of the correctness of these rulings is disposed of by the foregoing discussion, and it is not necessary to further refer to them.

We fail to discover any prejudicial error in the record, and therefore recommend that the judgment of the district court be affirmed.

Duffie and Epperson, CC., concur.

Per Curlam:

For the reasons given in the foregoing opinion, the judgment of the District Court is affirmed.

NEBRASKA SUPREME COURT.

CHARLES E. SEIFERT

v.

ROSE DILLON, alias Rose Kirkwood, Appt.

(—Neb.—, 119 N. W. 686.)

Bawdyhouse — injunction — defense.

1. The right of a landowner to restrain an adjoining property owner from using his property as a bawdyhouse, or house of ill fame, to which persons resort for the purposes of prostitution and lewdness, is a right belonging to the land; and the fact that defendant's premises were so used before plaintiff purchased his property constitutes no defense to an action to enjoin the same.

Same — adjoining property — laches.

2. The illegal use of property as a house of ill fame constitutes a continuing injury to a near-by property owner, which is unaffected by lapse of time.

Same — municipal tolerance — injunction.

3. The fact that municipal authorities

Headnotes by REESE, Ch. J.

Note. — As to right of owner or occupant of neighboring property to enjoin the maintenance of a house of prostitution, see case note to *Tedescki v. Berger*, 11 L.R.A. (N.S.) 1060.
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tolerate the maintenance of a house of prostitution on defendant's property, and thereby violate the law themselves, constitutes no defense to a suit by a near-by property owner to enjoin such maintenance; special damages being shown.

Same — injunction — special injury.

4. Where a near-by property owner and those in his employ are compelled to witness indecent conduct of the inmates of a bawdyhouse, and to hear loud, boisterous, indecent, and annoying noises made by them and their dissolute companions, he thereby suffers a special injury, different from that suffered by the general public, and is therefore entitled to enjoin the same, notwithstanding the maintenance of such place is a public nuisance.

(February 6, 1909.)

APPEAL by defendant from a judgment of the District Court for Lancaster County in plaintiff's favor in an action brought to restrain defendant from using her premises as a bawdyhouse. Affirmed.

The facts are stated in the opinion.

Messrs. James E. Philpot, T. J. Doyle, and G. L. DeLacy, for appellant:

To entitle a private person to come into equity and abate a public nuisance by injunction, he must allege and prove that he has sustained a peculiar and special damage, distinct and different from that which he suffered in common with the rest.

George v. Peckham, 73 Neb. 794, 103 N. W. 664; *Hill v. Pierson*, 45 Neb. 503, 63 N. W. 835; *Bigelow v. Hartford Bridge Co.* 14 Conn. 565, 36 Am. Dec. 502; *Irwin v. Dixon*, 9 How. 27, 13 L. ed. 33; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 531; *Beveridge v. Lacey*, 3 Rand. (Va.) 63; *Water Comrs. v. Hudson*, 13 N. J. Eq. 420; *State ex rel. Gervais v. Charleston*, 11 Rich. Eq. 432; *Rhymer v. Pretz*, 206 Pa. 230, 98 Am. St. Rep. 777, 55 Atl. 959; *Wood, Nuisances*, 3d ed. § 646; *Mechling v. Kittanning Bridge Co.* 1 Grant, Cas. 416; *Atty. Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136; *Jones v. Chanute*, 63 Kan. 243, 65 Pac. 243; *Ballentine v. Webb*, 84 Mich. 38, 13 L.R.A. 321, 47 N. W. 485.

Prescription runs against the right of a private citizen to abate a public nuisance by injunction.

Charnley v. Shawano Water Power & River Improv. Co. 109 Wis. 563, 53 L.R.A. 895, 85 N. W. 507; *Caldwell v. Knott*, 10 Yerg. 209.

Messrs. John M. Stewart and D. H. McClenahan, for appellee:

The operation of a bawdyhouse is both a common and a private nuisance; and appellee is entitled to an injunction to abate the same.

Wilcox v. Henry, 35 Wash. 591, 77 Pac.

1057; 1 Wood, Nuisances, 3d ed. § 29; 2 id. § 668; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 A. & E. Ann. Cas. 35; *Dempsey v. Darling*, 39 Wash. 125, 81 Pac. 152; *Blagen v. Smith*, 34 Or. 304, 44 L.R.A. 522, 56 Pac. 202; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Weakley v. Page*, 102 Tenn. 178, 46 L.R.A. 552, 53 S. W. 551; *Marsan v. French*, 61 Tex. 173, 48 Am. Rep. 272; 1 High, Inj. § 782.

Prescription is no defense to a proceeding to abate a public nuisance by a private individual.

Meiners v. Frederick Miller Brewing Co. 78 Wis. 364, 10 L.R.A. 586, 47 N. W. 430; *Birmingham v. Land*, 137 Ala. 538, 34 So. 613; *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 753; *Ingersoll v. Rousseau*, supra.

Mere delay without acquiescence will not constitute a bar, even where a legitimate business has been conducted.

Meigs v. Lister, 23 N. J. Eq. 206; *Leonard v. Spencer*, 108 N. Y. 338, 15 N. E. 397; *Priewe v. Wisconsin State Land & Improv. Co.* 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780.

Reese, Ch. J., delivered the opinion of the court:

This action was instituted in the district court of Lancaster county by the plaintiff, who is a merchant, engaged in business at No. 133 South Ninth street, in the city of Lincoln, and against the defendant, the keeper of a house of ill fame at No. 124 on the same street, being diagonally across the street and nearly opposite plaintiff's place of business. From the pleadings and evidence it is shown that O street is one of the principal business streets of said city, and that the properties referred to are south of said street and within less than a block thereof, and within that part of said city used for general business purposes. The place of business of plaintiff is in a two-story brick building, both floors of which are used in the conduct of the business, which is a general store for the sale of harness, fur coats, work coats, mittens, gloves, and bicycle supplies. The value of his stock of goods is about \$7,000. The building occupied by defendant is a two-story brick, and is confessedly used by her as a house of prostitution. It is alleged in the petition that defendant is using and intends to continue the use of said building as a bawdyhouse and house of prostitution, where are kept a large number of prostitutes under the control and charge of defendant, and as a resort of prostitutes and licentious men, and is resorted to at all times of the day and night by persons of that description,

and is a disorderly house where fighting and brawls, drinking of intoxicating liquors, and disturbances of the peace continually occur; that from the doors and windows of said house passers-by are hailed by the prostitutes and invited to licentious commerce with them, and indecent exposures of their persons are made therefrom, and that the house as kept and used is a nuisance, and a detriment to plaintiff, his business, and his property; that plaintiff's property has been greatly depreciated in value, the rental value thereof greatly lessened; that he is deprived of the comfortable use and enjoyment of the property, and his business has been injured by the loss of customers, who are unwilling to visit his store on account of the disgraceful and indecent acts and conduct of defendant and those kept by her and who frequent her place. The prayer of the petition is for an injunction restraining defendant and those under her control or authority or procurement from using the property or any part thereof for the purposes of prostitution, or keeping or maintaining a disorderly or bawdy house upon her premises. The answer admits the location and use of the properties as alleged, and avers that both are situated "in the immorally submerged part of said city;" and that there are other houses of prostitution and a number of saloons in the immediate vicinity; that her house has long been kept and used for the purpose named; that plaintiff was reared from boyhood in the immediate neighborhood, and knowing the use to which defendant's property was devoted, had purchased the store and business. All averments of the petition charging offensive acts or boisterous noises as well as damages to plaintiff are denied, and she avers that she has at all times maintained a quiet and orderly house which has been closed to men of vicious, brutal, and degenerate character when known to her. A trial was had in the district court, which resulted in a finding in favor of plaintiff, and enjoining defendant and all others acting with her consent and authority from using said premises as a bawdyhouse or a house of prostitution and maintaining or operating the same for such purposes. Defendant has appealed.

There is not much question as to the facts in the case. The principal dispute thereon is as to whether the proof sustains the finding of the court as to a special injury to plaintiff as distinguished from the injury to the public generally, sufficient to justify the issuance of an injunction in favor of plaintiff personally. It is not deemed necessary here to set out the evidence in detail, except to say that enough is shown to support a finding that the averments of

the petition are sustained by the proof that the maintenance of the house of defendant as a bawdyhouse has contributed to the depreciation of the value of plaintiff's property and the rental thereof, and has rendered his place of business an undesirable one, has prevented the extension of his local trade, and has been and is a source of annoyance to him, his clerks and customers; that men and women of vicious, lascivious, and drunken habits congregate at her house and along the street and sidewalk adjacent to plaintiff's property, and engage in brawls and fights to such an extent as to prevent respectable customers from frequenting his place of business. It may be said that it is true that these acts have been indulged in to a less extent in later years than formerly, yet enough is shown to justify the finding that they have been continued until recently before the beginning of the suit.

The principal contention is as to the law to be applied. It is a generally accepted rule of law that a private individual may not enjoin a nuisance of a public character unless he can show that he suffers damages or injury which is special to himself or his interests, that public nuisances are criminal in their nature, and can be suppressed by the enforcement of the criminal law applicable to such cases. It is conceded that the house of defendant is a bawdyhouse, and that she maintains it as one of that character, but it is insisted that she is subject only to the action of the state in the enforcement of the criminal law in the usual way. In support of this, a number of authorities are cited and which we do not deem it necessary to notice further, for the reason that, as a general rule, the position must be conceded. See 1 High, Inj. 4th ed. § 662. A bawdyhouse is a public nuisance. 1 Wood. Nuisances, 3d ed. § 29; Crim. Code, § 210.

In order to avoid the extension of this opinion to an unreasonable length, we will treat the assignments of defendant together. They are, not only that plaintiff has failed to show a sufficient personal interest to enable him to rightfully maintain the action, but that by his laches he has forfeited his right, if any ever existed, to seek the remedy of injunction in his own behalf. It is said in defendant's brief that "prescription will not run against a public nuisance so as to defeat the abatement of it by public authorities. But the appellant contends that prescription does run against the right of a private citizen to abate a public nuisance by injunction." Under certain conditions, this is probably true; but we hardly think such a rule could rightfully be invoked in a case of this kind. The case of *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 A. & E. Ann. Cas. 35, was much 19 L.R.A. (N.S.)

like the one now under consideration in its facts. The action was brought by a lot owner in the city of Everett against the owner of an adjoining lot to restrain him from maintaining a house of ill fame upon said adjoining lot. The issues were quite similar to those here presented. The court held that such illegal use of property could not be continued over the objection of the plaintiff in the case upon the ground that defendant's property was so used before the plaintiff purchased; that the right of the plaintiff to maintain the action was not affected by lapse of time; that the fact that the authorities of the municipality tolerated the maintenance of the house of prostitution (as shown in this case) was no defense; and that, where the adjoining proprietor was compelled to witness indecent conduct of the inmates of the bawdyhouse, and listen to the loud, boisterous, and unseemly noises made by them and their dissolute companions, he thereby suffered a special injury different from that of the general public, and was therefore entitled to enjoin the same, notwithstanding the maintenance of such a place was a public nuisance.

In *Dempsey v. Darling*, 39 Wash. 125, 81 Pac. 152, it was held that the owner of a vacant lot upon which he desired to construct a building to be used for a lawful purpose had the right to enjoin the owner of an adjoining lot from continuing a house of prostitution then in existence. See also *Wilcox v. Henry*, 35 Wash. 591, 77 Pac. 1055. *Blagen v. Smith*, 34 Or. 394, 44 L.R.A. 522, 56 Pac. 202, was where the defendant had remodeled certain buildings, and was about to rent them to be used for immoral purposes. In many other respects the questions involved were quite similar to those presented in this case. The supreme court of Oregon, in quite an elaborate opinion, held that a house of ill fame is a public nuisance, but that the plaintiff being the owner of adjacent property could enjoin its use or continuance. To the same effect are *Weakley v. Page*, 102 Tenn. 178, 46 L.R.A. 552, 53 S. W. 551; *Marsan v. French*, 61 Tex. 173, 48 Am. Rep. 272; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514. The case of *Ingersoll v. Rousseau*, supra, is republished and annotated in 1 A. & E. Ann. Cas. 35. The heading of the note at page 38, in referring to the principal case, says: "This case is clearly within the rule that private citizens may maintain a suit to enjoin a nuisance where special injury is suffered. The particular nuisance which produces the injury is immaterial, provided it is of such character as to cause special damages to certain persons,"—citing a number of cases from England, Canada, the United States, and more than half of the state su-

preme courts. It seems that there can be no doubt as to the rule, or that plaintiff has brought himself within it by the pleadings and evidence.

We have not overlooked the cases cited by counsel for defendant, but cannot here review them. They generally state the correct rule, but are not decisive of the case in hand.

It follows that the decree of the District Court, making the injunction perpetual, must be, and is, affirmed.

Fawcett, J., not being present at the time of the argument, took no part in the decision.

NEW YORK COURT OF APPEALS.

GILBERT C. HALSTED et al., Appts.,
v.

POSTAL TELEGRAPH CABLE COMPANY,
NY, Resp't.

(193 N. Y. 293, 85 N. E. 1078.)

Telegram — negligence — change.

1. A mere change of the word "eighty" to "eighth" in the transmission of a telegram does not show gross negligence on the part of the telegraph company.

Same — contract — agency.

2. The sendee of a telegram is bound by the terms of the contract with the sender that the company will not be answerable for mistakes in transmission beyond the price charged for the service unless the message is repeated, where the message is sent in response to one from the sendee seeking information which makes the sender the sendee's agent to transmit it.

Same — insurance of correctness.

3. A telegraph company is not an insurer of the correctness of transmission of messages by it.

Same — contract exemption — negligence.

4. A clause in a telegraph blank relieving the company from liability for mistakes in transmission of messages unless they are repeated is sufficient to cover mistakes due to negligence, although the word "negligent" is not used in the stipulation.

(November 10, 1908.)

APPEAL by plaintiffs from an order of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of a Trial Term for King's County in their favor in an action brought to recover the amount alleged to have been lost

through defendant's negligent transmission of a telegram. Affirmed.

Statement by Gray, J.:

The plaintiffs brought this action to recover from the defendant the damage occasioned to them by the alleged negligence of the latter in erroneously transmitting to them a telegraphic message. The plaintiffs, being manufacturers of beef bags, in the city of New York, received from Armour & Company, of Chicago, a letter asking the lowest "price on 25,000 sets of bags," and they replied that they would telegraph them a price at a later time. The plaintiffs then requested the Cannon Manufacturing Company, of Concord, North Carolina, as they allege, "to send them by wire the price for 200,000 yards each of the narrow and wide light beef-cotton goods." On July 27, 1903, they received through the defendant a telegram from Concord, addressed to them, which read: "Delivered commencing about August fifteenth light narrow two eighth wide three eighth net," and was signed "Cannon Mfg. Co." Thereupon, and on the same day, the plaintiffs telegraphed and wrote to Armour & Company a price, which was based on the quotations of the Cannon Manufacturing Company, as they were given in the telegram. Armour & Company the same day telegraphed, in reply, an order for the bags, and the order was entered by the plaintiffs. On July 28th plaintiffs ordered, by telegram, from the Cannon Manufacturing Company 175,000 yards of the narrow and 150,000 yards of the wide cloth, and at the same time wrote a letter to the company confirming the telegram. On July 29th plaintiffs received a letter from the Cannon Manufacturing Company, inclosing a copy of the telegram which it had delivered to the defendant, and it then appeared that the message should have read: "Deliveries commencing about August fifteenth light narrow two eighth wide three eighth net." The difference between the telegraphic message, as delivered to the defendant, at Concord, and as it was received by the plaintiffs at New York, was the word "deliveries" had become changed to "delivered" and that the two words "eighty" had become "eighth." It was shown that these quotations, which might not be very intelligible to the ordinary person, are well understood in the trade. The mistake made in the transmission of the quotations affected the contract made by the plaintiffs with the Armour company, and caused a loss to them in the transaction. The plaintiffs endeavored to procure a cancellation of the contract with the Armour company, by reason of the mistake in the telegram from the Cannon Manufacturing Company, upon

Note. — As to validity of limitation of liability of telegraph company for un-repeated messages, see case note to *Western U. Teleg. Co. v. Milton*, 11 L.R.A. (N.S.) 560, 19 L.R.A. (N.S.)

which it had been based; but they were unsuccessful. The Cannon Manufacturing Company refused to assume the liability for the mistake. The damages demanded in the complaint were in the amount of the loss to the plaintiffs on the Armour contract. The telegram from the Cannon Manufacturing Company was written upon one of defendant's blank forms, which read: "Send the following message subject to the terms on back hereof, which are hereby agreed to." That was followed by the plaintiffs' address, the quotations of prices and the signature of the Cannon Manufacturing Company. Below were the words: "Read the notice and agreement on back." One of the terms of the agreement referred to reads as follows: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatable message, beyond the amount received for sending the same." There was also a stipulation limiting the liability of the telegraph company in the case of a repeated message, unless specially insured in accordance with a provision for such insurance.

The defense of the defendant, beyond a denial of the negligence alleged with respect to the transmission of the telegram from Concord, was based upon the terms of the contract between it and the sender of the message. There was no evidence of negligence in the transmission of the message other than in the changes made in the message between its delivery to the defendant and its receipt by the plaintiffs. There was evidence that atmospheric and electrical conditions and disturbances might affect the accurate transmission of a telegraph message, although the possibility of such changes being caused thereby in the symbols, or signals, as were effected in this case, was somewhat in dispute upon the evidence of the experts.

Motions of the defendant to dismiss the action, at the close of the plaintiff's case and at the close of the whole case, were denied, and the trial court submitted to the jury the question whether the defendant was guilty of gross negligence in the performance of its undertaking. The court, upon a request of the defendant further to instruct the jury that "the terms and conditions on the blank . . . are reasonable and valid and constitute a contract between the parties," ruled that they were

reasonable and valid, and constituted a contract between the company and the sender, "but not with the plaintiffs." To which ruling the defendant excepted. A verdict was rendered for the plaintiffs for the amount claimed. Upon appeal to the appellate division, that court, by a divided vote of the justices, upon questions of law only, reversed the judgment which the plaintiffs had recovered, and granted a new trial. The plaintiffs have appealed to this court from the order of reversal.

Messrs. Beattys & Lamb, for appellants:

The telegraph company owed plaintiff, as addressee, a duty imposed by law, arising out of the exercise of a public franchise; and the terms of the contract did not relieve the company from liability for failure properly to perform such duty to the addressee.

Will v. Postal Telegr. Cable Co. 3 App. Div. 22, 37 N. Y. Supp. 933; Lowery v. Western U. Telegr. Co. 60 N. Y. 198, 19 Am. Rep. 154; Tyler v. Western U. Telegr. Co. 60 Ill. 421, 14 Am. Rep. 38; Pearsall v. Western U. Telegr. Co. 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534; Elwood v. Western U. Telegr. Co. 45 N. Y. 549, 6 Am. Rep. 140; Rose v. United States Telegr. Co. 3 Abb. Pr. N. S. 408; Elsev v. Postal Telegr. Co. 15 Daly, 58, 20 N. Y. S. R. 97, 3 N. Y. Supp. 117; Curtin v. Western U. Telegr. Co. 16 Misc. 347, 38 N. Y. Supp. 58; Wolfskehl v. Western U. Telegr. Co. 46 Hun. 542; De Rutte v. New York, A. & B. Electric Magnetic Telegr. Co. 1 Daly, 547; 3 Sutherland, Damages, 3d ed. § 972; 2 Am. & Eng. Enc. Law, 2d ed. p. 1024; Crosswell, Electricity, § 557; Jones, Telegr. & Teleph. Cos. § 478; Shearm. & Redf. Neg. 2d ed. § 560; Tobin v. Western U. Telegr. Co. 146 Pa. 375, 28 Am. St. Rep. 802, 23 Atl. 324; Western U. Telegr. Co. v. Richman, 5 Sadler (Pa.) 26, 19 W. N. C. 569, 8 Atl. 171; La Grange v. Southwestern Telegr. Co. 25 La. Ann. 383; Webbe v. Western U. Telegr. Co. 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670; McCord v. Western U. Telegr. Co. 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315; New York & W. Printing Telegr. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Fererro v. Western U. Telegr. Co. 9 App. D. C. 455, 35 L.R.A. 548; Smith v. Western U. Telegr. Co. 83 Ky. 104, 4 Am. St. Rep. 126; Western U. Telegr. Co. v. Longwill, 5 N. M. 308, 21 Pac. 339; Shingleur v. Western U. Telegr. Co. 72 Miss. 1030, 30 L.R.A. 444, 48 Am. St. Rep. 604, 18 So. 425; Western U. Telegr. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579; Reese v. Western U. Telegr. Co. 123 Ind. 294, 7 L.R.A. 583, 24 N. E. 163; Green v. Western U. Telegr. Co. 136

N. C. 489, 67 L.R.A. 985, 103 Am. St. Rep. 955, 49 S. E. 165, 1 A. & E. Ann. Cas. 349; Wadsworth v. Western U. Teleg. Co. 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574; Findlay v. Western U. Teleg. Co. 64 Fed. 450.

The addressee is bound by the sender's contract only where he had notice and knowledge of the terms of the contract between the sender and the company.

Webbe v. Western U. Teleg. Co. supra; Harris v. Western U. Teleg. Co. 9 Phila. 88; Johnston v. Western U. Teleg. Co. 33 Fed. 362; Becker v. Western U. Teleg. Co. 11 Neb. 87, 38 Am. Rep. 356, 7 N. W. 868; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; Western U. Teleg. Co. v. Richman, supra.

The printed blank was insufficient to limit defendant's liability for negligence.

Rosenthal v. Weir, 170 N. Y. 148, 57 L.R.A. 527, 63 N. E. 65; Mynard v. Syracuse, B. & N. Y. R. Co. 71 N. Y. 180, 27 Am. Rep. 28; Pearsall v. Western U. Teleg. Co. 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534; Blair v. Erie R. Co. 66 N. Y. 313, 23 Am. Rep. 55; Holsapple v. Rome, W. & O. R. Co. 86 N. Y. 275; Kenney v. New York C. & H. R. R. Co. 125 N. Y. 422, 26 N. E. 626; Nicholas v. New York C. & H. R. R. Co. 89 N. Y. 370; Brewer v. New York, L. E. & W. R. Co. 124 N. Y. 59, 11 L.R.A. 483, 21 Am. St. Rep. 647, 26 N. E. 324; Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490; Wharton, Ev. § 702; Western U. Teleg. Co. v. Fenton, 52 Ind. 1; Western U. Teleg. Co. v. Longwill, 5 N. M. 308, 21 Pac. 339; Tyler v. Western U. Teleg. Co. 60 Ill. 421, 14 Am. Rep. 38.

Plaintiffs made out a prima facie case of negligence by showing the error in the transmission of the message.

Pearsall v. Western U. Teleg. Co. 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534; Elsev v. Postal Teleg. Co. supra; 27 Am. & Eng. Enc. Law, 2d ed. p. 1026; Hart v. Western U. Teleg. Co. 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637; Western U. Teleg. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Tyler v. Western U. Teleg. Co. 60 Ill. 421, 14 Am. Rep. 38; Bartlett v. Western U. Teleg. Co. 62 Me. 209, 16 Am. Rep. 437; Julian v. Western U. Teleg. Co. 98 Ind. 327; Turner v. Hawkeye Teleg. Co. 41 Iowa, 458, 20 Am. Rep. 605; Western U. Teleg. Co. v. Crall, 38 Kan. 679, 5 Am. St. Rep. 795, 17 Pac. 309; Cogdell v. Western U. Teleg. Co. 135 N. C. 431, 47 S. E. 490; Western U. Teleg. Co. v. Dubois, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4; Western U. Teleg. Co. v. Short, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649; McLeod v. Pacific States Teleph. & Teleg. Co. (Or.) 15 L.R.A. (N.S.) 810, 94 19 L.R.A. (N.S.)

Pac. 568; Candee v. Western U. Teleg. Co. 34 Wis. 471, 17 Am. Rep. 452; Womack v. Western U. Teleg. Co. 58 Tex. 176, 44 Am. Rep. 614; Lowery v. Western U. Teleg. Co. 60 N. Y. 198, 19 Am. Rep. 154; Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446; J. Russell Mfg. Co. v. New Haven S. B. Co. 50 N. Y. 121; Bartlett v. Western U. Teleg. Co. 62 Me. 209, 16 Am. Rep. 437; Western U. Teleg. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; Western U. Teleg. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136.

The change of a single word is sufficient negligence to render defendant liable for damages.

Western U. Teleg. Co. v. Howell, 38 Kan. 685, 17 Pac. 313; Seiler v. Western U. Teleg. Co. 3 Am. L. Rev. 777; Western U. Teleg. Co. v. Cohen, 73 Ga. 522; Western U. Teleg. Co. v. Boots, 10 Tex. Civ. App. 540, 31 S. W. 825; Pepper v. Western U. Teleg. Co. 87 Tenn. 554, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783; Bartlett v. Western U. Teleg. Co. supra; Tyler v. Western U. Teleg. Co. 60 Ill. 421, 14 Am. Rep. 38; Western U. Teleg. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; New York & W. Printing Teleg. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Fererro v. Western U. Teleg. Co. supra; Western U. Teleg. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480.

Messrs. Charles F. Brown and Thomas B. Jones, with Mr. William W. Cook, for respondent:

The message in question was transmitted under terms and conditions expressly limiting the liability of the defendant, in the event of error, to the amount received for transmitting said message, the message being an unrepeatable message.

Kiley v. Western U. Teleg. Co. 109 N. Y. 231, 16 N. E. 75, affirming 39 Hun, 158; Breese v. United States Teleg. Co. 48 N. Y. 132, 8 Am. Rep. 526, affirming 45 Barb. 274; Young v. Western U. Teleg. Co. 65 N. Y. 163; Schwartz v. Atlantic & P. Teleg. Co. 18 Hun, 157; Bennett v. Western U. Teleg. Co. 18 N. Y. S. R. 777, 2 N. Y. Supp. 365; Riley v. Western U. Teleg. Co. 6 Misc. 221, 26 N. Y. Supp. 532, affirmed in 8 Misc. 217, 28 N. Y. Supp. 581; Altman v. Western U. Teleg. Co. 84 N. Y. Supp. 54; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; Tewes v. North German Lloyd S. S. Co. 186 N. Y. 151, 8 L.R.A. (N.S.) 199, 78 N. E. 864; 9 A. & E. Ann. Cas. 909; Hart v. Western U. Teleg. Co. 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637; Camp v. Western U. Teleg. Co. 1 Met. (Ky.) 164; Birney v. New York & W. Printing Teleg. Co. 18 Md. 341, 81 Am. Dec. 607; United States Teleg. Co. v. Gilder-

slave, 29 Md. 232, 96 Am. Dec. 519; *Ellis v. American Telegr. Co.* 13 Allen, 226; *Redpath v. Western U. Telegr. Co.* 112 Mass. 71, 17 Am. Rep. 69; *Clement v. Western U. Telegr. Co.* 137 Mass. 463; *Western U. Telegr. Co. v. Carew*, 15 Mich. 525; *Wann v. Western U. Telegr. Co.* 37 Mo. 472, 90 Am. Dec. 395; *Becker v. Western U. Telegr. Co.* 11 Neb. 87, 38 Am. Rep. 356, 7 N. W. 868; *Harris v. Western U. Telegr. Co.* 9 Phila. 88; *Passmore v. Western U. Telegr. Co.* 78 Pa. 238; *Aiken v. Western U. Telegr. Co.* 5 S. C. 358; *Western U. Telegr. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Western U. Telegr. Co. v. Catchpole*, 1 Tex. App. Civ. Cas. (White & W.) 108; *Western U. Telegr. Co. v. Smith*, 3 Tex. App. Civ. Cas. (Willson) 86; *Western U. Telegr. Co. v. Hearne*, 77 Tex. 83, 13 S. W. 970; *Womack v. Western U. Telegr. Co.* 58 Tex. 170, 44 Am. Rep. 614.

The terms and conditions are binding upon the addressee, as well as upon the sender of the message.

Ellis v. American Telegr. Co. 95 Mass. 226; *Findlay v. Western U. Telegr. Co.* 64 Fed. 459; *Whitehill v. Western U. Telegr. Co.* 136 Fed. 499; *Coit v. Western U. Telegr. Co.* 130 Cal. 657, 53 L.R.A. 678, 80 Am. St. Rep. 153, 63 Pac. 83; *Broom v. Western U. Telegr. Co.* 71 S. C. 506, 51 S. E. 259, 4 A. & E. Ann. Cas. 611; *Potret v. Western U. Telegr. Co.* 74 S. C. 491, 55 S. E. 113; 5 Am. & Eng. Enc. Law, 2d ed. p. 306; *Nelson v. Hudson River R. Co.* 48 N. Y. 498; *Squire v. New York C. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Rose v. United States Telegr. Co.* 3 Abb. Pr. N. S. 408; *Brooke v. Western U. Telegr. Co.* 119 Ga. 694, 46 S. E. 826; *Frazier v. Western U. Telegr. Co.* 45 Or. 414, 67 L.R.A. 319, 78 Pac. 330, 2 A. & E. Ann. Cas. 306; *Playford v. United Kingdom Electric Telegr. Co.* L. R. 4 Q. B. 706; *Dickson v. Reuter's Telegr. Co.* L. R. 2 C. P. Div. 62; *Beasley v. Western U. Telegr. Co.* 39 Fed. 181; *Hill v. Western U. Telegr. Co.* 85 Ga. 425, 21 Am. St. Rep. 166, 11 S. E. 874; *Russell v. Western U. Telegr. Co.* 57 Kan. 230, 45 Pac. 598; *Clement v. Western U. Telegr. Co.* 77 Miss. 747, 27 So. 603; *Lewis v. Western U. Telegr. Co.* 117 N. C. 436, 23 S. E. 319; *Western U. Telegr. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Pensacola Telegr. Co. v. Western U. Telegr. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Telegr. Co. v. Culberson*, 79 Tex. 65, 15 S. W. 219; *Western U. Telegr. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638; *Western U. Telegr. Co. v. Sanders* (Tex. Civ. App.) 26 S. W. 734; *Baldwin v. Western U. Telegr. Co.* (Tex. Civ. App.) 33 S. W. 890; *Western U. Telegr. Co. v. Terrell*, 10 Tex. Civ. App. 60, 30 S. W. 70; *Western U. Telegr. Co. v. Hays* (Tex. Civ. App.) 63 S. W. 19 L.R.A. (N.S.)

172; *Western U. Telegr. Co. v. Waxelbaum*, 113 Ga. 1017, 56 L.R.A. 741, 39 S. E. 443; *Western U. Telegr. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *Sherrill v. Western U. Telegr. Co.* 109 N. C. 527, 14 S. E. 94; *Manier v. Western U. Telegr. Co.* 94 Tenn. 442, 29 S. W. 732; *Ayres v. Western U. Telegr. Co.* 65 App. Div. 149, 72 N. Y. Supp. 634.

The sender of the message was requested by plaintiffs to send this particular message, and hence the plaintiffs were the principals, and the sender of the message acted as the agent of the plaintiffs, at the plaintiffs' request and for the plaintiffs' benefit, in sending the message sued on; and hence plaintiffs are bound by the terms and conditions.

Western U. Telegr. Co. v. James, 90 Ga. 254, 16 S. E. 83; *Manier v. Western U. Telegr. Co.* 94 Tenn. 442, 29 S. W. 732; *Coit v. Western U. Telegr. Co.* supra; *Thompson, Electricity*, § 237; *Curtin v. Western U. Telegr. Co.* 16 Misc. 348, 38 N. Y. Supp. 58; *Aiken v. Western U. Telegr. Co.* 5 S. C. 371; *De Rutte v. New York, A. & B. Electric Magnetic Telegr. Co.* 1 Daly, 556, 30 How. Pr. 403.

The telegraph company is not under the obligations of a common carrier, and is not liable as an insurer of the correctness of an unrepeatable message.

Breese v. United States Telegr. Co. 48 N. Y. 140, 8 Am. Rep. 526, affirming 45 Barb. 274; *Kiley v. Western U. Telegr. Co.* 109 N. Y. 231, 16 N. E. 75; *Schwartz v. Atlantic & P. Telegr. Co.* 18 Hun, 157; *Ayres v. Western U. Telegr. Co.* supra; *Primrose v. Western U. Telegr. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *Grinnell v. Western U. Telegr. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Western U. Telegr. Co. v. Carew*, 15 Mich. 525.

Proof that a simple error occurred is not even prima facie proof of gross negligence as distinguished from mere ordinary negligence.

Breese v. United States Telegr. Co. 48 N. Y. 132, 8 Am. Rep. 526; *Kiley v. Western U. Telegr. Co.* supra; *Altman v. Western U. Telegr. Co.* 84 N. Y. Supp. 54; *Ayres v. Western U. Telegr. Co.* supra; *Riley v. Western U. Telegr. Co.* 8 Misc. 217, 28 N. Y. Supp. 581.

It was not essential or necessary to prove that plaintiffs had notice and knowledge of the terms of the contract between the sender and the telegraph company.

Breese v. United States Telegr. Co. supra; *Young v. Western U. Telegr. Co.* 65 N. Y. 167; *Kiley v. Western U. Telegr. Co.*; *Ayres v. Western U. Telegr. Co.*; and *Altman v. Western U. Telegr. Co.* supra; *Tewes v. North German Lloyd S. S. Co.* 186 N. Y. 151, 8 L.R.A. (N.S.) 199, 78 N. E. 864; 9

A. & E. Ann. Cas. 909; *Western U. Teleg. Co. v. Waxelbaum*, supra; *Young v. Western U. Teleg. Co.* 65 S. C. 93, 43 S. E. 448; *United States Teleg. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Jacob v. Western U. Teleg. Co.* 135 Mich. 600, 98 N. W. 402.

Gray, J., delivered the opinion of the court:

It is the plaintiffs' claim that the defendant is liable to them, as the addressees of the telegraphic message, for the failure to properly perform its duty, from which liability it was not relieved by the terms of its contract with the sender of the message. The argument is made that the defendant, as a public service corporation, "owes a duty to the public, for the breach of which a party injured has a right of action, which is unaffected by any contract of limitation to which the injured person is not a party," notwithstanding the duty was undertaken by reason of such contract. So far as the plaintiffs' claim was predicated upon the alleged gross negligence of the defendant in the performance of the undertaking to transmit to them the telegraphic message from the sender in North Carolina, it is sufficient to say that the evidence wholly failed to make out any case for the jury on that theory. It showed simply the commission of an error, which, so far as material in its consequences, occurred in the change of the word "eighty" to "eighth." The letter "y" was changed to the letter "h" in two instances. Whether such changes were the inadvertent, or mistaken, act of the receiving operator, or of any operator at the relay station, or whether they were the result of atmospheric disturbances, or of perturbations of the electric fluid, to which concededly the transmission of telegraphic messages is more or less subject, is not material. The nature of the undertaking by a telegraph company suggests the possibility, if not the probability, of peculiar risks affecting it, whether in the one or the other way. However occurring, if by no wilful misconduct, a mere mistake or error in the transmission of a message would not warrant a jury in finding that there had been more than ordinary negligence. See *Breese v. United States Teleg. Co.* 48 N. Y. 132, 8 Am. Rep. 526; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098. The hazards attending upon the accurate performance by telegraph corporations of their function of transmitting messages are obvious, and the prudential character of such regulations as this defendant had adopted in order to guard against inaccuracy in transmission and to prevent mistakes from any cause is evident. The importance of accuracy to the 19 L.R.A. (N.S.)

parties cannot always be apparent to the operator, but it is to the sender. Where the wording of a message is such as to be obscure in its meaning, or unintelligible to the ordinary reader, mistakes are reasonably possible in the transcribing. In any case the regulations of the telegraph company afford the means of making accuracy reasonably certain, or of effecting insurance against mistakes.

The question in this case must be: What legal relation did the defendant sustain to the plaintiffs? or What was the measure of the duty owing by the defendant and of its responsibility for a failure in performance? Was the duty an absolute one, as claimed by the appellants, or was the undertaking one within the terms of the contract with the sender? In my opinion the contract was binding upon the appellants, and relieved the defendant of any liability beyond that stipulated for.

In the appellate division [120 App. Div. 434, 104 N. Y. Supp. 1019] it was held by a majority of the learned justices, in effect, that the defendant had the right to make the regulations which prescribed its liability in accepting messages for transmission, and that "whether the action is deemed to rest upon the contract of the sender, or to result from a breach of duty, the limitation upon the amount of damages to be recovered being reasonable, the plaintiff has no standing to maintain this action unless he is the real principal in the transaction, and then only to the extent of the amount paid for the transmission of the message." The dissenting justices took the view that, as the contract of the defendant with respect to its liability was only with the sender of the message, the plaintiffs, as the receivers, were not bound by it, and that their action rested on a negligent breach of the duty owing by the defendant to deliver the message as received. It was said that, "telegraph companies being under a public duty . . . to receivers of messages, senders of messages cannot, by contract, lessen or do away with that duty. They may only do so in respect of the duty due to themselves."

For the decision of this case it is unnecessary that the court should go as far as did the appellate division in the prevailing opinion in defining the general responsibility of the defendant towards the addressee of a message. It was alleged in this complaint that the "plaintiffs requested the Cannon Manufacturing Company . . . to send them by wire the prices" for the goods, and such was shown to be the fact by the evidence of the plaintiffs. The Cannon Manufacturing Company, therefore, in transmitting the information requested by

means of the telegraph, was made the agent of the plaintiffs for that purpose. The plaintiffs, not desiring to await a communication from the Cannon company in the ordinary way of a letter, availed themselves of the latter's services, and authorized them to employ the telegraph system for sending a reply. In doing so the sender was either the plaintiffs' agent in making the contract with the defendant, or it made the contract for their benefit. While, in either view, the result would be the same, in so far that the plaintiffs would come under the obligation of the contract with the defendant, it is probably the more correct view that the Cannon Manufacturing Company acted as the agent of the plaintiffs in contracting for the conveyance of its message by a telegraph line. If that be true, the plaintiffs must be concluded by the act of their agent. The Cannon Manufacturing Company had a reasonable latitude of action in entering into such a contract, and that the terms of the contract, as made, were reasonable, must be regarded as settled upon authority.

The defendant, while it may be likened to a common carrier in its occupation of conveying messages from and to all persons, unlike a common carrier of goods, does not become an insurer in their transmission. Its duties are performed in a different way. The reasons for making common carriers of goods insurers of their value do not apply in the case of telegraph systems; for there is no custody of goods, and the conveyance of messages is subject to the contingencies of extraneous disturbances beyond the control of the telegraph owner, or to the fallibility of operators in transcribing by signals, or symbols, or in comprehending the message itself as written. By reason of the franchises and powers accorded to it, a telegraph corporation performs public functions, and it comes under that general obligation, to which all quasi public corporations are subject, to conduct its corporate business, and to discharge the duties incident thereto, with reasonable diligence and with a due care for the rights and interest of those concerned in the corporate operations. But, however strictly held to this general obligation, it is competent for it to make such rules and to prescribe such regulations for the conduct of its business as are reasonable. It is entitled to protect itself against the incidental hazards of operation, and, by contract, to limit its liability for mistakes, or delays, or nondelivery, caused by the negligence of its servants, if not gross. *Breese v. United States Teleg. Co.* supra; *Young v. Western U. Teleg. Co.* 65 N. Y. 163; *Kiley v. Western U. Teleg. Co.* 109 19 L.R.A. (N.S.)

N. Y. 231, 16 N. E. 75; *Pearsall v. Western U. Teleg. Co.* 124 N. Y. 256-267, 21 Am. St. Rep. 662, 26 N. E. 534; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1-15, 38 L. ed. 883-889, 14 Sup. Ct. Rep. 1098. In each of the above-cited cases the contract with the telegraph company was upon printed blanks, similar to the one which the sender of the message in question made use of. In the *Pearsall* Case, supra, the question passed upon was whether the sender of a message was chargeable with constructive notice of resolutions of the defendant, limiting its liability for an unrepeatable message. While holding that mere notice was ineffectual to limit the liability for a failure to accurately transmit,—and upon that there was a sharp division in the court,—the right of a telegraph company to contract for such limitation was considered to be settled. The stipulations upon these blanks have invariably been held in this state to be reasonable, as they have been by the United States Supreme Court and in many of the states. The decision in the case of *Ellis v. American Teleg. Co.* 13 Allen, 226, largely quoted from in the prevailing opinion below, turned upon the general right of the receiver of a telegraphic message to hold a telegraph company responsible for the damage resulting from material errors occurring in the transmission of the message. In that case, as in this, there was an error in the quotation of a price. The Massachusetts supreme court held that the liability of the telegraph company to the receiver of the message was generally limited by the contract upon the blank to the amount received by the company from the sender, where the message had not been repeated. It was held there, in effect, that the regulation adopted by the telegraph company for the repetition of a message, in order to guard against mistakes, was a most reasonable requisition, and that, notwithstanding the receiver had entered into no express contract with the company, and could not be held to have made any express stipulations with it, he could not claim any higher or different degree of diligence than was stipulated for between the sender of the message and the telegraph company. This case was cited with approval, as to the general rule, in *Pearsall v. Western U. Teleg. Co.* 124 N. Y. 270, 21 Am. St. Rep. 662, 26 N. E. 537. If it were necessary in this case to determine the measure of liability of the defendant, generally, to the receiver of a message for the loss occasioned by some mistake or error in its transmission, my personal judgment would incline me to agree with the view of the Massachusetts court. The English courts have refused to recognize a right

of action in the addressee of a telegraphic message for a failure to accurately transmit it, for want of any privity of contract (*Dickson v. Reuter's Teleg. Co. L. R. 2 C. P. Div. 62*); and, while that right is accorded here for negligence in performing a duty, I fail to perceive any sufficient reason why, in a case of a failure not due to gross negligence, the telegraph company should be held to a higher degree of diligence and care than was stipulated for with the sender. But the facts of this case do not make it necessary to go so far, and our decision is limited to those facts. It is our judgment that, where the receiver of a message has, by a special request, procured it to be sent by the telegraph, he becomes bound by any reasonable contract made by the sender with the telegraph company for its transmission, and is limited in his claim for any damages for a loss occasioned by error or mistake in transmission, where the stipulations for the repetition or for the insurance of the message have not been availed of, to the amount stipulated in the contract.

In the two cases in this court to which our attention is directed by the appellants nothing in their decision authorizes, or even points to, a different view of the question. In the case of *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140, the action was brought by the receiver of the message and the defendant was shown to have been guilty of gross negligence. There was no error nor mistake in the message transmitted; but the fault of the telegraph company was in delivering a message purporting to be from the cashier of a bank, when it was known by the operator that that officer had not signed the telegraphic message. The telegram directed the payment of money to a person named, and, when first transmitted, the message was signed simply in the name of the bank. The plaintiffs, to whom the message was addressed, called the attention of the telegraph company to the fact that the name of the officer of the bank was wanting. It was sent back for repetition, and, as repeated, bore the name of the cashier. It was shown that the operator knew that both messages were written by a person who was not the cashier of the bank and who was known by the same name as that of the person to whom the telegram authorized the payment of the money. In the case of *Lowery v. Western U. Teleg. Co.* 60 N. Y. 198, 19 Am. Rep. 154, the plaintiff was the receiver of a message and sued the defendant for a loss

occasioned by reason of a change in the figures of a sum of money which the sender asked of him. Upon receiving a larger sum from the plaintiff, the sender of the telegram misappropriated it and absconded. The plaintiff recovered a judgment for his loss, which, eventually, was reversed in this court, upon the ground that the defendant's negligence was not the natural and proximate cause of the loss sustained by the plaintiff, as the embezzlement did not naturally result from the wrong of the defendant. The terms of the sending do not appear in the report of the case, and no reference is made to the subject. The appellants' reference to the printed record shows a contract governed by the law of Illinois, according to the determination made below, which differed from the law in this state. The case is of no authority upon the determination of the question in this case.

The contention of the appellants that the printed blank was insufficient to limit the defendant's liability for negligence is quite untenable. It was not necessary that the word "negligence" should be used in the stipulations of the contract. It was a sufficient protection to the defendant that the contract required a repetition of the message, or an insurance, in order to make the defendant liable for mistakes or delays in the transmission or delivery, beyond the amount received for sending the same. Such mistakes or delays, whether caused by the negligence of the defendant's servants, if not gross, as by wilful misconduct, or by causes beyond its control, were covered sufficiently by the clause of the contract.

I think that the plaintiffs failed to make any case against the defendant for the recovery of the damage claimed to have resulted to them by reason of the error or mistake in the message as transmitted, and the trial court was in error in submitting the case to the jury upon the theory that the stipulations on the printed blank upon which the message was sent were not binding upon the plaintiffs. For the reasons given, I advise the affirmance of the order of reversal and that judgment absolute should be rendered against the appellants, pursuant to the stipulation in their notice of appeal, with costs to the respondent in all the courts.

Cullen, Ch. J., and Vann, Werner, Willard Bartlett, Hiscock, and Chase, JJ., concur.

**NORTH CAROLINA SUPREME
COURT.**

D. D. WAGNER

v.

**ATLANTIC COAST LINE RAILROAD
COMPANY, Appt.**

(147 N. C. 315, 61 S. E. 171.)

**Carrier — passenger on platform —
negligence.**

1. A passenger on a mixed train is negligent, as matter of law, in riding upon the platform when there is plenty of room in the car, merely because the weather is warm and he prefers to ride there.

**Same — failure to warn passengers —
proximate cause.**

2. The failure of the conductor of a train to notify passengers inside the car that the train had not reached the station when it stopped, notwithstanding the announcement of the porter that the stop would be at the station, was not the proximate cause of injury to a passenger who, without necessity, voluntarily rode on the platform and attempted to alight to his injury when the train stopped, where he could not have heard the notice had it been given within the car, and the trainmen did not know that he intended to alight at that stop.

Trial — instruction — findings.

3. An instruction by the court to the jury, in an action to recover damages for personal injuries which involves a direction to find the issue that plaintiff was injured by defendant's negligence, for plaintiff upon the finding of certain facts, should require a finding on the matters of negligence with which defendant is charged.

Same — curing error.

4. Error in an instruction on a vital issue in a case is not cured by another instruction which correctly states the law which should be applied to that issue, but which is, in fact, applied to another contention in the case.

Same — negligence — question for jury.

5. If, upon plaintiff's evidence in an action to hold another liable for a personal injury, he shows negligence on his part as matter of law, the question of his negligence should not be submitted to the jury.

(Hoke, J., dissents.)

(April 15, 1908.)

A PPEAL by defendant from a judgment of the Superior Court for Edgecombe County in plaintiff's favor in an action

Note. — An extensive search has failed to disclose any other case discussing the effect of riding on the platform of a car upon a passenger's right to complain of the failure to announce that the train had not yet reached the alighting point at a station which had already been called.
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brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Connor, J.:

Action for personal injury sustained by the alleged negligence of defendant. The testimony tends to show that the defendant corporation owns and operates as a part of its system a railroad from Plymouth to Tarboro, North Carolina, for the transportation of freight and passengers; that, as said railroad approaches Tarboro from the east, it crosses a bridge over the Tar river and the low grounds thereof. Plaintiff's witness Harris, who took measurements of the bridge, etc., says: "From stop post to beginning of trestle is 12 feet; from beginning of trestle to the bridge, 599 feet; width of the bridge, 9 feet 8 inches from guard rail to guard rail. Car steps would be over the guard rail. About a couple of inches of the guard rail would be showing. River bridge is 289 feet 7 inches; from end of bridge to crossing at Water street, to center of street, 227 feet. From bridge to water, 35 feet 2 inches,—it was low water. Total length from stop post to bank, 889 feet 3 inches; average height of trestle, 26 feet. From the embankment to the river there is swamp and undergrowth; trees on west side; no trees on east side. When the road crosses Water street the train stops to receive and put off passengers. It is called "Lower Tarboro." On the 2d day of June, 1905, plaintiff boarded the local freight train at a station 8 miles east of Tarboro, between 7 and 8 o'clock at night, as a passenger for Tarboro. The train, with combination car and freight cars, was about 200 yards long. He took a seat on the platform of the car. "One foot was on the lower step, and one leg straight out." The night was very dark. Plaintiff was in the habit of riding on this train "two to four trips a week;" was working at stations below Tarboro. He says: "The train blew for the crossing, then stopped for bridge, and just before getting to bridge the porter called out: 'Next stop Lower Tarboro.' As the train pulled up again I was sitting on platform. Train stopped again after pulling maybe 250 or 300 yards. I had gotten up when train stopped. When it stopped I got up and stepped off. Porter was in door by me when he called out: 'Next stop Lower Tarboro.' He then went back in baggage car." When it stopped, "I stood there a second or two. I thought I would go to upper depot, but thought of my wheel which I had left down town, and got off to get it." The train always stopped for the drawbridge. It then pulled up and stopped

again at Lower Tarboro. "I never knew it to stop at this place before. . . . Conductor gave no notice that the train had not reached Lower Tarboro. It looked so to me. The light in the car was dim and blinded me. I carefully looked before stepping." He says: "I did not see anything there. I got off in the swamp. There were about six passengers on the car. It was warm, and I preferred riding on the platform." Plaintiff says that it was his custom to ride on the platform. No one spoke to him about it. Conductor knew he was on the train. The flagman and porter knew he was on the platform. He did not see any notice posted in car. He was seriously injured. Plaintiff introduced several witnesses whose testimony tended to corroborate him. Mr. Stewart, a witness for plaintiff, says: "There were plenty of seats. There was light in the car, and the door was open. I don't think there was anything to prevent a man on the platform seeing between the cross-ties. On the steps near the end of the cross-ties a man could look down and see anything below. There was no light on the platform until conductor went out." Plaintiff says that he did not see conductor after he got on at Conetoe. Mr. Jenkins, a witness for plaintiff, testified that he had traveled on the car and with the door open and a light in the car. He thought a man could see that there was nothing between the cross-ties. Sam Taylor testified to same effect. Mr. Hill, the conductor for defendant, testified: "We stopped at the stop post, at the drawbridge, and pulled up again, and waited for an extra we were to meet there. Everything was quiet. I told the passengers to keep their seats. We had been there five or ten minutes when I heard a lumbering. A man was sitting behind me; and about that time someone said that somebody had fallen off the train, and it turned out to be Wagner. We had a plenty of seats. I did not hear anyone call out: 'The next stop Lower Tarboro.' I had no porter." The flagman corroborated the conductor. Mr. Braswell, a passenger on the train, testified for defendant: That he saw plaintiff sitting on platform before reaching the trestle, and told him he had better go in, he would fall off, and plaintiff said he was where he generally rode. When the train stopped he heard the conductor say: "Keep your seats. You are not at Lower Tarboro yet." That no passengers came out on platform when the train stopped. This witness said that plaintiff fell off. "He was not in a position to step off." The conductor testified that there were three signs in the car—one on each side and one on the end—which read: 19 L.R.A. (N.S.)

"Passengers are warned not to put their heads or arms out of the window or use the platform except on entering or leaving the car." He further said: "I do not know how it read, but it was a warning to passengers not to use the platform or stand on it." W. I. Walker and L. A. Hinson, for defendant, testified to the same effect. The foregoing sets forth substantially the facts upon which the rights and liabilities of the parties depend. The defendant, at appropriate stages of the trial, moved for judgment of nonsuit, and duly excepted to the refusal of the court to grant the motions. The issues submitted to the jury presented the inquiry as to whether the plaintiff was injured by the negligence of defendant, as alleged, and whether plaintiff was guilty of negligence which contributed to the injury. There was a verdict for plaintiff, with an assessment of damages. Judgment and appeal. The defendant's exceptions are set forth in the opinion.

Mr. John L. Bridgers, for appellant:

The passenger, in riding upon the platform, was guilty of negligence as matter of law.

2 Wood, Railway Law, § 303; Hicks v. Naomi Falls Mfg. Co. 138 N. C. 319, 50 S. E. 703; Byrd v. Southern Exp. Co. 139 N. C. 273, 51 S. E. 851; Lloyd v. Albemarle & R. R. Co. 118 N. C. 1010, 54 Am. St. Rep. 764, 24 S. E. 805; Norton v. North Carolina R. Co. 122 N. C. 936, 29 S. E. 886; Ruffin v. Atlantic & N. C. R. Co. 142 N. C. 125, 55 S. E. 86; Pinnix v. Durham, 130 N. C. 360, 41 S. E. 932; Shaw v. Seaboard Air Line R. Co. 143 N. C. 312, 55 S. E. 713.

Mr. F. S. Spruill also for appellant.

Messrs. Gilliam & Gilliam for appellee.

Connor, J., delivered the opinion of the court:

Eliminating all immaterial and corroborative testimony, there is but little controversy respecting the facts. Plaintiff got upon defendant's train at a station 8 miles east of Tarboro, between 7 and 8 o'clock in the evening of June 2, 1905, and took his seat on the platform of the combination car, "with one foot on the bottom step, and the other leg straight out." There were plenty of seats inside the car, and plaintiff sat on the platform because it was warm and he preferred riding there. There is no evidence that the conductor knew he was on the platform, although plaintiff says that "he knew I was on the train." The porter knew that plaintiff was on the platform. Plaintiff made "two to four trips every week. He was working at Parmelee, Bethel, and Conetoe," towns below Tarboro. As the train reached the stop post,

at the approach to the trestle and bridge over the low grounds and the river, it stopped. As it moved forward the porter called out, "Next stop Lower Tarboro," and passed into the baggage car. By reason of an excursion train on the other or Tarboro side of the river going into a siding, the train, being an accommodation freight, "about 150 or 200 yards long," stopped on the trestle side about 250 or 300 yards from the stop or the post. The entire length of the trestle and bridge is 889 feet. From stop post to bridge is 611 feet. Before reaching the river the trestle is about 16 feet high. The conductor and other passengers were inside the car and remained therein. Up to this point the only matter in regard to which there is any controversy is the call by the porter: "Next stop Lower Tarboro." We assume, for the purpose of this decision, that plaintiff's version is correct. The conductor, who was inside the car with the other passengers, swears that when the second stop was made he said: "Keep your seats. We are not at Lower Tarboro yet." One passenger in the car corroborates the conductor. Two others say they did not hear him say anything. One of the latter says that he did not hear either call.

The defendant's witnesses testify that notices warning passengers from riding on the platform were posted inside the car. Plaintiff says that he never saw them; that it was his custom to ride on the platform. He also says that his residence was "near upper depot, about 300 yards to the west." He was uncertain whether to get off at Lower Tarboro, but decided to do so because he had left his wheel there. There is no evidence that he had a ticket, or that the conductor or porter had any notice that he would get off at Lower Tarboro, or that any other passenger wished to do so. The night was dark. Plaintiff says that he stood up, looked carefully, thought he was at Lower Tarboro, that it was very dark, could not see that the train was on the trestle, and stepped off, falling to the ground, and sustaining serious injury. Stewart, plaintiff's witness, says: "About the time the train stopped the second time I heard somebody say, 'Hello,' and I heard a noise of something hitting the ground, and we all knew someone had fallen off, and somebody said it was Mr. Wagner, the contractor from Tarboro." His son, J. W. Stewart, testified to same. Hinson and Braswell, for defendant, say that plaintiff fell off. Mr. Stewart and other witnesses for plaintiff testified to effect of light from car upon the cross-ties. It is undoubtedly true, as contended by plaintiff, that "the announcement by the conductor or brakeman of the 19 L.R.A. (N.S.)

station the train is approaching is the customary warning to passengers that the train is nearing the station, in order that they may get ready to alight. When a station is called, the passengers have a right to infer that the first stop of the train will be at such station; and when the train is stopped, it is an invitation to the passengers to alight." Moore, Carriers, chap. 20, § 34; Elliott, Railroads, § 1628, and many other authorities cited in plaintiff's brief. It will be observed, however, in the cases cited, the passenger was inside the car at the time the announcement was made, and, in consequence of it, went upon the platform to alight. This case is complicated by the fact, conceded by plaintiff, that he was voluntarily riding on the platform, there being "plenty of seats" on the inside of the car. It is not alleged, nor is there any suggestion, that it was negligent on the part of defendant to stop the train on the trestle. This was evidently necessary to permit another train to clear the track by going into a siding. The alleged, and the only possible, negligence was in the failure of the conductor, if there was such failure, or some other employee, to notify plaintiff that the train had not reached "Lower Tarboro." It was their duty to give such notice to passengers who were inside the cars. It may, under some circumstances, have been the duty to give such notice to persons standing or riding on the platform. If, for instance, the conductor or the porter knew that plaintiff, although negligently riding on the platform, intended alighting at Lower Tarboro, it would have been their duty to notify him. We find no evidence that either of them had such knowledge, or that the plaintiff himself had determined to stop there when he got on the train. He says that when the train stopped he stood a second or two. He thought he would go to the upper depot, but thought of his wheel, which he had left down town, and got off to get it. He lived near the upper depot. It does not appear that it was his habit to stop at the lower depot. We find nothing in the evidence imposing upon the conductor or porter any other duty to plaintiff than that which they owed to passengers inside the car.

Omitting, for the present, any reference to the alleged notices in the car, we proceed to consider the rights and duties of the parties in the light of the admitted facts. In *Goodwin v. Boston & M. R. Co.* 84 Me. 203, 24 Atl. 816, it was shown that plaintiff's intestate got upon the platform of the defendant's car. The conductor took his ticket, and made no objection to his riding there. The car was crowded, although there was ample standing room inside. The

weather was warm. In going around a curve he was thrown from the platform and killed. In an action for damages, Emery, J., says: "The danger of standing on the narrow platform of a passenger car while the car is moving with the usual speed of railroad trains is most conspicuous. No prudent man, no man ordinarily mindful of his conduct and of matters about him, would occupy such a position." Referring to the reasons suggested for riding on the platform, the judge says: "All these circumstances may have made it more agreeable to ride on the platform in the open air than to stand inside the hot, crowded car, but they did not in the least lessen the danger, nor the appearance of danger, in so doing. That Goodwin was not ordered off the platform could not have led him to believe it was safe to ride there. He needed no warning of such a danger. He knew the place for passengers was inside the car. . . . Within the car, with all its discomforts, was safety. Without the car was obvious peril." In *Fletcher v. Boston & M. R. Co.* 187 Mass. 463, 105 Am. St. Rep. 414, 73 N. E. 552, it appeared that plaintiff was in the car. He left his seat some time before reaching his destination, went into the baggage compartment, and engaged in conversation with a baggage master who, when the train approached it for the purpose of stopping, called the station at which the plaintiff was to alight. After this, as the train was moving slowly, the plaintiff left the car and stood on the first of four steps that led from the platform of that end, and, while in this position, the steps came into collision with a truck, and he was injured. The court said: "Plainly, if he had remained in the car until the train stopped, this damage would have been avoided; but he voluntarily left a place provided for him as a passenger, and where he would have been safe, and exposed himself to the chance of injury, which common experience has shown is incident to standing upon the platform of a moving railroad car." In *Clark v. Eighth Ave. R. Co.* 36 N. Y. 135, 93 Am. Dec. 495, Grover, J., said: "The negligence alleged against the plaintiff was that at the time of receiving the injury he was standing on the steps of the front platform of the car; it appearing that he would have escaped the injury had he been either inside of the car or upon the platform. In the absence of any explanation I should have no hesitation in saying that this position of the plaintiff at the time of the injury proved that he was negligent." In that case the evidence showed that the car was crowded. The question of negligence, under the circumstances, was left to the jury. In the note to this case it is said: "Where a per-

son is injured while riding in a dangerous position upon a railroad car, he is prima facie guilty of negligence which will bar recovery, and the burden is on him to show the injury was not the result of his negligence." 1 Fetter, Carr. Pass. § 167, says: "By the weight of authority, it is negligence, as matter of law, for a passenger to be upon the platform of a rapidly moving train, unless he is compelled to assume such position as the best he could do at the time, acting as a careful and prudent man." Elliott, Railroads, 1630. We are of the opinion that, taking plaintiff's testimony to be true, he was negligent, as a matter of law, in riding upon the platform in the manner described by himself.

The question, therefore, involved in the first issue, assuming that the porter called the station, and that the conductor failed to notify the passengers inside the car that the train had not reached "Lower Tarboro" when it stopped on the trestle, was such failure the proximate cause of the plaintiff's injury? In other words, if the jury should find that, if the conductor had made the announcement sufficiently loud to be heard by those inside the car, the plaintiff, being on the platform, could not have heard it, was such failure the proximate cause of the injury? While it is true that the authorities cited and many others examined by us relate to injuries sustained by persons thrown from the platform while the car is in motion, we can perceive no difference in principle in a case wherein the plaintiff, by voluntarily riding on the platform, alights from a train at a time and place which, if he had been inside the car, he would not have done. In both cases he is guilty of negligence, and, if but for such negligence he would not have sustained the injury, he cannot recover. The pivotal question, therefore, upon the first issue is, Was the plaintiff injured by the negligence of the defendant? This involves two propositions,—that defendant was guilty of a breach of duty to plaintiff, and that, by reason thereof, he was injured. As we have seen, the duty which defendant owed plaintiff was to give notice inside the car that, notwithstanding the announcement of the porter, the train had not reached Lower Tarboro. If the jury found that the notice was given, they should have answered the issue "No." If they found, as we presume they did, that such notice was not given, the question was presented whether the failure to give it was the proximate cause of the plaintiff's injury; that is, had he placed himself in such a position that he could not have heard it if given sufficiently loud to be heard by those inside the car? This was a question for the jury. It was involved in

against one who wrongfully enters upon the property and attempts to seduce his wife.

Damages — trespass — attempted seduction.

2. That one who wrongfully enters upon property occupied by another as a residence attempts to seduce his wife may be considered in aggravation of damages for trespass, notwithstanding statutes enlarging the rights of married women and permitting them to sue alone for injuries to their persons.

(September 30, 1908.)

APPEAL by defendant from a judgment of the Superior Court for Vance County in plaintiff's favor in an action brought to recover damages for trespass. Affirmed.

Statement by Connor, J:

The plaintiff filed his complaint in the following words, to wit: "(1) That, on or about the 25th day of April, 1907, the defendant, near the village of Dabney, at and in the county of Vance and state of North Carolina, and near the public road leading from Dabney to Dexter, did unlawfully and forcibly, wickedly, and maliciously enter upon a certain lot or parcel of land, then in the possession and occupancy as a residence of plaintiff, with the unlawful, ma-

licious, lascivious, and wicked intent and purpose to seduce, debauch, and carnally know one Lovetta Brame, the wife of plaintiff, and did then and there wickedly, maliciously, unlawfully, wrongfully, and willfully insult and attempt to seduce and carnally know the said Lovetta Brame, plaintiff's said wife, to plaintiff's great damage, \$2,000." Defendant demurred, for that: "(1) No special damage or injury or actionable wrong to plaintiff is alleged; the wife not being a party, and the complaint not showing that plaintiff had suffered any special damages or any damage. (2) The complaint does not set forth any facts sufficiently definite and specific to constitute a cause of action, in not setting out the acts and things complained of in such manner as that it may be seen that, if true, they constitute an actionable wrong. (3) An attempt to seduce is not actionable; no seduction or injury being alleged." His Honor overruled the demurrer, and allowed defendant sixty days to answer. Defendant excepted and appealed.

Mr. T. T. Hicks, for appellant:

The husband alleged no special damage, and cannot recover.

Harper v. Pinkston, 112 N. C. 296, 17 S. E. 161; Shuler v. Millsaps, 71 N. C. 297;

Case Note. — Personal wrong as aggravation of damages for trespass on realty.

There appear to be no other reported cases, aside from *Brame v. Clark*, in which plaintiff, suing for a trespass on realty, sought to aggravate the damages by showing that defendant attempted to seduce plaintiff's wife or other member of his family.

But in *Hatchell v. Kimbrough*, 49 N. C. (4 Jones, L.) 163, the court said, *obiter*, that, in an action of trespass *quare clausum fregit* "the plaintiff may, in aggravation, show that the defendant debauched his daughter."

In *Ellsworth v. Potter*, 41 Vt. 685, where it was shown that stones and eggs were thrown through the windows into the house occupied by plaintiff, it was held that the jury were properly instructed that, in estimating the damages, they were not limited to the injury to the realty, but might also take into consideration the character of the trespass and its indignity.

In *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149, a new trial was granted because the jury brought in a verdict for actual damages only, although it appeared that the defendants swore at the plaintiff and one of them struck him. The court said that "exemplary damages may be recovered in an action of trespass *quare clausum fregit*, as well as in any other action, where there are such circumstances of aggravation, of insult, and of malice as would warrant such recovery."

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In *Weyer v. Wegner*, 58 Tex. 539, it was held not error to admit in evidence insulting language used by, and acts of, the defendants while on the premises indicative of a belief that the owner of the premises was attempting to conceal property acquired in violation of the criminal law of the state; and in such case it was proper to instruct the jury that, if they believed that the defendants entered upon the plaintiff's premises in an oppressive and insulting manner, the jury would be authorized, in addition to nominal damages, to assess such exemplary damages as they might think right and just.

In *Druse v. Wheeler*, 22 Mich. 439, it was held proper to show, as an act of aggravation to enhance the damages, the malicious arrest of the owner of the realty in order to keep him out of the way during a trespass on his lands, such matter having been alleged in the declaration.

In *Trauerman v. Lippincott*, 39 Mo. App. 478, evidence was admitted showing that defendant's servant, while committing the trespass, pushed plaintiff out of the way. It was held proper to instruct the jury to allow plaintiff such sum as would fully compensate him for the mental anguish, humiliation, and mortification suffered by him by reason of any intentional striking or shoving of plaintiff, and that, if the acts were done maliciously, the jury might award punitive damages.

In *Sheldon v. Baumann*, 19 App. Div. 61, 45 N. Y. Supp. 1016, it was held that plaintiff, for the purpose of aggravating the dam-

Strother v. Aberdeen & A. R. Co. 123 N. C. 197, 31 S. E. 386; *Kimberly v. Howland*. 143 N. C. 405, 7 L.R.A.(N.S.) 545, 55 S. E. 778.

Messrs. A. C. Zollicoffer and Thomas M. Pittman, for appellee:

Every unauthorized entry upon, or direct interference with, another's land, is a trespass, for which an action lies without proof of actual damage.

Moak's Underhill, Torts, rule 38, *159; *Mosseller v. Deaver*, 106 N. C. 494, 8 L.R.A. 537, 19 Am. St. Rep. 540, 11 S. E. 529; *Webber v. Barry*, 66 Mich. 127, 11 Am. St. Rep. 471, 33 N. W. 289; *Schouler*, Dom. Rel. §§ 57, 108; *Barbee v. Armstead*, 32 N. C. (10 Ired. L.) 530, 51 Am. Dec. 404.

Connor, J., delivered the opinion of the court:

There can be no doubt that the plaintiff has alleged an actionable wrong,—a trespass upon his possession of real estate. It is elementary that "every unauthorized, and therefore unlawful, entry into the close of another is a trespass. From every such entry, against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage." *Ruffin*, Ch. J., in *Dougherty v. Stepp*, 18 N.

ages in an action for trespass on real property, should have been allowed to prove his allegation that defendant's entry upon the premises and the taking of certain personal property were against the protest of plaintiff's wife and daughter, who were present, and who were violently pushed aside by defendant's agents who committed the trespass.

In *Craig v. Cook*, 28 Minn. 232, 9 N. W. 712, it appeared that plaintiff was in the exclusive possession of the property under a lease from the defendant; that, during a temporary absence of plaintiff, defendant put the personal property of plaintiff out of the house and forcibly resisted his return into the house, committing an assault and battery upon him. The court said: "For a trespass wantonly committed upon real property, aggravated by an eviction of the possessor, by one knowing he had no right to do the acts complained of, exemplary damages may be awarded by a jury." It was contended that the causes of action for a trespass upon real property and for assault upon the person were improperly joined, but it was held that the case was within the statute authorizing the joining of causes of action for "injuries, with or without force, to persons and property, or either."

In *Lawrence v. Phelps*, 2 Root. 334, plaintiff alleged that defendant broke the doors and windows of plaintiff's house, and hit and wounded his wife. The court sustained defendant's objection to the introduction of any evidence as to the injury done plaintiff's 19 L.R.A.(N.S.)

C. (1 Dev. & B. L.) 371. His Honor's judgment was clearly correct. Both parties, however, discussed, although from different points of view, the question of damages which, upon the admissions made by the demurrer, plaintiff was entitled to recover. The defendant argued the case upon the theory that two causes of action are stated,—one for trespass on realty; the other for injury, etc., inflicted upon the wife. His learned counsel strongly contends that the conduct of the defendant was not an actionable wrong to the plaintiff. However this may be, and without intimating any opinion upon it, we do not so construe the complaint. The plaintiff alleges a malicious, unlawful, and forcible trespass, setting out that it was made with the malicious intent to and did in truth then and there wilfully, wickedly, maliciously, etc., insult and attempt to seduce and carnally know plaintiff's wife. This matter is stated as the foundation for a claim of actual and vindictive damages; the cause of action being the trespass. We are asked to pass upon the question whether, in the assessment of damages, these matters may be considered by the jury in aggravation.

In *Duncan v. Stalcup*, 18 N. C. (1 Dev. & B. L.) 440, Daniel, J., says: "In looking

wife, on the ground that she might have a separate action with her husband for the assault and battery.

In *Sampson v. Coy*, 15 Mass. 493, it was held that plaintiff in an action of trespass could not give evidence of an assault upon his person by the defendant when forcibly entering the dwelling house, where such matter was not specially averred.

In *Fisher v. Conway*, 21 Kan. 18, 30 Am. Rep. 419, where the petition in no manner counted on personal injuries, it was held that, while all the circumstances of the trespass to the realty, and whatever was done in its actual accomplishment, might properly be narrated before the jury as a part of *res gestæ*, although it involved the commission of an assault and battery, yet, the assault and battery being the subject of an independent action, the extent of the injuries should not have been gone into, and the court should have instructed the jury that no claim was made on account of personal injuries.

In *Lawandoski v. Wilkes-Barre & H. R. Co.* 35 Pa. Super. Ct. 10, it was held that, where plaintiff claimed only compensatory damages, and tried his case on that theory, it was error to instruct the jury that they would be justified in adding punitive to the compensatory damages, although it appeared that defendant had a personal altercation with plaintiff as to his right to enter upon the land, after which flurry of passion there was nothing to indicate wantonness, evil intent, or wrong motive.

into the books we find the rule in this action to be that the jury are not restricted in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect of the malicious conduct of the defendant, and the degree of insult with which the trespass was committed. The plaintiff is at liberty to give in evidence the circumstances which accompany and give character to the trespass." In this case vindictive damages were awarded. In *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181, Grier, J., said: "In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.'" This was an action *quare clausum fregit*. In *Mitchell v. Billingsley*, 17 Ala. 391, it was shown that defendants, in the commission of the trespass, used indecorous and insulting language, and that one of the defendants had a pistol. Exemplary and punitive damages were awarded. In *Merest v. Harvey*, 5 Taunt. 442, Heath, J., says: "I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. . . . It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages." Gibbs, Ch. J., said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him, except large damages? . . . I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain." In this case for a trespass £500 was given. In discussing the question whether, for injuries sustained by a plaintiff in respect to his marital rights, his action was for trespass or case, Mr. Street says: "Clearly, we are here confronted with a class of wrongs which historically have their roots in the law of trespass, but which, nevertheless, in maturity lie altogether beyond the field of trespass, and belong to that body of legal injuries in which harm is conceived as being done, not to persons or property, but to rights incident to them." *Foundations of Legal Liability*, 264.

It is suggested that, while it is true that exemplary damages may be recovered for malicious trespass upon property and for

insulting language to the owner, the wife alone can sue for damages sustained by her on account of indecent and insulting language and conduct. For the purpose of supporting this view the recent changes made by the Constitution and statutes in respect to the property and personal rights of married women are relied upon. We cannot think that, because the property rights of the wife have been enlarged, and her right to sue alone for injuries to her person and property conferred, the right and duty of the husband to be the head of the family, to protect the honor and virtue of his wife, or to recover for injuries sustained by interference with his marital rights, have been destroyed. It is true that, as held by this court, while he may be reduced to a mere steward or overseer of his wife's property, he is no less her husband, with all of the rights and duties incident to that relation. That which degrades or destroys her honor must affect his. It cannot be that if, by permission of the wife, he is living on her land as his home, the law will not afford him protection against and damage for a malicious wrong done to him through his wife. The law would but mock him if, when his home is invaded, his wife insulted, and her virtue assaulted, it gave him, for such injuries, but a penny, permitting the offender to go "scott free." If in the bitterness of his wounded spirit he sought redress by violation of the criminal law, subjecting himself to infamous punishment, the sympathy of his fellow men would be but little comfort to him. No man can long retain the respect of his wife and children if he does not seek redress for a malicious trespass upon his home and for an attempt to seduce his wife. The ancient law declared: "A patriarch is lord in his own house and family, and no person has a right to interfere with him; not even the village elder, or the imperial judge." Again it is said: "The house father was responsible for the due performance of his vacra and for the purity of his ritual." States grow in virtue and strength, citizens are loyal and home loving, in proportion as the unity of the family is preserved. The husband and father is recognized as the head of the family; the wife living under his protection and looking to him to guard her person and honor from all harm. The husband must have redress for wrongs done him by seeking the award of such actual and exemplary damages as a jury may find to be proper, rather than by violating the criminal law.

The judgment of his Honor was correct, and must be affirmed.

NORTH CAROLINA SUPREME COURT.

D. C. JONES et al., Appts.,
v.

W. A. SMITH et al.

(— N. C. —, 62 S. E. 1092.)

Entireties — trees — partition.

A wife holding land by entireties with her husband is not entitled to partition of trees cut therefrom by him, nor of lumber into which they are converted, since both are seised of the entirety.

(December 2, 1908.)

Case Note. — *Respective rights of husband and wife to the income or products from an estate held by the entirety.*

The general rule, under the common law, was that the husband had full control of the rents, profits, crops, etc., from an estate held by the entirety to the exclusion of the wife, her only interest being a right to support. 15 Am. & Eng. Enc. Law, p. 849. Some cases hold that this is an incident to the estate, while other cases hold that it is merely a part of the husband's common-law marital rights. Under the common law, the result is the same.

Thus, in *Morrill v. Morrill*, 138 Mich. 112, 110 Am. St. Rep. 306, 101 N. W. 209, 4 A. & E. Ann. Cas. 1100, it was held that, under the common law that prevailed in Michigan, a wife had no right to a share of the crops growing on lands held by her and her husband as tenants by the entirety. The court said: "I think it unnecessary to determine whether the husband's exclusive control of these crops is an incident of estates by entirety, or whether . . . it is a result of the marital unity. If it is an incident of estates by entirety, then, since, under our decisions, estates by entirety remain as at common law, that right continues to belong to the husband. If it is a result of the marital unity, the same conclusion must be reached because we have held—as we were bound to hold—that the statute does not affect the marital unity."

But, under the so-called married woman's acts, which, by the great weight of authority, did not abolish the common-law "estate by the entirety," this question is important. If the husband's control over the products of the land is a part of his common-law rights, then there can scarcely be any question but that such control has been destroyed, and each party becomes entitled to one half of the rents, profits, etc. But, if that control is an incident peculiar to the form of tenure, then it would appear that the husband's control would continue, for it could hardly be said that the tenancy remains while rights merely incidental to and flowing from the tenancy are taken away.

This phase of the question was not before the court in *JONES v. SMITH* because of the 19 L.R.A. (N.S.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Wilkes County in defendants' favor in an action brought to partition certain trees and lumber. Affirmed.

Statement by Walker, J.:

The plaintiffs are husband and wife and were at the time of the transactions herein-after mentioned. The plaintiff J. M. Jones, the husband, who is only a nominal party to the action, contracted to cut certain timber from a tract of land owned by him and his wife as tenants by entirety and deliver it at the defendant's mill for a price fixed in the

particular form of the action brought by the plaintiff, the court merely holding that partition would not lie for the logs and timber, and that the severance did not convert the logs and timber into a tenancy in common.

But in *Hiles v. Fisher*, 144 N. Y. 306, 30 L.R.A. 305, 43 Am. St. Rep. 762, 39 N. E. 337, it was held that the common-law right of the husband to the entire usufruct of an estate by the entirety during the joint lives of his wife and himself was not an incident of that estate, but was part of his common-law marital rights; and, under the statute, the rents and profits of an estate by entirety during the joint lives of husband and wife do not follow the nature of the estate in respect to their disposal, but belong to them in separate moieties, the wife's share of which is within the general statutory provisions giving married women power to control and dispose of their own property. And the *Hiles* Case was cited with approval, and followed, in *Messing v. Messing*, 64 App. Div. 125, 71 N. Y. Supp. 717.

And in *Bilder v. Robinson* (N. J. Ch.) 67 Atl. 828, it was held that, since the married woman's act, a wife was entitled to receive one half of the rents and profits of an estate held by the entirety.

It would seem that, under the ruling in the *Hiles* Case and those holding similarly, partition would lie, as the parties then would be tenants in common only, as to the rents, profits, crops, etc.

In *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254, it was held that a crop raised by a husband, upon land held by the husband and wife by the entirety is not subject to levy and sale on an execution against the husband, as a crop raised on the land is held in the same manner and subject to the same law as the land itself. It will be noted that, while the facts in this case differ greatly from those in *JONES v. SMITH*, yet the cases agree upon the point that the incidents of the estate attached to the crops after they had been severed.

There is but little direct authority upon this subject, but a few cases bearing more or less upon the general question may be noted.

Thus, in *West v. Aberdeen & R. F. R. Co.* 140 N. C. 620, 53 S. E. 447, 6 A. & E. Ann. Cas. 360, a wife was held not to be a proper

contract. The timber was cut and delivered to defendant, and he paid for the same. It was agreed by the parties that the timber should be sold and the proceeds of sale should be held subject to the decision in this case. This action was brought by the *feme* plaintiff for a partition of the lumber into which the cut timber had been sawed. The allegation of the petition is that she and the defendant are tenants in common; each owning a one-half interest in the lumber. The petitioner asks for a sale of the property in order that there may be an equal division between the parties. The court suggested that the *feme* plaintiff might amend and sue for her share of the money due for the timber. This she declined to do, but insisted on her right to recover according to the allegations of her petition. The court then intimated that she could not recover, whereupon she submitted to a nonsuit and appealed.

party in an action for damages to timber on any estate held by the entirety, as the husband was, during coverture, entitled to the full control and the usufruct of the land to the exclusion of the wife. But in *Fairchild v. Chastelleux*, 1 Pa. St. 176, 44 Am. Dec. 117, in which the facts were very similar, it was held that, while the husband had full control over the estate, it was in his election whether he should join his wife with him in the action for damages.

And, in an action by a wife for trespass in entering lands held by her and her husband by the entirety and removing sand therefrom under an alleged contract with the husband, it was held, in *Cox v. St. Louis, M. & S. E. R. Co.* 123 Mo. App. 356, 100 S. W. 1096, that, under the statutes of the state, the wife could sue for the entire damage.

In *Bynum v. Wicker*, 141 N. C. 95, 115 Am. St. Rep. 675, 53 S. E. 478, it was held that, while a husband could mortgage or convey an estate held by the entirety,—that is, convey the right to receive the rents and profits, and neither husband nor wife had any right to interfere with the mortgagee's possession—yet one claiming under a conveyance from the husband had no right to cut timber thereon, and an injunction restraining him from such cutting would be granted.

In *Thornley v. Thornley* [1893] 2 Ch. 233, it was held that, where husband and wife hold an estate by entirety, the husband was entitled to receive the rents during coverture; but, upon a divorce taking place, the husband's right to receive the rents which existed during the coverture came to an end.

Where a husband abandons his wife and leaves her in possession of premises held by them by the entirety, it was held, in *O'Connor v. McMahon*, 54 Hun, 66, 7 N. Y. Supp. 225, that his act in conveying an undivided one half of the estate to a third person was 19 L.R.A. (N.S.)

Mr. W. W. Barber for appellants.

Messrs. Finley & Hendren, for appellees:

The *feme* plaintiff is not entitled to recover one half the lumber by virtue of her right as tenant by the entirety with her husband.

Simonton v. Cornelius, 98 N. C. 433, 4 S. E. 38; 9 Am. & Eng. Enc. Law. p. 851.

Walker, J., delivered the opinion of the court:

The plaintiffs as husband and wife were seised of the land, including the timber, not properly as joint tenants or tenants in common, but as tenants by entirety, for, being considered as one person in law, they cannot take the estate in moieties, but both are seised of the entirety, that is *per tout et non per my*, the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the

inoperative, and did not give to such grantee a right to any of the crops, or to the use or possession of the land.

Some cases containing *dicta* as to the rights of the parties at common law may be cited.

Thus, in *Barber v. Harris*, 15 Wend. 615, which was an action in ejectment, the court said: "During the life of the husband he undoubtedly has the absolute control of the estate of the wife, and can convey or mortgage it for that period. By marriage, he acquires during coverture the usufruct of all her real estate which she has in fee simple, fee tail, or for life." And this statement was quoted with approval in *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692, which was an action to restrain the sheriff from deeding property sold under an execution, and in *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824, which was an action upon a lease given by a husband alone.

And in *Hemingway v. Scales*, 42 Miss. 1, 2 Am. Rep. 586, 97 Am. Dec. 425, which was an action in ejectment, it was held that the husband might, during coverture, do what he pleased with the rents and profits of an estate held by the entirety; but he could not dispose of any part of the inheritance without the wife's concurrence.

So, in *Simonton v. Cornelius*, 98 N. C. 433, 4 S. E. 38, in a proceeding to impeach a deed, the court said: "So, too, the fruits accruing during their joint lives would belong to the husband, when, by separation from the land, they become personal property, *jure mariti*, as when personal goods reduced into possession become his, even when the wife was sole owner, under the law as it then was."

Upon the general subject. Tenancy by entireties, see note to *Hiles v. Fisher*, 30 L.R.A. 305.

other, but the whole must remain to the survivor. 2 Bl. Com. 182. In 1 Washburn on Real Property, 5th ed. p. 706, it is said: "A still more peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such. If a man and woman, tenants in common, marry, they still continue to hold in common; but, if the estate is conveyed to them originally as husband and wife, they are neither tenants in common nor properly joint tenants, though having the right of survivorship, but are what are called tenants by entirety. While such estates have, like a joint tenancy, the quality of survivorship, they differ from that in this essential respect, that neither can convey his or her interest so as to affect the right or survivorship in the other. They are not seised, in the eye of the law, of moieties, but of entireties. In such cases, the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other, so that if, for instance, the wife survives and then dies, her heirs would take to the exclusion of the heirs of the husband. Nor can partition be made of the estate." See also 11 Am. & Eng. Enc. Law, 2d ed. p. 40; West v. Aberdeen & R. F. R. Co. 140 N. C. 620, 53 S. E. 477, 6 A. & E. Ann. Cas. 360; Bynum v. Wicker, 141 N. C. 95, 115 Am. St. Rep. 675, 53 S. E. 478; Bruce v. Nicholson, 109 N. C. 204, 26 Am. St. Rep. 562, 13 S. E. 790; 2 Kent, Com. 133. The nature, incidents, and properties of this estate by entirety were not changed by the provisions of the Constitution relating to married women. Long v. Barnes, 87 N. C. 329. As the plaintiffs were thus seised of the timber, its severance from the land by cutting it did not convert the estate in the trees, when severed, or in the lumber cut from the logs, into a tenancy in common, nor is the *feme* plaintiff, by reason of the severance, entitled to maintain this action for partition. If she could have enjoined the husband from cutting the timber, under the principle stated in Bynum v. Wicker, *supra*, she is certainly not entitled to have a partition of the lumber, into which the timber had been converted, no more than she would have been entitled to partition of the land or the trees standing or growing thereon. This is the only question before us, as the *feme* plaintiff insisted upon her legal right to partition as alleged and asserted in her petition.

The intimation of the court was correct, and therefore the nonsuit, to which the plaintiff submitted in deference thereto, must stand. It may be that the present state of the law as to married women, under the Constitution and statutes, and a 19 L.R.A. (N.S.)

wise public policy, call for a change in the incidents and properties of this anomalous estate (tenancy by entirety), so that it may be turned into a tenancy in common; but this is a question which addresses itself to the legislature, and not to us.

No error.

NORTH DAKOTA SUPREME COURT.

HELMIA LOWE, Resp't.,

v.

OLE ABRAHAMSON et al., Appts.

(— N. D. —, 119 N. W. 241.)

"Farm laborer" — domestic — lien.

A woman, employed in a family living upon a farm, who does ordinary housework and assists in cooking meals for laborers doing the farm work, is not a "farm labor-

Headnote by MORGAN, Ch. J.

Case Note. — Who is a "farm" or "agricultural" laborer within statute giving lien?

One employed in making sugar upon a plantation is within a statute giving a lien to plantation laborers. Saloy v. Dragon, 37 La. Ann. 71.

But one employed in making repairs upon a sugar-grinding house and the machinery therein, as well as acting as watchman, is not within such statute. *Ibid*.

Nor is one within such statute who is employed by a sugar refining company to weigh and load sugar cane upon cars, and who hires others to do the labor connected therewith, as he is an independent contractor. Fortier v. Delgado, 59 C. C. A. 180, 122 Fed. 604.

So, an overseer is not within a statute giving agricultural laborers a lien for labor. Isbell v. Dunlap, 17 S. C. 581.

And one who, with his machinery and servants, threshes grain for another, although present directing and assisting therein, is not within a statute giving a lien to any person "who shall do labor upon any farm, . . . or harvesting, or laboring upon, or securing, or assisting in securing, or housing any crop or crops sown or raised thereon." Mohr v. Clark, 3 Wash. Terr. 440, 19 Pac. 28.

However, one employed to cut and stack hay is within a statute similar to that last mentioned. Beckstead v. Griffith, 11 Idaho, 738, 83 Pac. 764.

A similar question is presented in Rowley v. Ellis, 197 Mass. 391, 83 N. E. 1103, where it was held that a farm foreman who has charge of the laborers thereon is a "farm laborer" within the Massachusetts employers' liability act relieving a master for injuries received by such.

As to who are laborers or employees generally, within the meaning of a statute giving a preference to such, see note to Tod v. Kentucky Union R. Co. 18 L.R.A. 305.

er" within the meaning of § 6277, Rev. Codes 1905, giving a lien for the wages of farm laborers.

(December 31, 1908.)

A PPEAL by defendants from a judgment of the District Court for Ransom County in plaintiff's favor in an action to foreclose a farm laborer's lien. Reversed.

The facts are stated in the opinion.

Mr. T. A. Curtis for appellant.

Messrs. Rourke & Kvello, for respondent:

Complainant is a farm laborer within the meaning of the statute.

Lane v. Archambault, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348; Winslow v. Urquhart, 39 Wis. 260.

Morgan, Ch. J., delivered the opinion of the court:

This is an action for the foreclosure of a farm laborer's lien, and is jointly brought against the owner of the land and his tenant. The complaint alleges that the plaintiff rendered services to the defendant Ole Abrahamson, who rented the premises, in the capacity of a farm laborer, at the agreed price of \$5 per week; that such services were performed upon land which is specifically described in the complaint, and the crop which was raised upon said land is also specifically described therein. The relief demanded is that plaintiff's right to a laborer's lien be established, and that such lien be foreclosed, and that she be paid the amount due her for such services, to wit, the sum of \$61.70, together with her costs and disbursements. In the claim for a lien filed by plaintiff it is stated that she "performed services in the capacity of a kitchen laborer." The answer denies that the plaintiff performed any services in the capacity of a farm laborer, and denies that any valid laborer's lien was filed. After a trial the court made findings of fact and conclusions of law in favor of the plaintiff, and ordered a sale of the grain raised upon the land to satisfy the plaintiff's lien for services as a farm laborer, together with costs and disbursements. The defendant Thomas Casey, the owner of the land, has appealed from said judgment, and demands a trial *de novo* under the provisions of § 7229, Rev. Codes 1905.

The sole question presented on the appeal is whether the plaintiff is entitled to a lien as a farm laborer upon the crops raised upon the land upon which her employer lived and resided, and for whom she was working as a servant from July 28th to November 8, 1906.

The evidence as to the contract under 10 L.R.A. (N.S.)

which she was employed, and as to the services which she performed, is as follows:

Q. What were her labors on the farm?

A. She done kitchen work, cooking and washed dishes.

Q. You had a quite a number of men there?

A. Yes, sir.

Q. How big a force?

A. I had 4 or 5 men most of the time, and Mr. Casey had a couple men there at the same time.

Q. And she cooked for all these parties?

A. Yes, sir.

Q. And prepared all the meals also?

A. Yes, sir.

Q. That is what you kept her for?

A. Yes, sir.

On cross-examination the witness stated:

Q. Mrs. Abrahamson done some of the work around the house?

A. Yes, sir.

Q. In fact did just as much as Helma [the plaintiff]?

A. Not much of the cooking, but she helped quite a lot.

Q. Mrs. Lee was there?

A. Yes, sir.

Q. Helma Lowe is a girl?

A. Yes, sir.

Q. And all the work she did was in the kitchen and around the house?

A. Yes, sir.

That is all of the testimony in regard to the character of the work performed by the plaintiff, as testified to by her employer, the defendant Abrahamson. The statute under which the lien is claimed is chapter 63, § 1, p. 87, Laws 1895 (Rev. Codes 1895, § 4826), being § 6277, Rev. Codes 1905, and, so far as applicable, is as follows: "Any person who performs services for another in the capacity of farm laborer between the 1st day of April and the 1st day of December of any year shall have a lien on all crops of every kind, grown, raised, or harvested by the person for whom the services were performed during said time, as security for the payment of any wages due or owing to such persons for services so performed, and said lien shall have priority over all other liens, chattel mortgages, or encumbrances, excepting, however, seed grain and threshers' liens." Without a statute giving such a lien or a special contract, farm laborers would not be entitled to a lien upon the crops, and must rely upon the personal responsibility of the landlord or cropper for their pay. The statute was passed to secure farm laborers against irresponsible landlords, and against the liens of implement dealers, which often covered the whole crop. We must look to the terms of the

statute to ascertain who are entitled to avail themselves of its provisions. It should be liberally construed to give effect to the intent of the legislature in enacting it. Its provisions should not be restricted or added to, as it is the sole function of the legislature to say to whom this special lien shall be given.

The general principle of construction that statutes in derogation of the common law are to be strictly construed can have no application in this state, as § 6724, Rev. Codes 1905, expressly provides that the provisions of the Code shall "be liberally construed with a view to effect its objects and to promote justice." Section 6691, Rev. Codes 1905, provides that, except when defined or explained in the statute, the "words used in any statute are to be understood in their ordinary sense, except when a contrary intention appears," etc. Whether the plaintiff is entitled to a lien under said § 6277 depends upon the meaning or construction to be given to the words "farm laborer" as used therein. As ordinarily understood, a farm laborer is one who labors upon a farm in raising crops, or doing general farm work. As commonly accepted, we think the words do not include those engaged in domestic work. They refer to work performed directly in connection with the crops raised on the farm. Under the evidence, it appears that the plaintiff did no work except in the house. She did the cooking for four or five men who were working on the farm for Abrahamson, and for two other men who were working for Casey. It does not appear that the persons working for Casey did any work for Abrahamson, or in connection with the crop on the farm. We think that the legislative intention was to secure only those persons whose work is directly connected with the raising of the crops. If the plaintiff be given a lien upon the crop in this case, it will result in her receiving pay out of the crop for some services that were not even remotely connected with the crop, or contributed in any way to the bringing of the same into existence. We do not think that the work done by plaintiff can be classed as farm labor within the meaning of the lien law. Although the statute is to be liberally construed to secure a lien in favor of persons who have labored upon the farm, we are satisfied that it was not intended to include those within its provisions whose work was only indirectly connected with the crop. We find this construction sustained under somewhat similar statutes in *McCormick v. Los Angeles City Water Co.* 40 Cal. 185; *Sullivan's Appeal*, 77 Pa. 107; *Allen's Appeal*, 81* Pa. 302; *Boisot, Mechanics' Liens*, § 111. *Re 19 L.R.A. (N.S.)*

spondent relies on *Winslow v. Urquhart*, 39 Wis. 260, and *Breault v. Archambault*, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348, as sustaining her right to a lien under the facts of this case. These cases sustain the right of a cook in a logging camp to a lien upon the logs that were cut or banked by the crews for whom the cooks prepared the meals. In these cases the cooks went into the logging camps, as members of logging crews, and did no other work, except to cook for them. In this case the plaintiff did other work besides cooking, and cooked for others than the farm laborers. Under the evidence as to the work performed by the plaintiff, we are satisfied that she was not a farm laborer within the provisions of said lien statute.

The judgment is reversed and the action dismissed.

All concur.

OKLAHOMA SUPREME COURT.

EX PARTE WILLIAM CLENDENNING.

(— Okla. —, 97 Pac. 650.)

Criminal conviction — suspended sentence — jurisdiction to commit.

When a judgment of imprisonment is imposed by a court on plea of guilty or conviction in a criminal case, and the same is not stayed as provided by law, the defendant should forthwith be committed to the proper officer for incarceration; and where this is not done, and the court makes an order under which the defendant is discharged from custody, it has no power or jurisdiction, after the lapse of the time involved in the sentence, and after the term, to issue commitment on such judgment.

(Williams, Ch. J., dissents.)

(September 11, 1908.)

Headnote by DUNN, J.

Case Note. — Power to commit after expiration of term of sentence.

This note does not include the distinct, though kindred, questions as to the right to suspend sentence or to commit for the remainder of a suspended sentence before the expiration of its term. It also excludes those cases where actually there was no sentence imposed, but sentence was postponed, which proceeding is often, but rather inaccurately, called a suspension of sentence.

Upon the question as thus indicated there is but little authority, and that little is far from being in accord with the *CLENDENNING CASE*. It is true that the conclusion reached in that case is supported by *Re*

APPPLICATION for a writ of habeas corpus to secure the release of petitioner from the custody of Henry Clay King, sheriff of Creek County, to which he had been committed upon the alleged happening of a contingency named in a suspended sentence. Petitioner discharged.

The facts are stated in the opinion.

Messrs. **Wade S. Stanfield and Barnum & McGraw** for petitioner.

Messrs. **Charles West, Attorney General, and W. C. Reeves** for the State.

Dunn, J., delivered the opinion of the court:

This case is an original proceeding in habeas corpus, brought by William Clendenning, who alleges that he is unlawfully restrained and deprived of his liberty by Henry Clay King, a sheriff of Creek county, state of Oklahoma. From the record in the case we gather that on December 16, 1907, the defendant was brought in to the county court of that county, and in case No. 15 the following judgment was entered against him: "Defendant appeared in person, but without attorney, and entered a plea of guilty of selling intoxicating liquors, whereupon the court ordered that he be fined \$50 and pay costs, amounting to \$4.15, a total of \$54.15, and to be committed to jail until said fine and costs are paid; and it was further ordered by the court that defendant be confined in the county jail for a period of thirty days, said sentence to be

suspended on good behavior." Thereafter, and on January 21, 1908, the defendant was again arraigned before the court of said county in case No. 68, charged with the same offense, when the court entered against him the following judgment: "Defendant waived arraignment and entered a plea of guilty, whereupon the court ordered that he pay a fine of \$75 and costs, and that he be given thirty days in jail; jail sentence suspended during good behavior. Fine and costs were paid, and defendant was conditionally discharged as shown above." In neither of these cases was commitment issued.

Thereafter, and on June 27, 1908, after the expiration of the terms of court at which both of the foregoing judgments were rendered, and after the expiration of about five months from the date on which the last judgment was rendered, and six months subsequent to the date of the first, the court pronounced the following judgment in case No. 68: "Now, on this 27th day of June, A. D. 1908, the same being one of the judicial days of the regular May, A. D. 1908, term of this court, the above matter came on to be heard, and it appearing to the court that on the 21st day of January, A. D. 1908, said defendant was, by judgment of this court then and there rendered, adjudged, ordered, and decreed to be imprisoned in the county jail of Creek county, Oklahoma, and it further appearing to the

Strickler, 51 Kan. 700, 33 Pac. 620; Tuttle v. Lang, 100 Me. 123, 60 Atl. 892, both of which are sufficiently set forth in that opinion, and by *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, in which it was held that an order committing a defendant to serve a sentence previously pronounced, but suspended, made after the term of imprisonment named in the sentence had expired, was void for want of jurisdiction.

On the other hand, in *Ex parte Collins* (Cal. App.) 97 Pac. 188, in which a commitment upon a suspended sentence after the term thereof had expired was upheld, the court said: "The time at which a judgment or sentence shall be carried into execution forms no part of the judgment of the court. . . . The expiration of time without imprisonment is in no sense an execution of the sentence. . . . Where the convicted defendant is at liberty and has not served his sentence, if there be no statute to the contrary, he may be rearrested as an escape, and ordered into custody upon the unexecuted judgment."

The last case was relied upon in *Mann v. People*, 16 Colo. App. 475, 66 Pac. 452, in which mandamus issued to a justice of the peace to compel him to issue a writ of commitment upon a sentence rendered by him, 19 L.R.A. (N.S.)

the court saying that it was immaterial that the time since the sentence which was sought to be enforced exceeded the length of the sentence.

And that a court may commit upon a suspended sentence even after the term thereof has expired finds support also in *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954; *Weber v. State*, 58 Ohio St. 616, 41 L.R.A. 472, 51 N. E. 116; and *Fults v. State*, 2 Sneed, 232, sufficiently set forth in *EX PARTE CLENDENNING*, though the court in that case seeks to distinguish the last two of these cases.

Authority for this conclusion would also seem to be found in *State v. Cockerham*, 24 N. C. (2 Ired. L.) 204, in which an order of commitment was upheld, though the defendant had been at liberty until the term of his sentence had elapsed; but it does not appear whether such sentence had been suspended, or how it came that the defendant was at liberty.

For a discussion of the question of the power to impose in pardon conditions extending beyond the term of sentence, see the case note to *Ex parte Prout*, 5 L.R.A. (N.S.) 1064; as to the question whether the time a prisoner is out on parole or conditional pardon is to be deducted from the term of his sentence, see case note to *Scott v. Chichester*, 16 L.R.A. (N.S.) 304.

court that said jail sentence was suspended on good behavior of said defendant, and it now appearing to the court, from the records of this court, that the behavior of said defendant has not been good since said 21st day of January, 1908, the suspension of said jail sentence is hereby set aside and annulled, and said judgment of this court is hereby this day ordered enforced, and the said defendant is committed to the custody of the sheriff of Creek county, Oklahoma, for imprisonment in said jail for thirty days from and after the date hereof, in conformity with said judgment of this court, rendered as aforesaid, on said 21st of January, A. D. 1908. To all of which action of the court the defendant excepts. Whereupon said defendant prayed an appeal to the supreme court of Oklahoma, which was by this court denied, and the defendant then and there duly excepted. Whereupon said defendant asked the court to fix the amount of appeal bond, which was by the court denied, to which the defendant excepted." And immediately thereafter, and on the same day, the court rendered the following judgment in case No. 17: "Now, on this 27th day of June, A. D. 1908, the same being one of the judicial days of the regular May, A. D. 1908, term of this court, the above matter came on to be heard, and the same action was taken herein as in No. 68, Criminal, except that the sentence herein was, by the court, allowed to be concurrent with the sentence in said No. 68, Criminal."

Upon this action by the court and the commitment issued thereunder, the defendant was taken into custody, and this writ was by him sued out to regain his liberty. He contends that after the expiration of the term at which the judgments were rendered, and after the expiration of the time within which they would or could have been served, in the absence of escape on his part, or any appeal or other lawful procedure taken to stay the same, the court lost jurisdiction to issue commitment thereon and to require their enforcement by his imprisonment. This raises the question of whether or not a court, after delivering its judgment and sentence in a criminal case, may stay the same, in the absence of appeal or other legal proceedings taken, looking to its modification, and after the term at which it was rendered has expired, and after the time embraced therein has elapsed, whether it has jurisdiction to then issue commitment in execution of its judgment, and incarcerate the defendant thereunder. In support of the action taken by the court we are cited by the attorney general to a number of authorities. Those which most nearly touch the proposition, and upon which he most strongly relies, are as follows: *Allen* 19 L.R.A. (N.S.)

v. State, Mart. & Y. 294; *Fults v. State*, 2 Sned, 232; *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954; *State v. Hatley*, 110 N. C. 522, 14 S. E. 751; *People ex rel. Forsyth, v. Court of Sessions*, 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386; *Weber v. State*, 58 Ohio St. 616, 41 L.R.A. 472, 51 N. E. 116.

The case of *Allen v. State*, supra, was one decided by the supreme court of Tennessee. *Allen* was convicted of the crime of manslaughter at the circuit court of Green county in September, 1826. He was sentenced to be imprisoned six months, and to be branded by burning on the hand, and to pay the costs of the prosecution. He asked for a stay of this judgment to enable him to make application to the governor for a pardon, and the court, in granting it, was doubtless greatly influenced by the fact that the burning on the hand, if inflicted, would much impair the privilege granted by a pardon, should one be secured. The judgment was stayed under a statute to enable defendant to make such application. This case is referred to in the case of *Crane v. State*, 94 Tenn. 98, 28 S. W. 317, in which the statute under which the court acted in that case is cited. Defendant *Crane* made application for a stay of the execution of his sentence until he could likewise apply to the governor for a pardon, and the supreme court of the state, in reference to this matter, said: "The power of this court to grant such a suspension in a proper case is clearly given by § 6096, Milligen & V. Code, as follows: 'In case of the conviction and sentence of a defendant to imprisonment, the presiding judge may, in all proper cases, postpone the execution of the sentence for such time as may be necessary to make application to the executive for a pardon or commutation of punishment.' This power and discretion was exercised by this court in the case of *Allen v. State*, Mart. & Y. 295. It is apparent, however, from a reading of the statute, that such power and discretion to suspend execution of sentence will only be exercised in proper cases, and it will not be extended to cases generally; otherwise, the course of justice would be impeded, and the governor deluged with applications in all cases before the convicted person could be imprisoned."

The case of *Fults v. State*, supra, was another case from Tennessee, which was decided upon the authority of the case of *Allen v. State*, supra. In that case the defendant was sentenced to a fine of \$10 and two days' imprisonment. The fine and costs were secured, and there appears of record the following entry: "On motion of defendant, David Fults, and for reasons appearing to the satisfaction of the court by admission of the attorney general and the avi-

dence in the case, he is permitted to enter into recognizance to appear at the next term of this court and then undergo the imprisonment adjudged against him, and abide by and perform the sentence of the court." He appeared at the next term of court, and was ordered to be imprisoned pursuant to the judgment. From this he appealed, and the supreme court held that there was nothing irregular in the proceeding, and that the execution should go. The stay of the execution, it will be noted, was to a time certain, and there was nothing contingent in it. Where there is no statute, such as in this state, some few of the courts have held that a court may fix a day certain in the future on which a sentence shall begin. This was done in this case, and the supreme court sustained it.

The case of *Weber v. State*, supra, in our judgment, is not applicable, for the reason that, in that case, the judgment, the suspension, and the setting of the same aside all took place, at the same term of court. The supreme court said: "When the suspension is without express conditions, as in this case, it is within the power of the court to set aside the suspension at any time during the same term, on its own motion, and to order the sentence to be executed." In the case at bar it will be noted that both terms of court at which these judgments were rendered had expired, that no motion for new trial or other proceeding had taken place to review or reverse the same, and the judgments were final so far as the control of the court over them was concerned.

Neither do we consider the case of *State v. Hatley*, supra, as controlling in this case. That was a case in which Phillip Hatley and his wife were sentenced to be imprisoned for twelve months in the county jail, with the proviso that, if the defendants left the state within thirty days, no execution should issue; otherwise, the defendants were to be imprisoned. The parties left the state, and in about one month returned to the jurisdiction of the court. Thereupon the clerk of the court issued execution upon the judgment that had been previously rendered. In the consideration of the case the supreme court of North Carolina said: "The court had no power to pass a sentence of banishment, and we think the judgment of the court cannot be fairly construed as a judgment of banishment. If so, it would be void. The only judgment passed by the court was that the defendants be imprisoned twelve months; and the words, 'but if the defendants leave,' etc., constitute no part of the sentence or judgment of the court, but were manifestly intended only as a note or memorandum directing the clerk to postpone the period at which the sen-

tence shall go into execution, and not as a punishment for the defendants, or an infliction upon some other community, predicated upon the assumption that it would be desirable and beneficial, both to the community in which they were engaged in the bad calling of keeping a disorderly and disreputable house and to the defendants, in giving them an opportunity to reform under new surroundings. Such course is not unfrequent, and, though dictated by the best intentions to benefit the public, as well as offenders, is not to be commended. We think it quite clear, when the defendants left the state and speedily returned (for it appears that the court was held in the latter part of October and they returned early in December), they came within the condition upon which the clerk was to issue the *capias*." The facts contained in the foregoing quotation distinguish that case from the one at bar, in that the court did not stay its judgment or the execution, and that the commitment was issued by the clerk; and this within the period of time during which the defendants, had they been immediately committed, would have been serving their sentence. These facts, we believe, take that case out of the rule controlling the one at bar.

Another case relied upon by the attorney general, *People ex rel. Forsyth v. Court of Sessions*, supra, was one wherein the supreme court of the state of New York by mandamus commanded the court of sessions to pronounce judgment in a criminal case wherein one Attridge had been convicted of the crime of grand larceny, in which the trial court, out of respect to his youth and previous good character, had suspended sentence. Three days thereafter the county judge, one of the three judges sitting at the trial, in the absence of the other two, brought the defendant before him and sentenced him to imprisonment. He was released upon habeas corpus on the ground that the sentence was not concurred in by a majority of the court. He was remanded to the custody of the sheriff, and again brought before the court, and the judgment thereupon was given that sentence be suspended during good behavior. He was thereupon discharged from custody. Thereafter the supreme court granted a peremptory writ of mandamus, commanding the said trial court to proceed to judgment and to pass sentence upon the defendant as prescribed by law. On the case being appealed to the court of appeals, the court of last resort of that state, it said: "The precise question involved, therefore, is the power of a court of record, possessing jurisdiction in criminal cases, to suspend judgment after conviction." And the court held that the

trial court possessed this power, in the following language: "Without attempting to collate all the authorities on the subject. it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts, and numerous adjudged cases." The statement of that case will show that it is not applicable to the case at bar, for the reason that the question involved here is not the power to suspend sentence, but the power of the court, after sentence, to suspend execution.

This case is noted, and the above distinction drawn, in the consideration of the case of *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, which was a case where execution of the judgment of the court, as in the case at bar, was suspended. The *Forsyth Case*, *supra*, being cited on the part of the state to sustain the power of the court to suspend execution, just as it is cited by the attorney general in the case at bar, the supreme court of Wisconsin said: "The case of *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 238, 23 L.R.A. 856, 36 N. E. 386, was not a case where execution of a sentence had been suspended, but where sentence had been postponed; and the power of the court to delay sentence in its discretion was sustained, and numerous authorities were cited to support it. But the present case involves different considerations. Here the execution of a sentence already pronounced is indefinitely suspended, and it may be the pleasure of the court never to direct execution, so that the suspension has the practical effect of a pardon, or of arrest of judgment, indeterminate or final, without the authority of law; and it has been likened to the incorporation into our criminal jurisprudence of the 'ticket-of-leave system,' without any of its safeguards, leaving the convicted criminal subject to the mere option or caprice of the judge, who may direct the enforcement of the sentence after any lapse of time, however great, or withhold it, to the great detriment, it may be, of the interests of the public,—a power plainly liable to great abuse."

The case of *Sylvester v. State*, *supra*, is one wherein the supreme court of New Hampshire, in a case on all fours with the one at bar, decided that it was within the power of the court to stay its execution. But one case is relied upon and cited by it to support its opinion, and that is the case of *Com. v. Dowdican*, 115 Mass. 133. An inspection of that case shows that it was not one wherein the court suspended execution; but it, like the case of *People ex rel. Forsyth v. Court of Sessions*, *supra*, was one wherein the court suspended sentence. The 19 L.R.A. (N.S.)

New Hampshire supreme court does not discuss the proposition involved, and cites no other authority to support its opinion. Hence it is practically of little or no weight as an authority.

To supplement the cases presented to us above, we have sought diligently to find other authority; but we have been unsuccessful. Outside of those which the attorney general has presented to sustain this judgment, we have been unable to find a solitary well-considered opinion. Every case wherein the question is squarely presented and passed upon, and the courts have given it the care and attention its importance deserves, holds, practically without dissent, that, "in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future, indefinite time, depending on the happening of a contingency; and an arrest under such conviction, made after the expiration of the term of imprisonment named in the sentence [and after the term], is illegal." *Re Strickler*, 51 Kan. 700, 33 Pac. 620; *Re Bloom*, 53 Mich. 597, 19 N. W. 200; *State v. Murphy*, 23 Nev. 390, 48 Pac. 628; *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 893; *Ex parte Gordon*, 1 Black. 503, 17 L. ed. 134; *State v. Voss*, 80 Iowa, 467, 8 L.R.A. 767, 45 N. W. 898; *Re Markuson*, 5 N. D. 180, 64 N. W. 939. We will review some of these cases.

The case of *Re Strickler*, *supra*, was one wherein the defendant pleaded guilty in the district court of Ford county, Kansas, to the charge of assault and battery, whereupon the following sentence was pronounced upon him by the court: "It is the sentence of the law that you, W. H. Strickler, be by the sheriff of Ford county, Kansas, incarcerated in the jail of said county, there to remain for the space of ninety days from the date of this sentence. It is further ordered by the court that the operation of this sentence shall be suspended during such time as the defendant shall keep the peace with all mankind, and desist from all unnecessary use of intoxicating liquor, and refrain from becoming intoxicated. It is further ordered, as a condition of this sentence, that whenever the said W. H. Strickler shall violate any one of the above conditions, and upon notice thereof to the sheriff by the prosecuting officer of Ford county, Kansas, or by the judge of this court, the said sheriff shall immediately incarcerate the said Strickler in the jail of said county, and he shall remain there committed until the expiration of ninety days from said date of incarceration, and until the costs of this prosecution have been paid by him. The question as to whether the conditions of this suspension have been

broken shall be determined by the prosecuting attorney of Ford county, or by the judge of this court, and no judicial investigation shall be required." After the expiration of the term of court at which this sentence was pronounced, and after the lapse of ninety days, the court issued the following commitment on this sentence to the sheriff of the county: "And whereas, said defendant, W. H. Strickler, has failed to comply with the conditions of said judgment, you are therefore commanded to take and commit said defendant, W. H. Strickler, to the jail of Ford county, Kansas, there to remain until said judgment be complied with." Upon the commitment issued the petitioner was arrested and placed in jail. He sued out in the supreme court a writ of habeas corpus, and that court, on the consideration of the case, speaking through Mr. Justice Allen, said: "The question here presented is whether the district court could lawfully sentence the defendant to imprisonment in the county jail, and then suspend its execution, to be enforced at some future time, on the happening of a contingency named in the judgment. Section 256 of the Criminal Code [Gen. Stat. 1901, § 5701] reads: 'Where any convict shall be sentenced to any punishment, the clerk of the court in which sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general or usual deputy, cause such convict to receive the punishment to which he was sentenced.' While it is usual to delay sentence after conviction until motions for new trials, in arrest of judgment, and the like, are disposed of, and while it is within the power of the court to continue the hearing of such motions, or for any other good and sufficient cause to withhold sentence, yet, when a sentence has been pronounced by the court, its operation begins at once; and under the section just quoted it is the duty of the sheriff to immediately proceed to carry the sentence into effect. We are not called on to consider the right of the court, at the term at which the conviction was had, to reconsider or modify its own order. In this case it was attempted to hang a sentence of ninety days' imprisonment over the head of the defendant, to be executed at such time as the prosecuting attorney of Ford county or the judge of the court might see fit. This would leave the defendant in a very uncertain situation. He would be unable to tell for an indefinite period whether he was a free man or a convict; and while the sentence in terms might be for but ninety days' imprisonment, it would be in effect far more severe, because of the un-

certainty as to the time of its execution. Such a sentence is wholly unauthorized by law. The commitment issued thereon is illegal, and does not justify the imprisonment of the petitioner. He will be discharged."

The facts in the case of Tuttle v. Lang, supra, are stated by the supreme court of Maine as follows: "The petitioner was arrested and brought before the Skowhegan municipal court, charged with the offense of the unlawful sale of intoxicating liquors. Before pleading to the complaint the petitioner, the prosecuting complainant, and the judge came to an agreement by which the petitioner should plead guilty and be sentenced to a fine, costs, and imprisonment, but that no mittimus in execution of the sentence should issue until the petitioner should again be guilty of unlawfully selling intoxicating liquors. The petitioner thereupon pleaded guilty, sentence of fine, costs, and imprisonment was imposed, a memorandum of the agreement was noted on the judge's docket, and the petitioner was released from arrest and allowed to go without day, without payment of fine and costs, and without imprisonment. No mittimus or other precept in execution of the sentence was issued, or even prepared." After the expiration of nearly two years the judge, being of the opinion that the petitioner was again unlawfully selling intoxicating liquors, issued commitment on the previous sentence, delivering it to the sheriff, who took the prisoner into custody and committed him to jail. He sued out a writ of habeas corpus, and the supreme court of Maine on these facts held: "If, after conviction and sentence, any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter issue a mittimus for his commitment. In such case, having completed its judicial functions, it has voluntarily surrendered all further control over the case and person."

The case of Re Markuson, supra, was one where on June 29, 1895, the petitioner was convicted of a contempt of court in violating the terms of an injunction order. The syllabus in the case sufficiently states the facts and the judgment to show the holding, and is as follows: "On June 29, 1895, petitioner was convicted of a criminal contempt of court, and judgment was entered of record against him in substance as follows: 'That petitioner be imprisoned in the county jail of Barnes county for a period of ninety days, commencing with to-day at noon; that he pay a fine of \$200, and, if default be made in the payment of the fine, he shall be imprisoned as many days as \$2 is contained

in \$200,—or 100 days.' Immediately after said judgment was entered, the court, of its own motion, made certain orders in the case, which were entered of record, to the effect: First, that in case an appeal was taken the time should commence to run from the date of the remittitur being filed in the district court; second, that the judgment be suspended thirty days, unconditionally, to facilitate an appeal to the supreme court; third, the court ordered that the bail bond given to secure the petitioner's attendance from day to day during the trial in the district court be and remain valid and binding upon the petitioner, and that petitioner was ordered to obey the further orders of the district court, whether made by that court, or made to conform to orders of the supreme court. Held, that the time of said imprisonment began to run at noon on June 29, 1895, and that the several orders purporting to suspend or postpone the operation of the judgment were without authority of law, and null and void."

In the consideration of the case the court recognizes the general rule, supported by practically all of the authorities, that, where not controlled by statute, the date for the beginning of the service of the term of imprisonment is not fixed in the sentence, its time will commence to run, when not legally stayed, on the day of sentence. See 25 Am. & Eng. Enc. of Law, 2d ed. p. 303, note 2. And this, in our judgment, is rendered certain in this state by the terms of our statute (Wilson's Rev. & Anno. Stat. [Okla.] 1903, § 5583), which provides that upon the judgment "the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with." The court in the case last cited, held that the sentence "began its operation when it was pronounced, and continued to be in full force from that day until it ceased to operate by its own terms."

The reasoning of the supreme court of Nevada in the case of State v. Murphy, *supra*, is peculiarly applicable to the case at bar, in view of the fact that their statute is practically the same as our own. This was a case where Murphy had been convicted of selling whisky to an Indian, and a judgment of imprisonment for a term of two years was pronounced against him therefor. Thereupon Murphy, expressing his intention of taking an appeal, moved the court for a stay of execution and to admit him to bail. The court granted a stay of execution of judgment for 10 days, and ordered that he be admitted to bail in the sum of \$3,000. Bond was given in accordance therewith, and Murphy was released

from custody. He did not appeal, and, on suit being brought on the bond, it was contended on the part of the principal and his sureties that the bond was void, because the court had no authority or jurisdiction to make an order staying execution of judgment. In the consideration of this case the court says: "The contention is that the trial court had no authority to make an order staying the execution of a judgment of imprisonment, and no authority to release or order the release of a defendant, under recognizance or otherwise, after judgment of imprisonment had been rendered against him, except after an appeal therefrom had been taken, and therefore any recognizance given for that purpose and at such time is void. This contention also involves a construction of our criminal practice act, and must be sustained. Section 451 of the criminal practice act provides that, 'when a judgment has been pronounced, a certified copy of the entry thereof in the minutes shall be forthwith furnished the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require the execution thereof, except when judgment of death is rendered.' Gen. Stat. 1885, § 4331. Section 453 of the same act expressly provides that, if the judgment be imprisonment, the defendant shall forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with. Gen. Stat. 1885, § 4333. We are unable to find any other provisions of the law bearing directly upon the time and manner of enforcing the judgment of the district court in cases of this character, or in any manner modifying the same, excepting such provisions as direct the enforcement of such judgment by order of the appellate court on appeal. No discretion is reposed in the district court as to the time its judgment shall become operative and enforceable, and any order thereof in contravention of the direct provisions of the statute above cited is without authority and void, and the release of the defendant, with or without bond, pursuant to such order, is unwarranted, and any bond, recognizance, or bail given for such release for the purpose of such order is without authority and void. . . . In the case at bar the complaint avers that the defendant was released from custody upon the execution and acceptance of the bail bond. The court had no right, no authority, and no power to order a stay of execution or the judgment of imprisonment for any length of time; nor had it any authority to release the defendant from custody, under bail, until he had appealed." The practical identity of the statutes construed

in the foregoing case with our own renders the foregoing decision particularly valuable.

One of the cases, recognized in many of the authorities cited as a leading one on the proposition here involved, is *State v. Voss*, 80 Iowa, 467, 8 L.R.A. 767, 45 N. W. 898, decided by the Iowa supreme court. A number of defendants involved in that case were enjoined from unlawfully selling intoxicating liquors. They violated the terms of the injunction, and, upon the hearing, the court found them guilty and adjudged punishment therefor by imprisonment and fine of \$500, and an order was made that they stand committed to the county jail unless the fine and costs were sooner paid. The judgment contained a further condition in this language: "The execution of this judgment is to be suspended during the pleasure of the court; but whenever the court, or one of the judges thereof, so directs, execution and warrant of commitment are to issue." The case was taken to the supreme court by certiorari, and it was contended that the order of the court suspending judgment was void; and the court, through Mr. Justice Beck, in the consideration of this matter, said: "The case is this: We find a judgment for a fine against defendant, which can only be enforced at the pleasure of the court. The judgment is thus suspended, and the state is defeated of the remedy provided by law, upon the exercise of the pleasure of the district court. If the power to do this exists in a case of contempt, it must exist in all cases punishable by fine and imprisonment. The law is no respecter of persons. One violator of law possesses no rights or immunities not held by another. It follows, then, that all fines and penalties prescribed by law may be collected only when it accords with the pleasure of the court in which judgment is rendered therefor. The claim of the validity of the condition of the judgment leads to the most absurd results. It is hardly necessary to say that it is based upon no statute."

The case of *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, '62 N. W. 177, from the supreme court of the state of Wisconsin, was one where the petitioner was convicted of the crime of adultery on the 16th of March, 1894, and was sentenced to pay a fine of \$200 and to be committed to the common jail for six months. The defendant paid the costs of the prosecution, and the court directed "that the sentence of imprisonment be suspended until the further order of the court." After the expiration of that term, and after six months had expired, the court ordered that the defendant be required to fully comply with the sentence in payment of the fine imposed, and committing him until the same was

paid, for a period not longer than six months, in accordance with his previous sentence. An original writ of habeas corpus was sued out in the supreme court of that state, and, in the consideration of that case, Justice Pinney, in holding that the judgment of the court committing the relator to jail under the conditions mentioned was void, said: "The sole power is vested in the governor 'to grant reprieves, commutations, and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper.' Const. art. 5, § 6. And the action of the court in the premises, after it had regularly pronounced the punishment provided by law for the offense in question, is clearly obnoxious to the objection that it is an attempted exercise of power not judicial, but vested in the executive. When the sentence was pronounced the defendant was in custody; and it became *eo instante* his duty to pay his fine; and for failure to do so the term of his imprisonment at once began. It had fully expired before the order of October 12, 1894, was made, under which he has been committed and is now held in confinement. The sentence had been in part complied with, and the attempted withdrawal indefinitely of the remainder was, we think, without legal warrant and void." The syllabus of the case is as follows: After sentence has been pronounced in a criminal case the court cannot, as a matter of leniency to the defendant, suspend indefinitely its execution. A defendant was sentenced to pay a fine and the costs, and to stand committed to jail until payment, the period of imprisonment being limited to six months; and the court directed that, if the costs were paid at once, the sentence of imprisonment be suspended until further order. The defendant paid the costs accordingly, but failed to pay the fine. Held, that an order, made more than six months later, that defendant pay the fine and stand committed to jail until payment in accordance with said sentence, was without authority."

Section 143 of Bunn's Constitution of Oklahoma (Const. art. 6, § 10) provides: "The governor shall have power to grant, after conviction, reprieves, commutations, parols, and pardons for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. He shall communicate to the legislature, at each regular session, each case of reprieve, commutation, parole, or pardon granted, stating the name of the convict, the crime of which he was convicted, the date and place of conviction, and the date of com-

mutation, pardon, parole, or reprieve." The statutes of Oklahoma relating to the enforcement of judgments in criminal cases are contained in volume 2 of Wilson's Revised and Annotated Statutes of Oklahoma of 1903, at chapter 68, and are as follows:

"Sec. 5581 (§ 445). When a judgment, except of death, has been pronounced, a certified copy of the entry thereof, upon the minutes, must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution."

"Sec. 5583 (§ 447). If the judgment be imprisonment or a fine and imprisonment, until such fine be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with."

From the foregoing provisions of the Constitution, it will be observed that no one within the state is given power to reprieve, commute parole, or pardon an offender with the exception of the governor, and it will be further observed that, when judgment has been pronounced, a certified copy of the entry thereof must be forthwith furnished the officer whose duty it is to execute it; and, where the judgment is imprisonment, the defendant must forthwith by such officer be committed and detained under the execution. There is no latitude allowable under these provisions. They embody the plain, unambiguous letter of the law. Under such statutes, where the execution is not stayed by proper proceedings to reverse, vacate, or modify, service of sentence under a judgment of imprisonment begins on the day on which it is rendered, and continues until fully executed according to law. Nor can there be any doubt of the salutary character of this law. Speedy and certain punishment, following the infraction of a law, best meets its ends and purposes, and leniency, through delay, toward an offender, seldom works kindness to him or safety to the public; but where circumstances do arise which render the sentence or operation of the law unduly harsh or cruel, and, by reason of its universality, the operation of the law is thought to work ill in particular cases, the power is vested in the governor to reprieve, commute, parole, or pardon, except in certain cases; but he, in the exercise of this right and duty, is hedged around by the provision that he must report his doings thereunder to the legislature. Such power is not vested in a court, and it is as much within the law as the poorest defendant who appears before it for sentence. Statutes provide penalties for the infraction of law, and, where incurred, they are not subject to enforcement on the whim, caprice, 19 L.R.A. (N.S.)

or discretion of the court; and if a court undertakes to do so, it would lead ultimately, as is stated by the supreme court of Iowa, to the most absurd results.

Let us look at the facts in this case, and see if this is not true. Our Constitution provides that one who is guilty of unlawfully selling intoxicating liquors "shall be punished, on conviction thereof, by fine not less than \$50 and by imprisonment not less than thirty days for each offense." In the case at bar, the defendant, being charged with the violation of this law, in the first case entered his plea of guilty, and the court assessed the minimum fine and imprisonment thereunder, and then, instead of incarcerating him in accordance with the plain terms of the law, deliberately accepted the fine and costs and permitted him to go during good behavior. What do we now find? But a trifle more than a month had elapsed when the same defendant is again before the same court, charged with the same offense, and entered the same plea. Again the court assessed a fine and the imprisonment required under the law, and once more solemnly entered an order releasing the defendant during good behavior. Were such a course permitted to trial courts, and did it receive the sanction of this court, it would make the enforcement of the law a mere farce, bring all courts in disrepute, and consummate the results noted. Such enforcement would result in licensing the sale of intoxicating liquors by the payment of fines at stated intervals. This course we cannot sanction. The Constitution will not permit it, and the statute plainly prohibits it. The execution should have issued for the imprisonment of this defendant on the day of his conviction. His incarceration should have taken place under it. That it did not is to be regretted; but the court has no power or jurisdiction after the expiration of the time of the sentence and of the term of court when rendered to call it back and issue a commitment thereunder. We fully concur in the sentiments expressed by Chief Justice Wallin of the supreme court of North Dakota in the case of *Re Markuson*, supra, where he says: "It is an unpleasant duty to enter an order discharging the petitioner from custody, in view of the fact that he was convicted by a competent court, and has not actually suffered the punishment indicated in the final judgment of that court. But our duty is plain, and we may not shrink from its performance."

While in this instance, if we had the power to sanction the execution of the belated commitment, which we have not, it would result in the punishment of one guilty man, yet the conclusion which the law compels will doubtless prevent the escape from pun-

ishment of many guilty men in the future; but, whatever the result, it is the law, and the petitioner will be discharged.

All the Justices concur except Williams Ch. J., who dissents.

OKLAHOMA SUPREME COURT.

SAM EVANS

v.

W. T. WILLIS, County Judge.

(— Okla. — 97 Pac. 1047.)

Criminal prosecution — instituting — method.

1. No original prosecution can be instituted in a court of record in this state, except by presentment or indictment by a grand jury, or by an information exhibited by the county attorney or some other officer thereto authorized by law.

Information — invalid — effect.

2. Where the paper writing purporting to be an information is not exhibited or presented by the county attorney, or someone authorized by law, the same being in-

Headnotes by WILLIAMS, Ch. J.

Case Note. — *Right of private person to exhibit criminal information in court of record.*

The instigation of criminal proceedings in courts of record in the United States is by one of two methods: By an indictment by a grand jury, or on presentment of an information by a prosecuting officer; and in some jurisdictions the two methods are concurrent. An information is, in reality, an indictment or formal accusation by a prosecuting officer without the intervention of a grand jury. Although there are few decisions upon the right of a private person to begin a criminal prosecution by means of such an information, the cases are in accord that a proceeding so instituted is wholly invalid.

In *Ex parte Thomas*, 10 Mo. App. 24, the Missouri appellate court holds that the St. Louis court of criminal correction has no jurisdiction to prosecute for a minor offense upon an information filed by a private person. Speaking of the indictment and information as concurrent remedies, the court says: "We have no doubt that the constitutional restriction to the information, as an alternative with the indictment, in prosecutions for minor offenses, was intended to import into our criminal jurisprudence all the cautionary implications against reckless or ill-advised accusations that attached to the information under the common law and early British statutes. It must come from the state, in its sovereign capacity, through an officer or court authorized to speak in that behalf." 19 L.R.A. (N.S.)

valid, and not capable of being amended; the county court did not acquire any jurisdiction of such action or prosecution.

Prohibition — when proper — criminal prosecution.

3. Upon an information purporting to have been presented by a private person, neither the prosecuting attorney for the county nor any other officer thereto authorized having exhibited same, the lower court having no jurisdiction to hear or determine such case on said information, and there being no other plain, speedy, and adequate remedy at law for the relator, relator's remedy is by a writ of prohibition to restrain action thereon.

(September 25, 1908.)

APPPLICATION for a writ of prohibition to restrain defendant from pronouncing sentence upon relator, who had been convicted of assault and battery. Writ awarded.

Statement by Williams, Ch. J.:

On the 24th day of July, A. D. 1908, a petition was filed in this court by the relator, Sam Evans, against the respondent, W. T. Willis, wherein it was alleged that, on the 22d day of July, A. D. 1908, there was filed

While this note is limited to prosecutions in courts of record, the Missouri cases on the subject have been included, even though the question arose in criminal actions instituted in justices' courts, because the Constitution in that state provides for the prosecution of all offenses by either indictment or information. So, in harmony with the holdings on this point where the jurisdiction of a court of record is in question, we find that a criminal information presented by a private person in a justice's court in Missouri will not support a prosecution for crime. *State v. Kelm*, 79 Mo. 515; *State v. Anderson*, 84 Mo. 524; *State v. Thompson*, 81 Mo. 163. See also *State v. Boogher*, 8 Mo. App. 600.

It was held in *State v. Brown*, 63 Kan. 262, 65 Pac. 213, that a district court had no power to authorize a private citizen to sign and file an information for the prosecution of persons who had violated the liquor law; and that their conviction was without warrant of law and should be set aside.

Upon the authority of *State v. Kelm*, supra, it has been held in Missouri that an affidavit of a private individual is not an information, within the meaning of the constitutional provision which says that all other offenses except felonies shall be prosecuted by indictment or information as concurrent remedies. *State v. Sebecca*, 76 Mo. 55; *State v. Shortell*, 93 Mo. 123, 5 S. W. 691; *State v. Huddleston*, 75 Mo. 667; *State v. Rockwell*, 18 Mo. App. 395; and see *Jackson v. State*, 4 Kan. 150.

in the county court of Lincoln county a pretended criminal information, charging relator with the crime of assault and battery; that on said date he was placed on trial in said court by said respondent as judge of said court, before a jury on said charge under said information, the body of which is in words and figures as follows:

State of Oklahoma, } ss.
Lincoln County. }

State of Oklahoma,
Plaintiff,
v.

Sam Evans,
Defendant.

Information.

In the county court of Lincoln county, state of Oklahoma, on the 24th day of June, 1908, in the name and by the authority of the state of Oklahoma comes Lee Mathey-er of the said county of Lincoln and gives the court to know and be informed that Sam Evans late of the aforesaid county, on the 24th day of June, 1908, in the county of Lincoln and state of Oklahoma then and there being did then and there wilfully, unlawfully, and with force and violence commit an assault and battery upon one Duncan Chishom by kicking the said Duncan Chishom forcibly and violently on the body of him, the said Duncan Chishom, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Oklahoma.

[Signed] Lee Matheyer.

Said information was duly sworn to before the respondent, as acting county judge of said county, by said Lee Matheyer. Upon the back was indorsed the style of the cause and file mark, under date of the 22d day of July, 1908, and a list of the witnesses of the state. That on the same date, prior to the trial, relator filed a motion to quash the information and the warrant issued thereon, for the reason that the same had been filed by one Lee Matheyer, who is neither the county attorney of said county, nor the deputy, nor assistant county attorney, nor the attorney general of the state, nor anyone authorized by the attorney general, nor anyone in authority; and for the further reason that said information was not drawn, presented, or filed by anyone acting in behalf of, or on the part of, the state of Oklahoma or the county of Lincoln, but was in fact carried on by a private prosecutor. It is further alleged that, notwithstanding the illegality of said proceedings, and the want of legal information or charge, relator was compelled to go to trial, and, on the 22d day of July, 1908, was found guilty of the alleged offense by a jury in said county court; that said trial and all proceedings

had under and by virtue of said pretended information were and are null and void, for the reason that the court never acquired jurisdiction over the person of the relator or the subject-matter of the controversy. Relator further alleges that the presiding judge of said court would, unless restrained, pronounce a sentence on said relator; that relator's remedy by appeal, or by any other procedure except by writ of prohibition, was inadequate. On the 24th day of July, A. D. 1908, a preliminary writ of prohibition was issued out of this court. On the 28th day of August, A. D. 1908, respondent filed his return to said writ, wherein he alleged that relator was not illegally restrained of his liberty, as on the 1st day of July, A. D. 1908, a complaint was made to John J. Davis, county attorney of Lincoln county, Oklahoma, and he was informed by some five different persons that Sam Evans had committed a brutal assault and battery upon one Duncan Chishom, on the 24th day of June, A. D. 1908, in the city of Chandler, Lincoln county, Oklahoma, and stated to the county attorney that they had some 15 or 20 witnesses who saw the relator's brutal conduct in kicking and maltreating the said Chishom, and the county attorney refused to prosecute, or to O. K. a complaint against the relator, rendering as his excuse that said relator was a friend of his, and a good man to keep him posted on whisky cases, and absolutely refused to start the matter and have an information or complaint filed. Thereupon several of the citizens, knowing of the brutal action of the relator, made a bond, as required by the statutes of the state of Oklahoma, and verified it, to pay the costs of the prosecution, and one Lee Matheyer went before the county judge of Lincoln county, Oklahoma, and swore positively to a complaint and information, after said bond had been given. Thereupon a warrant was issued in due form, and delivered to the sheriff of said county on the 1st day of July, 1908, who executed same by arresting said relator, who was brought before the county court, and, the county judge being disqualified, and the counsel representing the prosecution and the defendant not being able to agree upon a judge *pro tem.*, the said W. T. Willis was elected, in accordance with § 3306, Wilson's Rev. & Anno. Stat. 1903, as judge *pro tem.* to try said cause. Thereupon the cause proceeded to trial before a jury of six men, selected as provided by law. The evidence having been introduced both by the state and the defendant, and the jury instructed as to the law, and having heard the argument of counsel for both sides, the cause was submitted to the jury for their consideration. The jury returned a verdict of guilty against the

defendant, and, a motion for a new trial having been filed by defendant, the matter was set down later to hear said motion. Thereupon the preliminary writ herein was served upon the respondent.

Messrs. Hoffman & Robertson and Rittenhouse & Rittenhouse for relator.
Mr. W. C. Reeves for respondent.

Williams, Ch. J., delivered the opinion of the court:

It is the contention of the relator that the county court of Lincoln county has no jurisdiction to try him upon the information in this case. The county court is a court of record (Const. § 11, art. 7 [Bunn's ed. § 181]). It has, concurrent with the district court, appellate jurisdiction of judgments of justices of the peace and police judges in all criminal matters, and, concurrent with justices of the peace, jurisdiction in misdemeanor cases, and exclusive jurisdiction in all misdemeanor cases of which justices of the peace have no jurisdiction; and, in criminal cases appealed from justices of the peace and police judges, there shall be a trial *de novo* on both questions of law and fact. Section 3. "An act to define the jurisdiction and duties of the county court," etc. Sess. Laws 1907-08, p. 285, chap. 27; Const. § 12, art. 7 (Bunn's ed. § 183). Section 17, art. 2 (Bunn's ed. § 26) Okla. Const., provides that "no person shall be prosecuted criminally in courts of record for felony or misdemeanor, otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint." The question arises, however, as to whether or not any person, other than the county attorney, or someone acting for him, could file this information. An information would lie at common law for all misdemeanors, but not for a felony, it having been the policy under such law that no person should be put on trial for a capital offense, or any other crime known or understood as an offense, under said law occasioning a total forfeiture of the offender's lands or goods, or both. This is the line of demarcation by which we are to determine whether or not at common law an offense was a felony or a misdemeanor. 4 Bl. Com. 94, 95, 310. At common law an information is defined to be a complaint or accusation exhibited against a person for some criminal offense committed immediately against the King, or against a private person; an indictment being an accusation preferred by

the oath of 12 men, and an information is only the allegation of the officer who exhibits it. 3 Bacon. Abr. 635, title "information." According to Mr. Bacon, there are two kinds of criminal information under the common-law procedure in England, the first being an offense immediately against the King, and was filed by the Attorney General *ex officio*, and without leave of court. The second was against private individuals, and exhibited by the masters of the Crown. Information of this character were filed as a matter of course prior to the adoption of Stat. 4 & 5 William and Mary, chap. 18; but thereafter such information could not be filed by the masters of the Crown except upon leave of the court, and then to be supported by the affidavit of the person at whose instance the same was filed, such person being required to give security for co-ts. 3 Bacon. Abr. 635. Section 4200, Wilson's Rev. & Anno. Stat. 1903, provides: "The common law, as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed, to promote their object." Mr. Chitty says (1 Crim. Law, 844): "Informations may be filed by the Attorney General for any offense below the dignity of felony which tends, in his opinion, to disturb the government, or immediately to interfere with the interests of the public, or the safety of the Crown. He most frequently exercises this power in cases of libels on government or high officers of the Crown. . . . It seems, indeed, at his option to exert it when any offense occurs which may thus be prosecuted in the Crown office. . . . The Attorney General is the sole judge of what public misdemeanors he will prosecute. He may file an information against anyone whom he thinks proper to select, without oath, without motion, or opportunity for the defendant to show cause against the proceeding."

It appears to have been the common and usual practice, sustained by numerous precedents, for informations to be exhibited, whether in the name of the King's Attorney General, or of the master of the Crown office, for batteries, cheats, seducing a young man or woman from their parents in order to marry them against their consent, or for other wicked purposes, spiriting away a child, rescuing persons from legal arrest, perjuries, subornation of perjuries, forgery, conspiracies, and other like crimes done principally to a private person, as well as

for offenses done principally to the King, and, in general, or any other offenses against the public good, or against the first and obvious principles of justice and common honesty. 3 Bacon, Abr. title "Information;" 2 Hawk. P. C. chap. 26, § 1; Cole, Criminal Information, p. 9; Comyn's Dig. title "Information;" Archbold, Crim. Pl. & Ev. 69. Mr. Cole, in his work on Criminal Information, pp. 9, 10, states: "In cases of misdemeanor the law has intrusted the Attorney General, on behalf of the Crown, with a discretionary power of filing informations; and for that reason the court of Queen's bench will never give leave to the Attorney General, on behalf of the Crown, to exhibit a criminal information. He has the right to exhibit one *ex officio*, on his own responsibility and discretion. . . . But, although the Attorney General may, if he think fit, exhibit a criminal information *ex officio*, for any misdemeanor whatever, yet in practice he seldom does so, except when directed [to do so] by the House of Lords, or the House of Commons, . . . or where the case is of a very serious nature. The usual objects of an *ex officio* information are properly such enormous misdemeanors as peculiarly tend to disturb or endanger the Queen's government, or affront her in the regular discharge of her royal functions." 46 Law Library, 29, 30. In the case of *State v. Gleason*, 32 Kan. 250, 4 Pac. 366, the court said: "At common law an information might be filed, under the English practice, against persons charged with misdemeanors, yet no rule was granted in regard to such cases except upon such evidence as would, uncontradicted, make out the offense beyond a doubt. Archbold, Crim. Pl. & Ev. 176; *R. v. Willett*, 6 T. R. 294; *R. v. Williamson*, 3 Barn. & Ald. 582; *R. v. Bull*, 1 Wils. 93; *R. v. Hilbers*, 2 Chitty, 163; *R. v. Baldwin*, 8 Ad. & El. 168; *Ex parte Williams*, 5 Jur. 1133, cited in 1 Harr. Dig. 2268; 1 Chitty, Crim. Law, 856, 857."

There appears to be some conflict of authority as to whether or not the second class of informations have been adopted in this country. *State v. Gleason*, 32 Kan. 245, 4 Pac. 363; *Bishop*, Crim. Proc. 144, 604, 606; *State v. Moore*, 19 Ala. 514; *Wharton Crim. Pl. & Pr.* 8th ed. 87. In the case of *State v. Kelm*, 79 Mo. 515, it is said: "In our states the criminal information should be deemed to be such, and such only, as in England is presented by the Attorney or the Solicitor General. This part of the English common law has plainly become common law with us. And, as with us, the powers which in England are exercised by the Attorney General and Solicitor General are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, un-

der our common law, to prosecute by information as a right adhering to their office, and without leave of court." In the case of *State v. Moore*, 19 Ala. 519, the court said: "In England informations lay against persons for misdemeanors, and were in those cases criminal proceedings. The practice of filing them existed at the common law, and may be traced to the earliest periods. Informations for offenses more immediately affecting the King, his ministers, or the state, were filed *ex officio* by the Attorney General while those in which a private individual was virtually the prosecutor were placed on record by the King's coroner or master of the Crown office. Each of these officers had, and the Attorney General still has, the power of thus accusing the subject at his discretion. But the Stat. 4 & 5 William and Mary, chap. 18, reduced the coroner to a mere ministerial officer, and the informations exhibited by him in the Crown office were subjected entirely to the court of the King's bench. Criminal informations at this day (in England) are of two kinds: Those fixed *ex officio* by the Attorney General, at his sole discretion, and those prosecuted by the coroner or master of the Crown office, by leave of the court according to the statute. Chitty's Crim. Law, 843-845, where the authorities are cited. . . . Stat. 4 & 5 William and Mary is not in force in this state, and we have none like it that can possibly affect this case; consequently the discretion of the state to proceed, or not to proceed, for the forfeiture, is not placed in the hands of any of our courts, and it has already appeared that they cannot derive it from the common law. The *scire facias* to repeal the King's letters patent, for any cause of forfeiture that may have occurred, is analogous to the case before us. In that case, also there was a discretion to claim or to waive the forfeiture. In such cases, 'previously to suing out the writ, a petition or memorial must be presented to his Majesty, and a warrant obtained thereon to the Attorney General, upon which he will grant his fiat for suing it out; but it is said that, when a patent is granted to the prejudice of a subject, the King of right is to permit, upon petition, to use his name for the repeal of it.' 2 Tidd, Pr. 1094. The case before us, however, is one not affecting the rights of any particular individual. It is clear that the state here is the source of all such franchises, to be granted or withheld by the legislature at its discretion. But if, under our law, a forfeiture must be exacted for every act done or omitted which, in strictness, is a cause of forfeiture, then our law is obviously defective; and it is not only defective, but wrong, if this high discretion may be exercised by persons who,

with regard to it, are not the representatives of the state. The language of the act plainly shows that the legislature did not intend to confide this discretion to the solicitors; but, on the contrary, it was the manifest intention to withhold it from them. They were to act 'at the instance of the state,' which excludes the idea of their acting upon their own will or discretion." Clark, in his *Criminal Procedure*, page 128, says: "Under the common law of England, informations were of two kinds. The first was filed by the Attorney General, as a rule, for offenses more immediately against the King, or the public safety; but such an information could be filed by him for any other misdemeanor, though an offense more particularly against an individual. The second was filed by the masters of the Crown office, and it was the usual mode or proceeding by information for offenses against individuals. Formerly both of these informations could be filed without leave of court, and without further oath or affidavit than the oath of office of the officer preferring it. By an early English statute, however, which is old enough to have become a part of our common law, if applicable to our conditions, it was provided that informations by masters of the Crown office could only be filed by leave of court, and that they should be supported by the affidavit of the person at whose suit they were preferred. The law remained that informations filed by the Attorney General (and, as already stated, he could file them for any misdemeanor) need not be verified, and that he was the sole judge of the necessity or propriety of filing them. Leave of court was not necessary. Nor was the accused entitled to opportunity to show cause against the proceeding. The Attorney General usually acted on affidavits of witnesses laid before him, but this was not necessary. There is some authority for the proposition that the kind of information to be used at common law in this country is that which in England was filed by the masters of the Crown office, and that this is the kind contemplated by statutes which show no intention to the contrary; and if this is so, leave of the court and affidavit would be necessary. But, by the better opinion, the other kind of information is the one in use with us. 'In our states the criminal information should be deemed to be such, and such only, as in England is presented by the Attorney or Solicitor General. This part of the English common law has plainly become common law with us. As, with us, the powers which in England were exercised by the Attorney or Solicitor General are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, un-

der our common law, to prosecute by information, as a right adhering to their office, and without leave of court.'"

In this state it is made the duty of the county attorney, and not the attorney general, to appear in the district courts of their respective counties and defend on behalf of the state or his county all actions or proceedings, civil or criminal, in which the state is interested or a party; and, whenever the venue is changed in any criminal case, or in any civil action or proceeding in which his county or the state is interested or a party, it is the duty of the county attorney of the county where such indictment is found, or the county interested in such civil action or proceeding, to appear and prosecute such indictment, and to prosecute or defend such civil action or proceeding in the county to which the same may be changed. *Wilson, Rev. & Anno. Stat. (Okla.) 1903, § 1289.* And whenever there shall be no county attorney for the county, or when the county attorney shall be absent from the court, or unable to attend to his duties, the district court may, if it deems it necessary, appoint, by an order entered on the minutes of the court, some suitable person to perform for the time being the duties required by law to be performed by the county attorney; and the person so appointed shall thereupon be vested with all the powers of such county attorney for that purpose. *Id. § 1293. Const. § 17, art. 2 (Bunn's ed. § 26), supra,* providing that "no person shall be prosecuted criminally in courts of record for felony or misdemeanor, otherwise than by presentment or indictment or by information," enabling a felony to be prosecuted by information, which, under the common law, could only be prosecuted by indictment, did not extend the rule so that a person could be put on trial in a court of record for a felony on information verified and exhibited only by a private prosecutor. To hold that in courts of record such prosecutions for misdemeanor could be maintained by such an information would establish two rules of practice in such courts for exhibiting informations,—one for misdemeanors and another for felonies. When the same officer prosecutes for the state in all such cases, such practice is not presumed to have been intended by the framers of the Constitution.

At common law an information exhibited by the Attorney General or Solicitor General was not required to be verified. It is not necessary to determine whether or not article 4 of the amendments to the Constitution of the United States, providing that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but

upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized," changes the common-law rule as to information in this country, for § 5306, Wilson's Rev. & Anno. Stat. 1903, provides that "the county attorney shall subscribe his name to informations filed in the probate or district court, and indorse thereon the names of the witnesses known to him at the time of filing the same. He shall also indorse thereon the names of such other witnesses as may afterward become known to him, at such time before the trial as the court may by rule prescribe," and that such information should be verified "by the oath of the prosecuting attorney, complainant, or some other person," it being provided that when the information in any case is verified by the county attorney, it shall be sufficient if the verification be upon information or belief. This section enlarges the common-law rule. Prosecutions originally cognizable in courts of justices of the peace need not be begun by such an information. Const. art. 2, § 17 (Bunn's ed. § 26). But when exhibited in such justice court by any other person than by the county attorney, or his assistant or deputy, or some other person authorized by law, the justice of the peace may require of such private prosecutor a bond for the costs of such prosecution. Const. art. 7, § 18 (Bunn's ed. § 190); Wilson, Rev. & Anno. Stat. 1903, §§ 5305, 5306, 5307. The provision being made that criminal offenses, including both felony and misdemeanor, may be originally prosecuted by information in courts of record, and in courts not of record, which includes only misdemeanors, by complaint, an information is clearly distinguished from a complaint. An information exhibited under the common law, by leave of the court, by a private prosecutor, is, in effect, merely a complaint as termed in our Constitution.

Hence, since the adoption of our state Constitution, no person can be prosecuted criminally in any court of record in this state for felony or misdemeanor other than by presentment of an indictment by a grand jury, or by information exhibited by the county attorney or other officer authorized by law. The information filed in this case by the private prosecutor, who was neither the county attorney nor any officer authorized by law, was void.

The next question arises as to whether or not the writ of prohibition herein sought is the proper remedy. Such writ will not be issued on account of errors or irregularities in the proceedings of a court having jurisdiction, or on account of insufficiency of averment or pleading, or upon matters of

defense which may be properly raised in the lower court. Ex parte Branch, 63 Ala. 383; Epperson v. Rice, 102 Ala. 668, 15 So. 434; Clark v. Superior Ct. 55 Cal. 199; 16 Enc. Pl. & Pr. p. 1126, and authorities cited in footnotes 2-4. The better rule appears to be that the writ will be issued where the lower court appears to be without jurisdiction upon the record and admitted facts. 16 Enc. Pl. & Pr. p. 1128, and authorities cited in footnotes 1 and 2. Such extraordinary writ will not be awarded when the ordinary and usual remedies provided by law, such as appeal, writ of error, certiorari, or other modes of review or injunction, are available. Ex parte Smith, 23 Ala. 94; Ex parte Smith, 34 Ala. 455; Ex parte Scott, 47 Ala. 609; Ex parte Reid, 50 Ala. 439; Ex parte Mobile & O. R. Co. 63 Ala. 349; Weaver v. Leatherman, 66 Ark. 211, 49 S. W. 977; 16 Enc. Pl. & Pr. p. 1130, and authorities cited in footnote 2. There is no general rule by which the adequacy or inadequacy of a remedy can be ascertained, but the question is one to be determined upon the facts of each particular case. The writ will not be issued on account of the inconvenience, expense, or delay of other remedies, but will be granted where the remedy available is insufficient to prevent immediate injury or hardship to the party complaining, particularly in criminal cases. 16 Enc. Pl. & Pr. p. 1131, and authorities cited in footnotes 1 and 2. It appears that in criminal cases neither appeal, habeas corpus, nor certiorari would be a plain, speedy, or adequate remedy. 16 Enc. Pl. & Pr. p. 1132, and authorities cited in footnote 1. The undisputed facts showing the indictment upon which the prosecution was based to be absolutely void, the writ of prohibition was declared to be the proper remedy. Bruner v. Superior Ct. 92 Cal. 239, 28 Pac. 341; People ex rel. Yearian v. Spiers, 4 Utah, 385, 10 Pac. 609, 11 Pac. 509; People ex rel. Pierce v. Carrington, 5 Utah, 531, 17 Pac. 735; People v. Southwell, 46 Cal. 141; People v. Colby, 54 Cal. 37; People v. Hunter, 54 Cal. 65; Levy v. Wilson, 69 Cal. 105, 10 Pac. 272; Ex parte Brown, 58 Ala. 542; 16 Enc. Pl. & Pr. p. 1132, and authorities cited in footnotes 1 and 2. It appearing as a matter of record that the information exhibited in the court below was by a private prosecutor, and it being admitted in the answer of the respondent that the county attorney had refused to file an information against the relator, and no other officer authorized by law having filed such information, the county court is without jurisdiction to try said cause. If judgment is pronounced against the relator upon the verdict of the jury, it might result in his being incarcerated in jail pending an appeal. An

appeal in such an instance would not be such an adequate and speedy remedy as to prevent immediate injury or hardship to the relator. When it appears to the court having jurisdiction to issue the writ of prohibition that the lower court, under any conditions, is without jurisdiction to try the accused upon the alleged information filed, with all amendments permitted under the law considered as made, to require him to invoke the remedy of appeal, occasioning delay and necessitating a supersedeas bond, or resulting in his being confined in jail pending the determination of his appeal, when the same conclusion as to the lower court being without jurisdiction will be reached, would work an unnecessary and unreasonable hardship upon the accused.

The writ of prohibition is awarded.

All the Justices concur.

OKLAHOMA SUPREME COURT.

INTERNATIONAL LAND COMPANY,
Appt.,
v.

JOSEPH MARSHALL by Next Friend.

(— Okla. —, 98 Pac. 951.)

Equity — clean hands.

1. Equity will refuse to lend its aid in any manner to one seeking its active interposition who has been guilty of any unlawful or inequitable conduct in the matter with relation to which he seeks relief.

Infant — conveyance — false statement of age — cancellation of deed.

2. Where a party fraudulently represents that he is over twenty-one years of age, when in fact he is only nineteen years of age, and such false and fraudulent representations, in connection with his appearance and size, being believed, by means of a deed then and there executed and delivered by him, he, on account of such fraudulent representations, obtains the sum of \$125 as a part of the consideration therefor, such party grantor, whilst in possession of the land described in such deed, will not be permitted to invoke the aid of equity to have such deed canceled, although it may be absolutely void, without offering to refund the amount of money so fraudulently obtained.

Headnotes by WILLIAMS, Ch. J.

Note. — The question as to the estoppel of an infant by false representations as to his age is treated in a note to Lowery v. Cate, 57 L.R.A. 684, which is supplemented by a case note to Commander v. Brazile, 9 L.R.A.(N.S.) 1117. See also Tobin v. Spann, 16 L.R.A.(N.S.) 672, on the same subject.
19 L.R.A.(N.S.)

Same — knowledge of fraud.

3. Although the injured party may have had prior notice that such party was under age, yet, if he believed such false representations, which were fraudulently and intentionally made by such party grantor, and, relying thereon, parted with a consideration as result thereof, such party grantor, although the other party may not have exercised reasonable care, will be refused the aid of equity to cancel such deed, though it may be absolutely void, unless he offers to refund the amount of money thus wrongfully obtained.

(Kane, J., dissents.)

(November 24, 1908.)

A PPEAL by defendant from a judgment of the United States Court for the Western District of the Indian Territory in plaintiff's favor in an action brought to compel the reconveyance to plaintiff of certain lands. Reversed.

Statement by WILLIAMS, Ch. J.:

On the 29th day of December, A. D. 1905, the appellee, a minor, by his next friend, Jeff Marshall, as plaintiff, instituted this action in the United States court for the western district of Indian territory, at Muskogee, against the appellant, as defendant, alleging in his complaint that the said plaintiff was a minor under the age of twenty-one years, and brought said action by and through his father and next friend, Jeff Marshall; that on or about the 26th day of December, A. D. 1905, he was a minor, being eighteen years of age, and a citizen of the Creek Nation, and as such there was allotted and patented to him certain described real estate; that on said date the said plaintiff endeavored to borrow some money from the defendant, through C. M. Bradley, its president, and offered to give a mortgage on 40 acres of said land as security therefor, and the defendant, through its said president, informed said plaintiff that it would let him have \$125, and would take a deed to 40 acres of said land, with the understanding that plaintiff should have the privilege of returning said money, and the defendant would reconvey said land to him; that thereupon the said plaintiff accepted said proposition, and executed what was thought to be a deed, conveying 40 acres of said land, and delivered same to the president of said defendant company, and that the said defendant paid to said plaintiff the said sum of \$125; that soon after plaintiff received said sum of money and executed said deed to the defendant, conveying, as he thought, 40 acres of land, he discovered that said defendant had taken a deed to all of said land, being 120 acres; that immediately plaintiff tendered

back to said defendant the said sum of \$130 in lawful money, and demanded the reconveyance to him of said land, the said sum of money being sufficient to pay all interest and cost of the executing and recording of the deed, and the said defendant refused to accept said sum of money, and refused to reconvey said land to said plaintiff; that the defendant well knew at the time of the execution of said deed, and before the same was executed, and before the defendant had paid the plaintiff said sum of money, that said plaintiff was a minor, and had no authority to convey said land. Plaintiff then and there in open court tendered to the defendant the sum of \$130, alleging that said deed was duly recorded on the 27th day of December, A. D. 1905, in the record of deeds at Wagoner in said district, and said deed is a cloud upon his title. Plaintiff prays for a decree, to the end that the defendant be directed to make and deliver to him a good and sufficient deed, reconveying to him all of the said described land, and, in the event that the defendant fails or refuses to do so, that a commissioner be appointed by the court with full power to act, and that he be instructed to convey all of said land by good and sufficient deed to said plaintiff.

On the 10th day of January, A. D. 1906, the defendant answered, denying that plaintiff is a minor under the age of twenty-one years of age, and that he was under the age of twenty-one years on the 20th day of December, A. D. 1905, and that he did, at the time alleged in the complaint, endeavor to borrow money from the defendant, through its president, and that, in such endeavor, offered to give a mortgage on 40 acres of said land, and that defendant, through its president, agreed to loan plaintiff the sum of \$125, and, as security therefor, to take a deed to such land, with the understanding that the plaintiff was to have the privilege of returning said money, upon which the defendant would reconvey to him said 40 acres of land, and that any such proposition was made and accepted for a loan of \$125 to the plaintiff, and that, in drawing up the papers, 120 acres, as alleged in the complaint, were covered and included by the deed, when, under the agreement, only 40 acres should have been conveyed, and denies that said plaintiff offered to redeem said land, or any part of it, by paying back or tendering to it the amount he had received from said defendant as part payment under the deed executed by Joseph Marshall to the defendant, conveying to it 120 acres of land, described in the complaint, which defendant admits were allotted to said plaintiff. Defendant denies that, at the time the transaction occurred between it and the plaintiff, at which time the defendant received a deed

to the land mentioned in the complaint from plaintiff, its president, C. M. Bradley, acting for it, knew or had knowledge and belief that said plaintiff was a minor under the age of twenty-one years. Defendant admits that said deed executed and delivered to it by the plaintiff on December 26, 1905, was filed and recorded at Wagoner, in the western district of the Indian territory, but denies that said deed is any cloud upon the plaintiff's title. For further answer, defendant avers that, under the allegations of the complaint to the effect that plaintiff is a minor under the age of twenty-one years, and was at the time he made said deed on December 26, 1905, this suit cannot be maintained by him through a next friend, because his right to disaffirm and set aside a transaction of the character alleged does not accrue until his majority. Defendant pleads that it paid the plaintiff, Joseph Marshall, the sum of \$375 on the representation of said Joseph Marshall that he was of age, and had a right and capacity to transfer and convey his land, which the defendant, through its president, C. M. Bradley, believed to be true, and, acting upon such belief, paid to said plaintiff the said sum of \$375, which defendant avers and pleads said plaintiff should refund before he can ask equity in this court: that on December 26, A. D. 1905, the defendant, through its president, C. M. Bradley, purchased lots 3 and 4 and the southeast quarter of the southwest quarter of section 31, township 16 north, range 17 east, in the Creek Nation, Indian territory, from the plaintiff, Joseph Marshall, and agreed to pay him therefor the sum of \$1,400; that, under said agreement, it did upon that date pay said plaintiff the sum of \$125, and execute and deliver to him a duebill for the sum of \$1,275; that it paid the said plaintiff the sum of \$250, which was credited on said duebill as a partial payment on said land; that said plaintiff appeared to be twenty-one years of age at the time this contract and deed was made; that he positively and assuredly made the statement to said C. M. Bradley that he was twenty-one years of age, and had capacity to enter into said contract and execute said deed, upon which representations and statements of said plaintiff the defendant, by and through its said representative, paid to said plaintiff the said sum of \$375, believing the transaction to be valid, and believing the statements made by the plaintiff were true as to his age; that, on account of the said representations and assurances made by plaintiff as to his age, he should not be allowed to repudiate and disaffirm said contract in a court of equity without first doing equity by paying back to said defendant the said sum of \$375, paid to him upon said

statements, which, if untrue, were fraudulent. Defendant further pleads that if the plaintiff is a minor, and was such on December 26, A. D. 1905, being less than twenty-one years of age, he cannot repudiate and disaffirm said deed executed and delivered by him to said defendant because of his minority at the time the suit is brought. Said cause was referred to a master to take testimony, and to report his findings and conclusions as to both fact and law, and, on the 23d day of June, A. D. 1906, the cause was heard on the exceptions to the master's report theretofore filed, and the court confirmed the same in all respects, and rendered a decree as prayed for by plaintiff, to which action of the court the defendant saved its exceptions.

In due time an appeal was taken to the United States court of appeals for the Indian territory. On the 25th day of October, A. D. 1906, it was stipulated by counsel that whereas the defendant had prayed and obtained an appeal from the decree of the court in this case to the United States court of appeals for the Indian territory, and desiring to save cost for making up and printing the record, there being but two propositions defendant desires to press upon the appeal, it was agreed that, in the light of the evidence taken and filed in this case, the following facts were established by the evidence on file in the case before the master and before the lower court on the trial of said cause, to wit: (1) That the plaintiff, Joseph Marshall, is a Creek freedman, a citizen of the Creek Nation, not of Indian blood; (2) that, as such citizen, there were allotted and patented to him, as his distributive share of the lands of the Creek Nation, lots 3 and 4, and the southeast quarter of the southwest quarter of section 31, township 16 north, range 17 east, in the Creek Nation, Indian territory, for which he received a patent executed by the principal chief of the Creek Nation; (3) that, on the 26th day of December, 1905, said Joseph Marshall was the owner and in the possession of said land; (4) that on said date said Joseph Marshall, by warranty deed in due form, conveyed to the defendant all of the land above described, which was duly acknowledged and properly recorded on the 27th day of December, 1905; that at the time said Joseph Marshall executed said deed he also made an affidavit in words and figures as follows: "Joseph Marshall, being first duly sworn, upon his oath states that he was twenty-one years old on June 21st, 1905, and that he makes this affidavit for the purpose of selling his land and receiving money thereon;" (5) that, at the time of the execution of said warranty deed aforesaid, the plaintiff, Joseph Marshall, was a minor, 19 L.R.A. (N.S.)

under the age of twenty-one years, having been nineteen years of age since the early part of June, 1905; (6) that C. M. Bradley, president of the defendant company, acted for it as its agent in the purchase of said land from the plaintiff, Joseph Marshall; (7) that the defendant, through its said agent, C. M. Bradley, agreed to pay as the consideration for said land the sum of \$1,400, \$125 of which sum was paid to the plaintiff, Joseph Marshall, on December 26, 1905, at the time he executed and delivered to the defendant the above-mentioned deed, and received from the defendant a duebill for the remainder of the consideration; (8) that on December 26, 1905, said Joseph Marshall, in company with Sanders Anderson, another negro, went to the office of the defendant company, and represented to said C. M. Bradley, acting for the defendant in this matter, that he, Joseph Marshall, was twenty-one years of age, and had been since June 21, 1905; that his mother so informed him, and he made an affidavit to that effect, as appears on the back of the deed, before W. J. Vandiver, notary public, as appears from the above copy of said deed; that the representations of said Joseph Marshall that he was of age, taken with his physical appearance, were believed by said C. M. Bradley to be true; (9) that, believing said Joseph Marshall to be of age, said C. M. Bradley, acting for the defendant, did on December 26, 1905, pay to said Joseph Marshall the sum of \$125 as part payment on the land, taking from him the deed above referred to; (10) that on December 27, 1905, the following day, the mother of Joseph Marshall, the plaintiff, went to the office of the defendant, and told the said C. M. Bradley that Joseph Marshall was her son, and that he was only twelve years old, and cautioned defendant not to pay plaintiff any more money on the land; (11) that on December 28 or 29 1905, the defendant, by and through C. M. Bradley, acting for it, paid to Joseph Marshall, the plaintiff, \$250 further on the consideration for said land, at which time said Joseph Marshall again represented that he was of age; (12) that on the trial of this case Joseph Marshall testified that he did know his age.

It is further stipulated that the clerk of the United States court for the western district of the Indian territory, in making up the transcript of the record, may omit therefrom the master's report of the evidence, and the exceptions filed by the defendant to the master's report, and, in lieu thereof, insert this agreement: "It is further agreed that the only questions for review in this case on the appeal are (1) whether or not the plaintiff is entitled to any relief without paying back to the defendant the \$125 received by

him on December 26, 1905, at the time the deed was made; and (2) whether or not the plaintiff is entitled to any relief in this case without paying back to the defendant the \$250 received by him on December 28 or 29, 1905, as set out in the statement of facts, both of which questions were on the above facts properly presented to the court below on the hearing, and decided by that court against the defendant, to which decision defendant then and there excepted. It is further agreed that these two questions shall be the only points upon which the defendant, as appellant, will assign error in the case." The appeal was perfected in the United States court of appeals of the Indian territory, and transferred in accordance with law to this court for review.

Mr. George S. Ramsey, for appellant:

An infant of the age of discretion is estopped to disaffirm his deed where he obtained, upon his false representations as to his age, money from the vendee, his physical appearance corroborating his statement that he was of age.

Bigelow, Estoppel, 600; Bradshaw v. Van Winkle, 133 Ind. 134, 32 N. E. 877; Williamson v. Jones, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 411; Ryan v. Grownney, 125 Mo. 474, 28 S. W. 189, 755; Ostrander v. Quin, 84 Miss. 230, 105 Am. St. Rep. 426, 36 So. 257; Craig v. Van Bebber, 18 Am. St. Rep. 633, note; Damron v. Com. 110 Ky. 268, 96 Am. St. Rep. 453, 61 S. W. 459; Dillon v. Burnham, 43 Kan. 77, 22 Pac. 1016; Ingram v. Ison, 26 Ky. L. Rep. 48, 80 S. W. 787; Pemberton Bldg. & L. Asso. v. Adams, 53 N. J. Eq. 258, 31 Atl. 280; Hayes v. Parker, 41 N. J. Eq. 630, 7 Atl. 511; Adams v. Fite, 3 Baxt. 69; Sims v. Everhardt, 102 U. S. 300, 26 L. ed. 87; MacGreal v. Taylor, 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. Rep. 961; 22 Cyc. Law & Proc. p. 556; Bagley v. Fletcher, 44 Ark. 153; Clark v. Tate, 7 Mont. 171, 14 Pac. 763.

Affirmative relief should not be granted without requiring plaintiff, as a condition precedent thereto, to restore all the money received by him from defendant upon the purchase price of the tract of land.

22 Cyc. Law & Proc. p. 614; 1 Page, Contr. §§ 888-890; Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 56, 9 N. E. 420; Fitts v. Hall, 9 N. H. 443; Ostrander v. Quin, 84 Miss. 230, 105 Am. St. Rep. 426, 36 So. 257; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 349; Smith v. Evans, 5 Humph. 77; Bozeman v. Browning, 31 Ark. 365; Myrick v. Jackson, 39 Ark. 297; Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314; American Freehold Land Mortg. Co. v. Dykes, 111 Ala. 178, 56 Am. St. Rep. 45, 18 So. 292; Hillyer v. Bennett, 3 Edw. Ch. 19 L.R.A. (N.S.)

222; Gray v. Lessington, 2 Bosw. 257; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Bryant v. Pottinger, 6 Bush. 473; Cummings v. Powell, 8 Tex. 80; Folts v. Ferguson, 77 Tex. 302, 13 S. W. 1037.

Mr. N. A. Gibson also for appellant.

Messrs. R. P. DeGraffenreid and F. Scruggs for appellee.

Williams, Ch. J., delivered the opinion of the court:

Two principles settled by the great weight of authority respecting the contracts and liabilities of infants, apparently not antagonistic, abstractly stated, in practical application produce two conflicting lines of adjudications; and to reconcile the same, or, rather, to determine properly where one begins and the other ends, is not without difficulty: (1) The contracts of infants, when not for necessities, impose nothing but voidable liabilities; (2) infancy being in law a shield, and not a sword, cannot be pleaded to avoid liability for frauds, trespasses, or torts.

The first reported adjudication is that of *Grove v. Nevill* (decided during the reign of King Charles II.), 16 Car. II., Rot. 401, 1 Keble, 778, being "an action upon the case in the nature of deceit on sale by the defendant of goods as his own, whereas in truth they were another's. The defendant pleads nonage at the time of the sale, to which the plaintiff demurred." One of the judges considered that the same was a tort as waste or escape, and that nonage was no plea, but the majority of the court was of the contrary opinion, holding that there was no actual tort, or anything *ex delicto*, but only *ex contractu*, which was voidable by plea, and only a tort by construction of law. One of the judges declined to vote either way. The next case is that of *Johnson v. Pie* (decided a year later), 1 Lev. 169, which was an action of case, "for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him £100, and so he had cheated the plaintiff by this false affirmation. After verdict for the plaintiff of not guilty, and £100 damages, 'twas moved in arrest of judgment that the action would not lie for this false affirmation; but the plaintiff ought to have informed himself by others, and cited *Grove* and *Nevill's Case*, to be adjudged in this court in Easter term, 16 Car. II. Rot. 401, where in case against an infant for selling a false jewel, affirming it to be a true one, 'twas adjudged the action did not lie; to which 'twas answered that this is a trespass on the case, and an infant is chargeable for trespasses, though not for contracts." Two of the judges held that the action did not lie because the affirmation, being by an in-

fant, was void, and that it was not like under trespass, felony, etc., for under such circumstances a fact or act was done. The other judge doubted, and was of the opinion that infants are chargeable for trespasses, and so if he cheat with false dice, etc. The English law from the earliest period has thrown the mantle of protection around the minor or infant on account of his ignorance and inexperience, and the courts have experienced great difficulty in applying the facts to said principles. In many cases they have either expressly denied or absolutely ignored the doctrine that an infant can be held liable in a court of law for a fraud or deceit connected with a contract, limiting such application to acts purely *ex delicto*. They proceed upon the ground that the invalidity of an infant's contract is a matter defensive, for his protection, and of which all persons dealing with him must take notice; that neither an honest belief by the opposite party that he of full age, nor a false affirmation to that effect by himself, operates to take the matter out of the general rule, since the incapacity to bind himself springs not out of the belief of either of the contracting parties upon the subject, but upon the existence of his minority; that to hold an infant liable for or estopped by any fraud or falsehood in any manner connected with a contract, whether before or at the time of making it, is to deprive him of the protection which the law has given him in consideration of his ignorance and inexperience.

There is a long line of decisions, both English and American, sustaining the doctrine announced in the case of Johnson v. Pie. *supra*. Brown v. Dunham, 1 Root, 273; Norris v. Wait, 2 Rich. L. 148, 44 Am. Dec. 283; West v. Moore, 14 Vt. 447, 39 Am. Dec. 235; Schenk v. Strong, 4 N. J. L. 87; Jennings v. Rundall, 8 T. R. 335; People v. Kendall, 25 Wend. 399, 37 Am. Dec. 240; Penrose v. Curren, 3 Rawle, 351, 24 Am. Dec. 356; Brown v. McCune, 5 Sandf. 224; Wilt v. Walsh, 6 Watts, 9; Price v. Hewett, 8 Exch. 146; Green v. Greenbank, 2 Marsh. 485; Morrill v. Aden, 19 Vt. 505; Jewitt v. Warren, 10 Hun. 560. In the case of Evroy v. Nicholas, 2 Eq. Cas. Abr. 488, decided in the year 1720, it was said: "A., as heir to his father and special occupant, became entitled to a lease for three lives of certain lands in Hampshire, and, being an infant of about seventeen years of age, B., who was his guardian, or acted as such, in 1727 did, by A.'s approbation, for £157, sign a demise of the said lands to the plaintiff for twenty-one years, to commence from May, 1730, at which time a lease in being would determine, about six months before A. would come to age. The money was either paid to A. him-

self or to his guardian by his consent, and the infant, to show his good liking of the bargain, witnessed the deed and the receipt of the money. B. proving afterwards insolvent, and having made several disadvantageous bargains for A., he would have set aside this lease, and actually demised the lands to C., another defendant, who entered upon and evicted the plaintiff, and took a crop of corn which the plaintiff had sowed. The bill against A. was to make a new lease of the premises for twenty-one years, or to refund the £157 fine; and against C., to have satisfaction for the crop. And it was objected for A. that no interest passed by the lease of the guardian, who was nonimal, neither testamentary guardian nor guardian in socage; and, if he had been so, such lease could not be obligatory during A.'s nonage, and that, therefore, the lease in point of law was absolutely void; and, although A. witnessed the lease, yet that could not bind him any more than if he had really executed it, which he might have avoided at his coming to age. King, Chancellor: Infants have no privilege to cheat men. This lease was made with the consent and approbation of A., the infant, who was above the age of discretion, and knew what he was doing, and it's certain his consenting to the lease was the only inducement the plaintiff could have to take it at so large a fine, being he was not to possess the lands 'till six months before the determination of the infancy, etc., and therefore, whether ever the money came to A.'s hands or not, he ought to make good the lease or refund the fine; for otherwise the plaintiff and all other persons would be defrauded by the collusion of an infant and his guardian, and so decreed that, on A.'s refusing to make a lease, he shall repay the fine. But, as to the crop, his lordship would not meddle about that, because in point of law the lease was absolutely null." In the case of Drury v. Drury (decided by the Lord Chancellor in the year 1760) 2 Eden, 39, Reg. Lib. A. 1760, fol. 465, it was declared "that the defendant, Lady Drury, being an infant at the time of her executing the indenture on the 5th of October, 1737, was not barred of her dower in the intestate's real estates, nor of her share of his personal estate, under the statute of distribution. After the decree had been pronounced, the Earl of Buckinghamshire and Lady Mary Ann Drury intermarried, and, the cause being revived, an appeal was prosecuted to the House of Lords. Buckinghamshire v. Drury, 2 Eden, 59. In that case the Earl of Hardwicke said: "See the case of Davila v. Davila, 2 Vern. 724, before cited, and Lord Cowper's reasoning at the end of the case, that the husband might think it not necessary to make a will because he might consider his

wife barred by the agreement. A contrary construction would be to make this adult infant commit a fraud upon her husband by claiming in contradiction to the articles. But minors are not allowed to take advantage of infancy to support a fraud. There was a decree by Lord Cowper (analogous to the case in 2 Leo. 108, of *Piggot v. Russell*), where tenant in tail applied to borrow money on a mortgage. The attorney's clerk who engrossed the deed was the issue in tail, was then about the age of eighteen, and knew of his being issue in tail, but took no notice of it. Lord Cowper relieved against this minor, and would not suffer him to take advantage of his own fraud. *Vide* note following *Watts v. Creswell*, 9 Viner, Abr. 415. In this case I must take it Sir Thomas Drury relied on this agreement, and therefore made no will, and otherwise that he was drawn in and deceived." And it was ordered by the House of Lords: "That so much of the said decree complained of by the said appeal whereby an account is directed of the personal estate of the intestate, Sir Thomas Drury, etc., be affirmed, and that the residue of the said decree should be reversed; and it was declared that the respondent is bound by the agreement entered into in consideration of, and previous to, her marriage with the said Sir Thomas Drury, and that the same ought to be performed and carried into execution, and that the respondent is thereby barred of her dower, and of any share of the said Sir Thomas Drury's personal estate under the statute for distribution of intestates' estates." In the case of *Ex parte Unity Joint Stock Mut. Bkg. Asso.* (decided June 1, 1858, before the Lord Justices) 3 De G. & J. 63, Lord Justice Knight Bruce said: "It is unnecessary to say what in this case we might have thought it fit to do if we had been exercising a jurisdiction merely legal, for our jurisdiction is equitable as well as legal. Again, with respect to our equitable jurisdiction, it is not material to say what we might have thought the proper course to be taken in the absence of decision; for I think that, upon the admitted facts, the case is concluded by the judicial opinions of Lord Cowper, Lord Hardwicke, Lord Thurlow, and other eminent judges which it would be improper in us practically to question. A young man who, from his appearance, might well have been taken to be more than twenty-one years of age, engaged in trade, and wished to borrow or to obtain credit, and for the purpose of so doing represented himself to the petitioning creditor as of the age of twenty-two,—expressly and distinctly so represented himself. We feel no difficulty or doubt on the question whether the minor did at the time believe or not believe what he said, for it is impossible

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from the materials before us to infer that he did believe his statement to be true, or was ignorant of his own age when he obtained the money. The question is whether, in the view of a court of equity, according to the sense of decisions not now to be disputed, he has made himself liable to pay the debt, whatever his liability or non-liability at law. In my opinion we are compelled to say that he has." The Lord Justice Turner: "I have the strongest inclination to expunge this proof, but the authorities are too strong to permit us to do so. If the course which has been taken by courts of equity on this subject is to be altered, it must be so by the House of Lords, and not by us."

The other class of decisions, both English and American, whilst recognizing the nonliability of an infant upon its contract, yet differentiate between holding him upon a contract and making him responsible for his frauds, deceits, and falsehood in matters connected therewith, but not forming a constituent part of it, wherever the action brought or defense pleaded sounds in tort, and not in contract, although the deceit or fraud upon which the same is based was connected with the contract. In the case of *Grove v. Nevill*, 1 Keble, 778, the gravamen was that the infant having by deceit in the sale of goods as his own, whereas in truth they were another's the complainant was damaged, there being no allegation that the infant then and there falsely alleged that he was over the age of twenty-one years, and that the plaintiff, relying upon such statement, bought said goods; and it appears that the case of *Johnson v. Pie*, *supra*, was decided upon the authority of *Grove v. Nevill*, *supra*, the reasoning of which was based upon a false assumption. In the argument of *Johnson v. Pie* the *Grove and Nevill Case* was cited. "where, in case against an infant for selling a false jewel, affirming it to be a true one, it was adjudged the action did not lie," and the case seems to have been considered as if the affirmation that he was of age was to be regarded as a part of the contract. But there is a wide difference between the two cases. In the *Grove and Nevill Case* the subject-matter of the contract was the jewel which was sold. The affirmation that it was a true one was a false warranty of the article sold. If the defendant had been of age, assumpsit might have been maintained. The infant was not to be charged by adopting a different form of action. But the representation in *Johnson v. Pie* and in the present case, that the defendant was of full age, was not a part of the contract, nor did it grow out of the contract or in any way result from it. It is not any part of its terms, nor was it the consid-

eration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the purchase of the land covered by the deed, but that by no means makes it a part and parcel of the deed. It was antecedent to the deed, and, if the infant is liable for a positive wrong connected with the contract, but arising after the contract is made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract. It has been said that "all the infants in England might be ruined" if infants were bound by acts that sound in deceit. But this cannot be a reason why the action should not be maintained for fraudulent wrongs done, for the same reason would seem to apply equally in cases of slander, trover, and trespass. The latter are as much the results of indiscretion as the former, and quite as likely to be committed. In *Bacon. Abr. Infancy*, 1, 3, p. 133, it is said: "Also it seems that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if, by combination with his guardian, etc., he make any contract or agreement, with an intent afterwards to elude it by reason of his privilege of infancy, that a court of equity will decree it good against him according to the circumstances of the fraud." 3 *Gwillim's Bac.* 604. If an infant has fraudulently represented that he is of full age, or actively and purposely conceals his minority, whereby the other party is induced to enter into a contract, then it is held that the infant will be estopped in equity by his fraud from avoiding the contract on the ground of infancy to the prejudice of the other contracting party. *Ferguson v. Bobo*, 54 *Miss.* 121; *Davidson v. Young*, 38 *Ill.* 145; *Conroe v. Birdsall*, 1 *Johns. Cas.* 127, 1 *Am. Dec.* 105. In the state of New Hampshire is an apparent conflict of authority. In the case of *Fitts v. Hall*, 9 *N. H.* 441, an infant had bought a lot of hats, for which he had executed his note, and, in an action upon the note, he availed himself successfully of the plea of infancy. Suit was then brought against him for deceit practised in affirming at and before the purchase that he was an adult, and this was maintained in an elaborate opinion, reviewing the same to some extent, and expressly disapproving the case of *Johnson v. Pie*. Later, in the case of *Prescott v. Norris*, 32 *N. H.* 101, the supreme court of the state, while citing the case of *Fitts v. Hall*, ap-
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parently with disapproval, held that an infant who sold and warranted a barrel of gin to be pure could not be held liable for the false warranty, because that was a part of the contract.

Likewise, in South Carolina, in the case of *Norris v. Wait*, 2 *Rich. L.* 148, 44 *Am. Dec.* 283, it was said that an infant could not prejudice his rights in a court of law by neglecting to state his title to the purchaser of his property from another; yet afterwards, in the case of *Word v. Vance*, 1 *Nott & M'C.* 199, 9 *Am. Dec.* 683, it was held that infancy was no defense to an action for a deceit practised in selling a horse. In the case of *Badger v. Phinney*, 15 *Mass.* 359, 8 *Am. Dec.* 105, the supreme court of that state held that where goods had been obtained by a minor upon the false affirmation that he was of age it vitiated the contract so that no title ever vested in the minor, and that he might be treated as having unlawfully converted them, and might be sued in trover or replevin. This doctrine was approved by Judge Story (*Story, Contr.* §§ 107-111).

In this case it is not necessary to determine as to the liability in actions at law of infants for frauds and torts connected with contracts. The following propositions are raised in this record: (1) Whether or not the plaintiff is entitled to any relief, without paying back to the defendant, the \$125 received by him on December 26, 1905, at the time the deed was made and delivered to the defendant; (2) whether or not the plaintiff is entitled to any relief in this case without paying back to the defendant the \$250 received by him on December 28 or 29, 1905, and credited as a part payment on the consideration for said land. It is settled by the great weight of authority that equity will regard the circumstances surrounding the transaction,—the appearance of the minor; his intelligence; the character of his representations; the advantage he has gained by the fraudulent representations; and the disadvantage to which the person deceived has been put by them in determining whether he shall be permitted to invoke successfully the plea of infancy. That an infant must restore the property which he obtains on a contract where he has been guilty of deceit or fraud before he can avoid it is the universal rule in equity. *Petty v. Roberts*, 7 *Bush*, 411; *Damron v. Com.* 110 *Ky.* 268, 98 *Am. St. Rep.* 453, 61 *S. W.* 459; *Schmitheimer v. Eiseman*, 7 *Bush*, 298; *Davis v. Tingle*, 8 *B. Mon.* 542; *Wright v. Arnold*, 14 *B. Mon.* 638, 61 *Am. Dec.* 172; *Hayes v. Parker*, 41 *N. J. Eq.* 631, 7 *Atl.* 511; *Pemberton Bldg. & L. Asso. v. Adams*, 53 *N. J. Eq.* 258, 31 *Atl.* 280; *Adams v. Fite*, 3 *Baxt.* 70; *Ostrander v. Quin*, 84 *Miss.* 230, 105 *Am. St. Rep.* 426, 36 *So.* 257; *Fer-*

guson v. Bobo, 54 Miss. 121; Levy v. Gray, 56 Miss. 318; Brantley v. Wolf, 60 Miss. 430; Yeager v. Knight, 60 Miss. 732; Willie v. Brooks, 45 Miss. 542; Upshaw v. Gibson, 53 Miss. 341; Baker v. Stone, 136 Mass. 406; Thormaehlen v. Kaepfel, 86 Wis. 382, 58 N. W. 1089; Ryan v. Growney, 125 Mo. 483, 28 S. W. 189, 755; Davidson v. Young, 38 Ill. 149; Bradshaw v. Van Winkle, 133 Ind. 134, 32 N. E. 877; Williamson v. Jones, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 413; 2 Pom. Eq. Jur. 2d ed. § 945; 2 Herman, Estoppel & Res Adjudicata, § 1119; Bigelow, Estoppel, 5th ed. p. 600; 2 Kent, Com. p. 240. In the case of Alfrey v. Colbert, 7 Ind. Terr. 338, 104 S. W. 647, the court said: "It is contended by the appellants that the appellee misrepresented his age, and perpetrated a fraud in inducing them to pay \$550 for the land in controversy. On the other hand, the appellee contends that the money paid to him while a minor has been wasted and squandered, and that consequently he should not be compelled to return the same. The court below found that the plaintiff, at the time of executing the first and second deeds, was inexperienced; that his education and training was limited; that plaintiff was of weak and feeble mind, and, although not insane, his case comes within the category where his property should be placed in the hands of a curator; that the consideration paid by defendants was wholly inadequate. But, in view of the misrepresentations made by the appellee as to his age, we think the court below very properly ordered that the appellee should refund to the defendants within one year from the date thereof all moneys paid to him for and on account of the purchase of said lands, which the court finds to be \$555, with interest at the rate of 6 per cent per annum."

From the facts agreed to have been established by the evidence, if the appellee, Joseph Marshall, had been of age, he could have executed a valid deed to the appellant covering said land, and on account of the affidavit made by said appellee for the purpose of selling said land, that he was twenty-one years of age, and had been since June 21, 1905, and, taken in connection with his physical appearance, the appellant, as a reasonable person, believed the same to be true; that the said appellant, at the time the deed was executed, paid to the appellee the sum of \$125, and executed a proper note for the balance of the purchase price thereon. "He who comes into equity must come in with clean hands." "He that hath committed iniquity shall not have equity." Pom. Eq. Jur. 3d ed. § 397. The appellee will not be

permitted to invoke the powers of equity for the purpose of having the conveyance canceled without offering to return the said \$125.

From the facts agreed, as proved, it further appears that, on the 27th day of December, 1905, the day after the said \$125 was paid to the appellee, his mother stated to the appellant that he was only twelve years old, and cautioned the defendant not to pay plaintiff any more money on the land. There is no agreement as to the proof as to whether or not appellant made reasonable investigation in order to ascertain whether or not the statement of appellee's mother was true. It appears that the appellee in fact was nineteen years of age, and that his mother represented him to be only twelve years of age. The question arises as to whether or not negligence on the part of the officer of the appellant company, although the appellee had been guilty of fraud or deceit, more particularly guilty of the specific criminal offense known as false pretenses under the laws in force in that jurisdiction, would take that transaction out of the rule. Equity is to give relief to parties where it cannot be afforded at law; but equity will refuse to lend its aid in any manner to one seeking its active interposition who has been guilty of any unlawful or inequitable conduct in the matter with relation to which he seeks relief. 16 Cyc. Law & Proc. p. 144. From the agreed proof, it appears that the appellee, not only on the 26th day of December, 1905, practised deceit or fraud upon the appellant company, thereby securing the sum of \$125, but that, a few days thereafter, by repeating the same fraud or deceit, secured the additional sum of \$250. The fact that, in the meantime, information may have come to the officer of the appellant company, which, had it been reasonably followed up and investigated, would have prevented such additional fraud or deceit from having been practiced upon it, does not lessen the fraudulent acts of the appellee. It appears that the appellee is in possession of the land covered by the deed. Is a court of equity to lend its jurisdiction to the party initiating such fraud and deceit by canceling this deed, though it be void? If so, it lends encouragement to such fraud. Equity says to the appellee: "You must invoke my jurisdiction with clean hands, having committed no iniquity in the transaction about which its power is sought to be exercised. If, as a result of your fraudulent act, inconvenience follows to you or the subject thereof, it flows from the necessary consequence of your own act." The doctrine of estoppel does not apply in this case. Act June 30, 1902, chap.

1323. §§ 16, 17, 32 Stat. at L. 503, 504; act April 21, 1904, chap. 1402. 33 Stat. at L. 204. As a general rule an infant's conveyance of realty cannot be conclusively avoided by him until he reaches full age. Welch v. Bunce, 83 Ind. 382; Kilgore v. Jordan, 17 Tex. 341; Cummings v. Powell, 8 Tex. 80; Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 416; McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Singer Mfg. Co. v. Lamb, 81 Mo. 221; Irvine v. Irvine, 5 Minn. 61, Gil. 44; Zouch v. Parsons, 3 Burr. 1794; Stafford v. Roof, 9 Cow. 626; Rool v. Mix, 17 Wend. 119, 31 Am. Dec. 285; Matthewson v. Johnson, Hoffm. Ch. 560; Chapman v. Chapman, 13 Ind. 396. But these authorities apply to voidable, and not void, deeds. No question is raised, however, as to the right of the infant, by his next friend, to institute this action before he attains his majority. However, the rule seems to be that, where the deed of the infant is absolutely void, there could be no objection to a suit during his infancy to have it declared void. Swafford v. Ferguson, 3 Lea, 292, 31 Am. Rep. 639. However, in note to Craig v. Van Bebber, 18 Am. St. Rep. 671, it is stated, referring to the case of Swafford v. Ferguson, supra: "It may be remarked that this case virtually stands alone among recent cases in its persistent adherence to a criterion long since exploded." We are inclined to the doctrine, however, that where the deed is absolutely void, and there is no question of affirmance or disaffirmance, suit may be maintained during infancy to have it declared void. But, in this instance, the appellee, being guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief, not offering to do equity, cannot have the interposition of the powers of equity. It may be insisted by appellee that after he reaches his majority he can more readily find a purchaser for said premises with this conveyance canceled, although it may be absolutely void; but a party with unclean hands with relation to the matter about which he seeks relief for his convenience cannot be permitted to have the aid of equity without purging himself. If a court of equity were to be permitted to lend its aid for any such purpose without equity being done by the party invoking its aid, the purpose for which courts of equity came into being would become abortive.

The judgment of the lower court is reversed, with instructions to proceed in accordance with this opinion.

Dunn, Turner, and Hayes, JJ., concur.

Kane, J., dissents.
19 L.R.A. (N.S.)

VIRGINIA SUPREME COURT OF APPEALS.

JOHNSTON & GROMMETT BROTHERS,
Impleaded, etc., Appts.,
v.

J. E. BUNN et al.

(108 Va. 490, 62 S. E. 341.)

Lien — enforcement — personal judgment.

1. The nonestablishment of the right to a lien in a bona fide proceeding by a subcontractor to enforce a lien against the property of the owner for work performed for the contractor does not defeat the jurisdiction of the court to render a personal decree against the contractor for the amount found due by him.

Construction contract — engineer's estimate — effect of absence.

2. Absence of a final estimate by the engineer upon completion of the work will prevent a recovery by the subcontractor against the contractor for the performance of certain work of the amount alleged to be due, where, by the terms of the contract by which the parties are bound, the procuring of such estimate is to constitute a condition precedent to the right to recover for the work done.

(September 10, 1908.)

Case Note. — Right, upon failure to establish ground of equitable jurisdiction, to obtain in a suit in equity relief that might be obtained at law.

The scope of this note is limited to the question whether, where a complainant fails to state or prove a case which will entitle him to equitable relief, a court of equity will proceed, for the purpose of settling the entire controversy, to decree relief to which he appears to be entitled, but which might have been obtained in a court of law. It does not assume to include cases in which either the relief obtainable at law or the equitable relief sought has been refused in the exercise of the discretion of the court, unless the discretionary refusal of relief under certain circumstances has been so habitual as to have become an established rule. Nor does it include cases where equitable relief has become needless during the pendency of the suit,—as by the defendant's discontinuance of acts sought to be enjoined,—or where the right of the plaintiff to equitable relief passes to another,—as where, during the pendency of a suit for an injunction on behalf of the owner of realty, the plaintiff's death causes the right to the injunction to vest in his heirs, while the right to damages vests in his personal representatives,—or where a like suit is instituted by a tenant whose lease expires *pendente lite*. Another class of cases which it has been deemed proper to exclude, as involving considerations of a peculiar character, is that in which a plaintiff having certain equitable rights has brought his suit for equitable re-

APPEAL by defendants Johnston & Grommett Brothers from a decree of the Circuit Court for Wise County awarding a personal judgment against them in a proceeding to enforce a mechanics' lien. Reversed.

The facts are stated in the opinion.

Messrs. Flannigan & Burnett and Irvine & Morison, for appellants:

No indebtedness is proved by the owner to the general contractor, and there is no foundation for equity jurisdiction.

Taylor v. Netherwood, 91 Va. 88, 20 S. E. 888.

The certificate and final estimate were necessary.

Norfolk & W. R. Co. v. Mills, 91 Va. 613, 22 S. E. 556; Kidwell v. Baltimore & O. R. Co. 11 Gratt. 676.

The subcontractor must complete his part of the work before his lien can be filed.

Moore v. Rolin, 89 Va. 107, 16 L.R.A. 625, 15 S. E. 520.

Mr. W. S. Mathews, for appellees:

The court, having acquired jurisdiction, could properly render a personal decree.

Bailey Constr. Co. v. Purcell, 88 Va. 300, 13 S. E. 456; Rison v. Moon, 91 Va. 384, 22 S. E. 165; O'Brien v. Stephens, 11 Gratt. 610; Devries v. Johnston, 27 Gratt. 809; Dollman v. Collier, 92 Tenn. 660, 22 S. W. 741; 20 Am. & Eng. Enc. Law, p. 274, note 2; Taylor v. Netherwood, 91 Va. 88, 20 S. E. 888; 27 Cyc. Law & Proc. pp. 320, 433.

The personal judgment was not premature.

Roanoke Land & Improv. Co. v. Karn, 80 Va. 589.

lief knowing that the relief sought will be impossible, for the real purpose of obtaining compensation in lieu thereof.

The Protean character of the subject under discussion, arising, as it does, in connection with nearly every form of equitable proceeding or relief, not only precludes, but renders undesirable, the working out of the question in such detail as where some specific question of the granting in equity of relief obtainable at law where some particular form of equitable relief is unsuccessfully sought is under discussion. To such an occasion, therefore, may be postponed the consideration of decisions in proceedings of a purely statutory character, as well as cases arising under statutes providing for the recovery of a personal judgment where the main purpose of the proceeding fails,—as often in the case of mortgages and other liens,—and cases where the plaintiff's claim to equitable relief is met by a countervailing equitable right in the defendant,—as where an injunction is sought against the maintenance of a slightly encroaching building, the removal of which would be of little benefit to the plaintiff, but a considerable detriment to the defendant, so that the equities may be best preserved by awarding a money compensation.

It is believed, however, that the present note, while probably not exhaustive of the decisions, so sufficiently presents them as adequately to represent the state of the law on the subject.

A source of difficulty in connection with the subject under discussion is the apparent treatment of the question in some cases as one of the propriety of the exercise of equity jurisdiction, rather than as one of its existence. Such handling of the question obviates the necessity of taking position on the question (with which some courts appear to have trouble) whether or not the jurisdiction of a court of equity depends upon a demonstration of the existence of some right to equitable relief. A complete exposition of the subject under discussion, however, seems to require their inclusion among the cases hereinafter set forth.

19 L.R.A. (N.S.)

In general.

Although a few cases are found which can be characterized only as variants from the general rule, the preponderance of opinion in relation to the subject under consideration clearly seems to be that where a case for relief in equity fails, a court of equity is without jurisdiction to award other relief by way of disposing of the entire controversy; unless, indeed, it appears that the remedy at law will be inadequate. Otherwise, as the courts have frequently pointed out, a litigant, by a pretended claim for equitable relief, might deprive his opponent of advantages incident to an action at law.

The logic which makes the jurisdiction of a court of equity dependent upon the establishment of a right to equitable relief has not always met with approval. One case, at least, goes so far as to invoke in this connection the principle that the jurisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in a particular case (Walters v. Farmers' Bank, 76 Va. 12, hereinafter set forth at length). A proposed test, that the existence of jurisdiction be determined by the good faith of the complainant, is rejected as unsatisfactory in Hildebrandt v. Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109.

The grouping of the cases following has been made, so far as possible, with reference to the respect in which the complainant fell short of obtaining the equitable relief sought, such arrangement conducing to the juxtaposition of cases containing the greatest number of common characteristics.

Where pleadings are defective.

In Dugan v. Cureton, 1 Ark. 31, 31 Am. Dec. 727, it was held that where no specific ground of equity is alleged in a bill to enjoin the enforcement of a judgment, a court of equity is without jurisdiction to set off a claim for damages based on breach of covenant.

In Townsend v. Vanderwerker, 9 Mackey, 197 (reversed on other grounds in 160 U. S.

Harrison, J., delivered the opinion of the court:

The bill in this case was filed by the appellees to enforce payment of a mechanics' lien, alleged to be due them as subcontractors for work done in constructing a section of the Black Mountain Railroad.

It appears that the Keokee Coal & Coke Company, as general contractors, entered into a contract with the Black Mountain Railroad Company to build for the latter a railroad, several miles in length, between Imboden, in Wise county, and Keokee, in Lee county. The Keokee Coal & Coke Company sublet its entire undertaking, by contract in writing, to the firm of Johnston & Grommett Bros., the appellants, who, in turn, by parol contract, sublet a part of the work to the appellees, Bunn & Monteiro. The

evidence shows that under this parol contract the appellees were to be governed by the written contract which had been entered into by the appellants with the Keokee Coal & Coke Company.

The Black Mountain Railroad Company, the Keokee Coal & Coke Company, and Johnston & Grommett Bros. were made parties defendant to the bill, which alleged that complainants had completed their contract and taken out a mechanics' lien for the balance due them on that portion of the roadbed which they had constructed, and prayed that the Black Mountain Railroad Company and the Keokee Coal & Coke Company be required to answer as to the amount they were due, or would become due, to Johnston & Grommett Bros., by reason of the latter's completion of their

171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258), it is said that there is no ground whatever for coming to a court of equity for damages for the failure specifically to perform a contract; and that therefore a bill which, instead of seeking specific performance of an agreement to convey, sought to recover a claim for money due on account of money laid out and expended by complainant, or a claim for damages for not conveying the property, was properly dismissed.

In *McKinney v. Springer*, 6 Blackf. 511, where complainants filed a bill to obtain a lien on a building erected by them for the amount of their labor and materials, which was not attempted to be maintained as coming within the provisions of the mechanics' lien statute, it was held that there was no ground upon which a court of chancery could grant relief, the bill being in substance one to recover the value of the work done by the complainants.

In *Fultz v. Walters*, 2 Mont. 165, it was held that where a bank issuing a certificate of deposit was unnecessarily made a party to a suit in equity brought by the transferee of the certificate to compel its indorsement by the payee, for the purpose of obtaining a decree requiring the payment of the certificate, the bill should be dismissed as to the bank.

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In *Dakin v. Union P. R. Co.* 5 Fed. 665, it was held that a bill in equity to have full-paid stock issued in place of a mere subscription to stock, which failed to show the payment of anything for the subscription or to offer to pay anything, could not be retained to recover damages, since the entire ground for equitable relief had failed.

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See also subdivision, "Where claim is found wanting in equity," *infra*.

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In *Pond v. Lockwood*, 8 Ala. 669, it was held that where the complainant in a suit to enjoin a judgment failed to make out a case, there was nothing on which to rest the jurisdiction of the court to decree the recovery of a sum of money paid one of the defendants, the court saying: "If it could be entertained because, upon the face, it appeared unobjectionable, then it would be competent to transfer to equity many cases of pure legal cognizance, by making them dependent upon a supposititious statement of facts. This would be a state of things not to be endured, and need but be mentioned to show that the chancellor properly refused to render a decree."

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contract for the construction of the railroad mentioned. The prayer, further, is that complainants, who are the appellees here, be decreed a lien on that part of the Black Mountain roadbed which was constructed by them between stations 834 and 856, described in their mechanics' lien, which was made a part of the bill, and that they be decreed a sale of the same for the payment of their debt, and be given a personal judgment against the Black Mountain Railroad Company and the Keokee Coal & Coke Company for such sums as they may appear to have owed Johnston & Grommett Bros. on the date they, respectively, received notice of the complainants' mechanics' lien, and for general relief.

Upon the bill, the answers, which deny its allegations, and the evidence in the cause,

the decree appealed from was rendered, giving a personal judgment for \$2,203.21, subject to a credit of \$522.15 and costs of suit, against the appellants, Johnston & Grommett Bros., with the right to issue execution thereon. The decree then refers the cause to a commissioner to ascertain whether the Black Mountain Railroad Company and the Keokee Coal & Coke Company are liable to the complainants by reason of the filing of their mechanics' lien, and if so, in what amount.

We are of opinion that the position taken by appellants, that the court was without jurisdiction to enter the judgment complained of, is not tenable. The appellants contend that the only ground for equitable jurisdiction in this case is that the complainants have a mechanics' lien to be en-

performance of a contract in the event of the failure of primary relief by specific performance.

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In *Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529, it was held that where a bill in equity by the trustee of a bankrupt to recover alleged preferences was sought to be sustained upon the theory of a conspiracy between the bankrupt and the preferred creditors, and the proof failed to establish such a conspiracy, the trustee was not entitled to a decree, the court saying: "The former practice in chancery was to dismiss the bill when it was disclosed that there was no ground for equitable interference, even though a cause of action at law appeared to exist; and, under the Code, where law and equity are administered in

shall make and return a final estimate of the work done by contractors, and shall certify the same in writing. It further provides that the procuring of such certificate and final estimate shall constitute a condition precedent to any right of action by contractors against the Keokee Coal & Coke Company.

The evidence shows that during the progress of the work the monthly estimates were made and the appellees paid in accordance therewith; but it clearly appears that no final estimate upon the work done by the appellees has ever been made by the chief engineer; indeed, it is insisted that the work undertaken by the appellees has not been completed. Nor does it appear that appellees have ever mentioned to the chief engineer their claim that the work was completed, or requested of him a certificate in writing showing a final estimate and the balance, if any, due to them. The basis of

the personal decree against the appellants is admitted to be a final estimate upon the work done by appellees, made by engineers who were strangers to the transaction, and employed for the purpose by appellees without the knowledge or consent of the appellants. The evidence shows that, in the nature of things, these outside engineers could not make an accurate or reliable estimate showing the balance due upon an undertaking they had previously had no connection with, and that, in some particulars, their estimates would be necessarily the result of mere conjecture.

A sufficient answer, however, to this proceeding by appellees, is that it violates the express terms of the contract by which they agreed to abide. That contract provides that the engineer in charge of the work shall certify in writing its final completion, together with a final estimate showing the balance due. It was error to ignore,

married woman's separate estate, alleged to have been fraudulently conveyed by her, with the payment of a debt, to which suit her surety was properly made a party, upon the failure to obtain the relief sought a personal judgment might be rendered against the surety. Although expressions used in the opinion seem to depart from the usually recognized doctrine with respect to the granting of legal relief where the main object of the suit in equity fails, the decision finds ample justification in the fact that the right action at law had, during the pendency of the equity suit, become barred by the statutes of limitation. The expressions referred to are to the effect that jurisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in a particular case; so that where a plaintiff, in the bona fide assertion of an equitable claim, invokes the jurisdiction of a court of equity, but, from some cause developed in the course of the investigation, fails in establishing his title to the specific relief claimed in his bill, the court may, instead of leaving the parties to their legal rights and remedies, go on and end the litigation by giving complete and final relief.

In *Boston Blower Co. v. Carman Lumber Co.* 94 Va. 94, 26 S. E. 390, it was held that where, in a suit to enforce an alleged lien, the materials furnished, for which the lien was claimed, were found to be not such as to come within the operation of the lien law, a court of equity had no jurisdiction to render a personal judgment for the amount of the debt in favor of the complainant, who, having retained the title to the goods furnished, had a complete remedy at law. The court said: "Where a plaintiff is properly in equity, that court will oftentimes, in order to prevent a multiplicity of suits and do complete justice, give such relief as is usually afforded only in a court of law; but 19 L.R.A. (N.S.)

the plaintiff must be in court upon a case properly cognizable in a court of equity."

In *Vendome Turkish Bath Co. v. Schettler*, 2 Wash. 457, 27 Pac. 76, it was held that where a mechanics' lien was not established, there was nothing in the case of which equity could take cognizance, but that the suit should be dismissed without prejudice to an action at law to recover the amount claimed.

In *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109, it was held that, in the absence of a statute authorizing personal judgment on failure to establish a mechanics' lien, such judgment could not be rendered upon the theory that a court of equity, having once obtained jurisdiction in a cause, will maintain it to the end. The court discusses the question as follows: "But the question is, When does the court obtain jurisdiction in a cause like this? Clearly, the court had no jurisdiction excepting to foreclose a lien. Now, can a party, by coming into court, and setting up a mere pretended lien, which has no validity, confer jurisdiction upon the court to render a personal judgment upon a contract which otherwise would only be triable in an action at law, and thus deprive the defendant of the benefits of such a trial? It is admitted that, if the equitable features of the action were so wanting or ill-founded as to amount to bad faith upon the part of the plaintiff, the action could not be maintained; but it is contended that if it is apparent the plaintiff sought the equity side of the court in good faith, the court would thereby get jurisdiction; in other words, making the jurisdiction of the court depend upon the good faith of the party in asserting his equitable rights. We do not think this position can be maintained in a case like this. As to whether a lien is sufficient upon its face is purely a question of law, and the defects in the lien in

without cause, this final arbiter agreed upon in the contract, and adopt the uncertain and arbitrary standard of measurements and estimates furnished by strangers employed by one of the parties to the contract without the consent of the other. There is not shown to have been in this case any unnecessary or unreasonable delay by the engineer in charge in making estimates, nor does there appear to have been any other ground for the course pursued by appellees in employing other engineers to perform the duties they had agreed should be discharged by the chief engineer of the Black Mountain Railroad Company. If the conduct of the engineer designated by the contract was fraudulent, or he was guilty of a mistake so gross as to amount to a fraud on the rights of the opposing party, the latter would not be bound by such estimates, but could maintain their action on the contract to recover the amount due them. Norfolk

& W. R. Co. v. Mills, 91 Va. 613, 22 S. E. 556. No such condition, however, appears in this record. On the contrary, the appellees have obtained a decree based upon final estimates made, without apparent cause therefor, by strangers to their contract, and in violation of its express terms.

We are of opinion that the order of reference made in the cause should be enlarged, so as to require the commissioner, in addition to the other inquiries directed, to ascertain and report whether the appellees had completed their work in accordance with the terms of their contract, and, if so, what balance, if any, was due them from the appellants.

The decree appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

this instance were thus apparent by an inspection. The jurisdiction of the court ought not to be made to depend on the mere intent or belief of the plaintiff. If his good faith is to be justified to any extent by the facts, and subject to inquiry accordingly, the law and practice would be rendered very uncertain in this respect, and present great practical difficulties in the determination of questions of jurisdiction to which it would give rise."

In *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721, it was held that where, in an action in equity to foreclose a lien upon certain wheat, it was found that the right to a lien was lost by the wilful inclusion, in the notice of lien, of items not lienable under the statute, the right to proceed in equity ceased.

In *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257, it was held that where specific enforcement of a contract could not be decreed because it had not been acknowledged for recordation, the contract being on its face void in law for all purposes of equity jurisdiction, the alleged equity jurisdiction was merely colorable or pretended; and that therefore the rule that, having jurisdiction for one purpose, full relief or alternate relief will be given, could not be invoked to warrant a decree in favor of the complainant for the recovery of money paid under the contract.

In *Russell v. Clark*, 7 Cranch, 69, 3 L. ed. 271, it was held that where the only ground of equitable jurisdiction was the discovery of facts solely within the knowledge of the defendant, and the defendant, by his answer, disclosed no such facts, and plaintiff supported his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules limiting the jurisdiction of courts required that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.

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In *Dowell v. Mitchell*, 105 U. S. 430, 26 L. ed. 1142, it was held that where, in a proceeding to foreclose a mortgage, it was found that such mortgage was not a lien, a court of equity was without authority to render a decree upon the notes which the invalid mortgage was intended to secure. The court said: "The rule is, that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law."

In *Union Stock Yards Co. v. Nashville Packing Co.* 72 C. C. A. 195, 140 Fed. 701, it was held that where, upon removal of a cause into a United States court, the complainant elected to proceed with it as one of equitable cognizance, and failed to establish its claim to an injunction, the case could not properly be retained for the purpose of awarding damages for breach of covenant, or to determine the right of possession of land, since the remedy in a court of law was entirely adequate for either of those purposes.

In *Van Raalt v. Schneck*, 159 Fed. 248, it was held that where the evidence was insufficient to establish the right to an injunction against infringement of a trade symbol, equity would not retain jurisdiction for the purpose of awarding damages, the complainants having a complete and adequate remedy at law.

—uncertainty.

In *Sims v. McEwen*, 27 Ala. 184, it was held that where a case for specific performance was not made out, the agreement as charged being vague and uncertain, and it being doubtful whether the other party could fulfil the terms of the contract on his

part, the complainant could not properly obtain compensation for services performed by him under the contract, in the absence of any special equity.

In *Zeringue v. Texas & P. R. Co.* 34 Fed. 239, it was held that where a contract was too indefinite to be the subject of a bill and decree for special performance, the bill could not be retained for the purpose of awarding compensation in damages. The court said: "Section 723, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 583, provides that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.' Under no head of chancery jurisdiction can a court of the United States sustain a bill in equity to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law." It may be noted, however, that the statute invoked has, in other instances, been held to be declaratory of a familiar principle, rather than restrictive of the equity jurisdiction of the Federal courts.

Compare *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225, under title, "Existence of other grounds for equitable relief," *infra*.

But see *Paris v. Haley*, 61 Mo. 453, under heading, "Instances in which relief has been granted," *infra*.

—laches.

In *Harrison v. Deramus*, 33 Ala. 403, it was held that where the complainant seeking the rescission or specific performance of a contract to convey lands failed to establish any right to such relief, his right to rescind having been lost by his conduct after notice of the deficiency in the quantity of the lands, and his right to specific performance having been destroyed by his acceptance of a conveyance of all the lands mentioned in the contract to which the defendant ever had any title, after notice that it did not embrace all the lands in the original contract, his bill will not be retained, in the absence of any special equity, for the purpose of awarding damages or compensation on account of such deficiency.

In *Findley v. Koch*, 126 Iowa. 131, 101 N. W. 766, it was held that where complainants were not entitled to specific performance because of want of diligence in asserting their rights under a contract, they were not entitled to damages for its breach.

In *Alger v. Anderson*, 92 Fed. 696, it was held that where a bill for the rescission of a contract to purchase lands upon the ground of fraudulent representations failed of its purpose by reason of laches of the complainant, compensation for the portions of the property for which title had failed could not be awarded. The jurisdiction of the United States courts as courts of equity is elaborately considered, the author of the opinion announcing as his conclusion that, "in the exercise of the limited equity jurisdiction in the courts of the United States, a bill which makes a case for equitable re-

lief, and also in the alternative for the enforcement of a legal right, cannot be sustained when no part of the equitable relief is granted, as this would be to exercise jurisdiction over a purely legal demand, as to which the right of trial by jury is secured."

In *Beers v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 273, 141 Fed. 957, it was held that where complainant's right to an injunction against the maintenance of elevated railway tracks in the street in front of his lots was lost by laches, equity could not determine his damages and order their payment. The court said: "The ascertainment in equity, as an alternative for an injunction, of the damages suffered, is only the form that a decree may take when, within the discretion of the court, an affirmative injunction ought not to be issued. But for a decree of this form, as well as for a decree for an injunction, there must first be established a case in equity. Until that time the party obtains no foothold in equity. Laches prevents such foothold. Laches being disclosed, no cause in equity exists, the party being already remitted, at the time of the filing of the bill, to his remedies at law."

In *Kessler v. Ensley Land Co.* 123 Fed. 546, it was held that where stockholders seeking to set aside conveyances of property of the corporation failed, by reason of laches, to obtain the relief sought, they were not entitled to a personal judgment for the damage and loss which the corporation and its stockholders had suffered by reason of the transactions complained of. The court said: "Such relief . . . is merely incidental to the equitable cause of action; and, when that fails, the bill should not be retained to administer relief which is merely incidental, and ordinarily a matter purely of legal cognizance."

—statute of frauds.

In *Murdock v. Anderson*, 57 N. C. (4 Jones, Eq.) 77, it was held that where, on account of the insufficiency, under the statute of frauds, of the writing relied upon to establish the contract, equity declined to decree specific performance, it could not assume jurisdiction to decree the repayment of the purchase money, the complainant having an adequate remedy at law.

But compare *Paris v. Haley*, *supra*, under heading, "Instances in which relief has been granted," *infra*.

Where claim is found wanting in equity.

In *Hurlbut v. Kantzler*, 112 Ill. 482, it was held that a person contracting with the lessee for the assignment of a lease, knowing that such assignment could not be made without the express consent of the lessor, was not entitled to damages in a court of chancery in lieu of specific performance.

In *Farson v. Fogg*, 205 Ill. 326, 68 N. E. 755, it was held that a bill to compel specific performance of a contract to pave a public street, which contract was known by the

parties not to be performable without the consent of the city, could not be retained for the assessment of damages, the court saying: "Where the bill makes no case for a specific performance, and shows no ground for such relief, a court of equity will not decree damages, because a court of equity does not sit for the purpose of entertaining bills whose only object is to secure damages. The remedy in such case is at law, and not in equity."

In *Sayer v. Brown*, 7 Ind. Terr. 675, 104 S. W. 877, it was held that where specific performance of a contract unlawfully to get title to Indian land was refused on account of its illegality, no recovery could be had of a sum of money advanced under the agreement.

In *Reinicker v. Smith*, 2 Harr. & J. 421, where specific performance of a contract was refused upon the ground of imbecility of the other contracting party, it was held erroneous to decree that his heir should refund the consideration paid.

In *Banaghan v. Malaney*, 200 Mass. 46, ante, 871, 85 N. E. 839, it was held that, upon refusal of specific performance of a contract to sell real estate because of inequitable conduct on the part of complainant, the bill need not be retained for the assessment of damages, although this might have been done, but complainant may be left to his remedy at law.

In *Welles v. River Raisin & G. River R. Co.* Walk. Ch. (Mich.) 35, it is held that the court will not aid the party at law to whom it has refused relief in equity on account of the illegality of the transaction.

In *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514, the rule that equity cannot grant damages unless there is some case of equitable relief made out also, to which the damages would be applicable or subsidiary, was applied in a case where specific performance of a contract whereby a man agreed to let his married daughter and her family live on his property if she would support him during his life, and also promised that the lands should be hers after his death, was denied to the daughter's husband, who claimed as her heir, upon the ground that the daughter's death had made performance impossible, even had not the character of the duties to be performed made a decree impracticable.

In *Scott v. Billgerry*, 40 Miss. 119, it was held that where the contract in question, which was one for the sale of a quantity of cotton, was one of which equity will not decree specific performance, the complainant was not entitled to a decree for the value of the property, since courts of equity do not entertain jurisdiction to give redress by way of compensation or damages for breach of contract or other wrongs, where these are the sole objects of the bill, and are not incidental to other relief, unless some peculiar equity intervenes.

In *Roller v. Murray*, 107 Va. 527, 59 S. E. 421, it was held that a complainant to whom specific performance was not granted on the ground that the contract was champertous

could not recover reasonable compensation for his services upon a *quantum meruit*, the court saying: "Any claim upon a *quantum meruit* is a legal demand, to be asserted at law. The doctrine that when a court of equity once acquires jurisdiction of a cause, it will do full justice between the parties, though, in doing so, it has to administer and decide rights properly pertaining to the common-law jurisdiction, does not apply to the case of a bill which goes out of court on a demurrer for want of equity."

In *Marks v. Gates*, 14 L.R.A. (N.S.) 317, 83 C. C. A. 321, 154 Fed. 481, it was held that where, on account of the unconscionable character of a contract whereby one party agreed, in consideration of the cancelation of a debt and cash advanced, to convey to the other a one-fifth interest in any and all property which he should acquire, either by location, purchase, or otherwise, in the territory of Alaska,—there being no limit as to the time or manner of acquisition of the property, or as to its character or value,—specific performance was denied, the facts presented in the complaint were not such as to entitle the court to retain the case for the assessment of such damages as the complainant might have sustained for breach of contract. The court said: "A court of equity will not grant pecuniary compensation in lieu of specific performance unless the case presented is one for equitable interposition, such as would entitle the plaintiff to performance but for intervening facts, such as the destruction of the property, conveyance of the same to an innocent third person, or the refusal of the vendor's wife to join in a conveyance."

But compare *Bullock v. Adams*, 20 N. J. Eq. 367, under title, "instances in which relief has been granted," *infra*.

See also cases in subdivision "Where pleadings are defective," *supra*.

Failure to establish ground of jurisdiction.

In *Crowell v. Young*, 4 Ind. Terr. 36, 64 S. W. 607, it was held that where a Federal court was without jurisdiction of a bill in equity to foreclose a mortgage by reason of the lands covered thereby being Indian lands, it could not have decreed the payment of the note thereby secured, because the proceedings for the foreclosure of the mortgage alone gave jurisdiction to equity, and when that fell the whole case in that forum fell with it.

In *Love v. Morrill*, 19 Or. 545, 24 Pac. 916, it was held that where the proof in a suit brought under a statute giving courts of equity jurisdiction over disputes as to boundary lines showed that the only controversy between the parties was the legal title to a strip of land claimed to have been acquired by adverse possession, equity could not determine the controversy, but should remit the parties to their remedy at law.

In *Denny v. McCown*, 34 Or. 47, 54 Pac. 952, it was held that the rule that a court of equity retaining jurisdiction of a case for one purpose will retain it till complete jus-

tice is administered had no application to a case where, on account of the invalidity of a trust deed sought to be foreclosed, its jurisdiction could not be legally exercised; and that therefore it could not award a money judgment upon the indebtedness secured.

In *Marsh v. Haywood*, 6 Humph. 210, it is said that where a bill in equity is dismissed for want of jurisdiction, all the power of the court also fails, except to give judgment for costs.

See also *Russell v. Hayner*, 64 C. C. A. 424, 130 Fed. 90, under title, "Where pleadings are defective," supra, and *Boston Blower Co. v. Carman Lumber Co.* 94 Va. 94, 26 S. E. 390; *Vendome Turkish Bath Co. v. Schettler*, 2 Wash. 457, 27 Pac. 76; *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109; *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721, under heading, "Where proof fails to establish case," supra.

Instances in which secondary relief has been granted.

There are, as hereinbefore stated, a few decisions—some of them clearly of a sporadic character—in which some show of right in a complainant who has failed to establish his claim to equitable relief seems to have led the court to afford relief which might have been obtained at law; and which appear to constitute an irreconcilable minority.

In *Downes v. Bristol*, 41 Conn. 274, where the rescission of a contract for the exchange of lands was sought on the ground of fraud, but it appeared that the alleged fraudulent representation was made in good faith, and that compensation might be made in damages for the difference in value, it was held that the failure of the plaintiff to establish a right to rescission did not divest the court of jurisdiction to decree the payment of damages.

In *Green Bay Lumber Co. v. Miller*, 98 Iowa, 468, 62 N. W. 742, 67 N. W. 383, it was held that where an action for the foreclosure of a mechanics' lien was properly brought in equity, the complainant was entitled to judgment for the amount due even though the lien should prove to be invalid.

In *Atkinson v. Felder*, 78 Miss. 83, 29 So. 767, it was held that where a mortgagee had properly brought a suit in equity for the recovery of the debt and the foreclosure of a mortgage given on lands of a wife to secure the joint note of herself and husband, the fact that the mortgage was adjudged void because of the insanity of the wife did not preclude the court from giving a recovery for the money claimed, though thereby adjudging a purely legal right.

In *Paris v. Haley*, 61 Mo. 453, it was held that where a bill to obtain the specific performance of a contract prayed in the alternative for its rescission, and specific performance was refused because of the uncertainty of the contract and the failure to reduce it to writing, the court would proceed to grant complete relief. The court said: "It seems to be well established that a court

of equity will not turn a party out of court, to pursue his remedy at law, where complete justice can be done by the court of equity, and this, although, in its progress, the court may decree on a matter cognizable at law. . . . In this case the plaintiff has the legal title and the defendant's notes, and it would seem that, so far as he was concerned, his remedy at law was ample; but the court having jurisdiction of the case, as stated in the bill, and asking in the alternative for rescission, the court should proceed to settle the controversy, and we think it may be most equitably settled in the mode above suggested."

In *Bullock v. Adams*, supra, it was held that where specific performance was refused to a complainant who was in default, the court might, under the prayer for general relief, have directed the money paid to be refunded to the complainant although such money could be recovered at law: upon the principle that when a matter is before the court properly for relief which can only be had in equity, the court will grant such other relief, arising out of the facts of the case, to which the party is entitled, although the relief can be had at law.

In *Wolcott v. Sullivan*, 1 Edw. Ch. 399, it was held that where a mortgagor had filed a bill against a mortgagee who was also the lessee of the mortgaged premises, requiring an account of what was due for principal and interest, and also on the lease for rents, although it turned out that he was not entitled to a credit on his bond and mortgage for the rents claimed to be due, he had a right to an account of such rents, and, as chancery had obtained jurisdiction for one purpose, it would retain it for all the purposes of the suit; it being as competent to give relief in relation to the rent as a court of law. On appeal, in 6 Paige, 117, in which the decree was affirmed, it was said that the objection that complainant had an adequate remedy at law for the recovery of his rent was not made in defendant's answer in such a form as to enable him to take advantage of it at the hearing, and that the question as to complainant's right to the rent having been fully litigated by both parties, it would have been improper to turn complainant around to a suit at law for the recovery of such rent.

In *Salinas v. Ellis*, 26 S. C. 338, 2 S. E. 121, the right of a complainant in a foreclosure action to a personal judgment for the indebtedness was recognized, although it was held that a judgment of foreclosure was rendered improper by the fact that the lien of the mortgage had been discharged by a tender.

In *Evans v. Kelley*, 49 W. Va. 181, 38 S. E. 497, it was held that where, in a suit brought to enforce the payment of a balance of purchase money due as a lien upon two tracts of land, upon one of which it was a purchase-money lien, and upon the other of which security had been given therefor, it developed that, by virtue of a release postponing the lien on the second tract to another lien, such tract, when sold, having

failed to bring more than enough to pay such other lien, the first tract was relieved from the lien, a personal judgment upon the note, secured against the surety thereon, was proper, the court saying: "It is now firmly established as a rule of equity that although the relief originally sought is denied, yet, having assumed jurisdiction, equity, to avoid further litigation, will grant relief between the parties to the suit, although such relief is legal in its nature."

In *Andrus v. Berkshire Power Co.* 77 C. C. A. 248, 147 Fed. 76 (writ of certiorari denied in 203 U. S. 596, 51 L. ed. 333, 27 Sup. Ct. Rep. 784), it was held that where, in a suit to restrain the flooding of complainant's land by the construction of a dam, it appeared that plaintiff's conduct, indicative of his willingness to accept compensation, was such that he was not entitled to an injunction, the court would proceed to ascertain the damages to which he was entitled by reason of the construction, maintenance, and use of the dam.

—existence of other grounds for equitable relief.

There are, however, cases in which the granting of a money decree, even though the complainant fails to establish his claim to the primary equitable relief sought, is clearly rendered proper by the inadequacy of the remedy at law or the presence of some other recognized ground of equity jurisdiction. These cases are in no way at variance with the doctrine hereinbefore stated to be supported by the weight of authority.

In *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225, it was held that when a purchaser who has entered into possession, and who, upon the faith of the contract, has made valuable improvements upon the land, afterwards files his bill to compel a specific performance, but fails to establish his case with sufficient certainty to entitle him to that relief, the bill may be maintained for the purpose of allowing him compensation, if he has not a full and adequate remedy at law,—as by reason of the insolvency of the other party.

In *Glinski v. Zawadski*, 8 Fla. 405, it was said that, as a general rule, when specific performance is denied, the jurisdiction of equity terminates, so that compensation cannot be decreed; but that there are exceptional cases in which, whenever a clear equity is found to have arisen between the parties to the contract, growing out of its peculiar character or nature, there can be no doubt that the court may retain the bill for the purpose of having that equity properly adjusted.

In *Bourke v. Hefter*, 202 Ill. 321, 66 N. E. 1084, it was held that where a bill to foreclose a trust deed and a cross bill praying for its cancellation made a case cognizable in equity, the court, though finding that the party liable on the notes which the trust deed purported to secure was not bound by such trust deed, had power to enter a personal judgment for the amount

found due on the notes, and to require its payment as a condition to setting aside the trust deed.

In *Nudd v. Powers*, 136 Mass. 273, where a bill brought for a sale of an estate, upon the rents of which a charge was created by will, failed to obtain that form of relief, it was held that it might be sustained to declare and enforce the charge, the legal remedies for which, if any, are either derived from equity, and therefore do not take away its jurisdiction, or are inadequate.

In *Hawley v. Sheldon*, Harr. Ch. (Mich.) 420, it was held that where equity refused to decree specific performance, upon the ground of want of mutuality in the contract, it would nevertheless retain the bill for the purpose of ascertaining the costs of the improvements made by the complainant upon the property, and adjusting mutual accounts, the court saying that, from the changes in the title to the property and the singularly indefinite manner in which the business had been transacted, the remedy of the complainant at law would perhaps be difficult and less plain and adequate.

In *Anthony v. Leftwich*, 3 Rand. (Va.) 238, it was held that where, under the circumstances of the case, a contract ought not in equity to be specifically executed, compensation for improvements made upon the faith of the contract may be awarded.

See also *Walters v. Farmers' Bank*, 76 Va. 12, under title, "Where proof fails to establish case," supra.

Effect of Code provisions.

The effect of statutory changes providing for the granting of judgments at law and equitable relief by the same tribunal, and abolishing distinctions in the form of pleadings, may be best traced in detail in the decisions hereinafter set forth. It may here be stated, however, that the inherent distinctions between actions at law and suits in equity are still recognized; and the effect, broadly stated, of such statutory changes, is to permit the retention of a case in which the allegations of the complaint to which an answer has been filed disclose, in addition to a claim for equitable relief, the existence of a cause of action at law. (See cases under heading, "—as warranting relief on legal cause of action," *infra*.)

But where the complaint, as framed, discloses only a cause of action in equity, the court cannot, upon denying equitable relief, enforce a legal right disclosed by the proof. (See cases under heading, "Rule that pleadings must disclose legal cause of action," *infra*.) Especially is this true where the right of action at law is inconsistent with the claim to equitable relief. (See *Kinsey v. Bennett*, 37 S. C. 319, 15 S. E. 965, *infra*.) And the principle will not be extended to special proceedings, the statutory provisions relative to which do not contemplate the use of the proceeding for the purpose of granting legal relief where the right to the relief primarily sought is not established. (See *Dudley v.*

Third Order of St. Francis, 138 N. Y. 451, 34 N. E. 281; *Weyer v. Beach*, 79 N. Y. 409; *McDonald v. New York*, 58 App. Div. 73, 68 N. Y. Supp. 462; *Castelli v. Trahan*, 77 App. Div. 472, 78 N. Y. Supp. 950; *Gallick v. Engelhardt*, 36 Misc. 269, 73 N. Y. Supp. 309; *Sinclair v. Fitch*, 3 E. D. Smith, 677, *infra*.)

But the continued recognition of the inherent distinction between actions at law and in equity notwithstanding the changes effected by the adoption of the reformed procedure is best shown by a number of cases which appear to warrant the statement that where the allegations upon which equitable relief is sought prove to be absolutely ungrounded, the case will not be retained as to do so would be to permit a plaintiff at will to convert a cause of action at law into one in equity. (See *Miller v. St. Louis & K. C. R. Co.* 162 Mo. 424, 63 S. W. 85; *W. J. Johnston Co. v. Hunt*, 66 Hun, 504, 21 N. Y. Supp. 314; *Whyte v. Builders' League*, 35 App. Div. 480, 54 N. Y. Supp. 822; *Rosenheimer v. Standard Gas Light Co.* 39 App. Div. 482, 57 N. Y. Supp. 330; *Clark v. Smith*, 90 App. Div. 477, 86 N. Y. Supp. 472; *American Ice Co. v. New York*, 51 Misc. 114, 100 N. Y. Supp. 748; *Schroeder v. Ennis*, 5 N. Y. S. R. 881, hereinafter set forth at length.)

—in general.

In *Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 164, it was held that where actions are begun in chancery which, upon their face, appear to be exclusively and wholly cognizable at law, they may be transferred to the law side of the court on motion of either party, or by the court on its own motion; failure to do so, however, without a motion by parties for the purpose, not being reversible error; but that, if there be any equitable element to which the jurisdiction of a court of chancery may attach, then the court in the same proceeding may administer all legal relief connected with the subject-matter and essential to do full and complete justice at once to all parties before it.

In *Sadlier v. New York*, 185 N. Y. 408, 78 N. E. 272, it is said, in discussing the changes effected by the Code: "The inherent, fundamental differences between actions at law and actions for equitable relief, such as determine whether a trial of the action by jury is a matter of right, and otherwise affect the interests of litigants, have not been and cannot be abolished. For such reason and for the very simple reason that a person must, in his complaint, as we have seen, state the facts constituting his cause of action, a plaintiff who brings an action for equitable relief must establish such cause of action or his complaint should be dismissed. It is, therefore, frequently held that damages, as in an action at law, cannot be given in an action in equity, where the plaintiff has failed to establish his right to equitable relief."

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—as warranting relief on legal cause of action.

In *Becker v. Superior Ct.* 151 Cal. 313, 90 Pac. 689, it was held that the court had jurisdiction, in an action to establish a mechanics' lien, although the amount involved was less than the jurisdictional amount for which an action at law might be maintained, to render a personal judgment for the amount due, though the lien failed, since in California legal and equitable remedies may be pursued and granted in a single action; and the fact that the equitable relief is not obtained furnishes no reason in itself for the refusal of legal relief in the same action,—overruling *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785.

A like decision was made in *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983.

In *Leuschner v. Duff*, 7 Cal. App. 721, 95 Pac. 914, it was held that where complainant failed to obtain specific performance of a unilateral contract on account of the offer having been withdrawn by the defendant before the offer of performance by complainant, the trial court, applying the rule that a court of equity, having acquired jurisdiction of a cause, will grant any relief to which the parties are entitled, properly decreed the restoration to the plaintiff of the consideration paid.

In *Jaekel v. Pease*, 6 Idaho, 131, 53 Pac. 399, it was held that, in a suit to foreclose a mortgage, where foreclosure was denied on account of the invalidity of the mortgage by reason of the certificate of acknowledgment not complying with the statute, the plaintiff was nevertheless entitled under the Code to judgment for the amount of the mortgage debt shown by the pleadings and proof to be due him, against defendants personally liable therefor.

In *Marquat v. Marquat*, 12 N. Y. 336, it was held, in view of the Code provision that, if the defendant answers, the court may grant plaintiff any relief consistent with the case made by the complaint and embraced within the issue, that where, in an action to establish an alleged lien for money loaned, the plaintiff failed to establish a case entitling him to the relief specifically demanded, but the evidence showed a loan of money to one of the defendants remaining due and unpaid, the court might give judgment therefor.

In *New York Ice Co. v. North Western Ins. Co.* 23 N. Y. 357, reversing 31 Barb. 72, a suit to reform an insurance policy and to recover judgment for a loss thereon, it was held erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief demanded, if there was enough left of his case to entitle him to recover a sum in which he was insured.

In *Herrington v. Robertson*, 71 N. Y. 280, it was held that where a complaint seeking to establish a lien upon certain property for money advanced towards its purchase was so framed as to present a case for equitable cognizance, and there was no demand

in any stage of the case by the defendants that a jury should pass upon the case, the court could then, though the plaintiff failed to establish his right to a lien, give him judgment for the amount of the advance.

In *Barlow v. Scott*, 24 N. Y. 40, it was held, in view of the Code provisions above referred to, that where the facts alleged in a complaint framed for the specific performance of an agreement, and, in default thereof, for compensation in damages, were not sufficient to justify a decree for specific performance, as they showed that the plaintiff had no valid title or interest, and that the same was in the possession of another party, holding under a good and valid title, the court might decree compensation, although it was conceded that, under the former judicial system, a court of equity would not have retained the suit for such purpose, for the reason that actions for damages only were properly cognizable in courts of law, in which a perfect remedy could be had.

In *Cuff v. Dorland*, 55 Barb. 481 (reversed on other grounds in 57 N. Y. 560), it was said that the rule is now well settled that in actions brought for equitable relief, and tried before a judge, if there appears to be no ground for granting such relief, the court shall retain the case, and grant such legal relief as may be just; and it was therefore held that where specific performance of a contract was refused because of its imperfect character, and because the circumstances under which it was executed were not of a character to call for its enforcement by the court, the case should nevertheless have been retained for the purpose of awarding to the plaintiff the damages he was entitled to for the nonperformance.

See also, as adhering to the same general doctrine, *Seeley v. New York Nat. Exch. Bank*, 8 Daly, 400, affirmed in 78 N. Y. 608.

In *Pendleton v. Dalton*, 92 N. C. 185, it was held that where both legal and equitable redress may be had in the same tribunal and in a single action, and a vendor resists specific performance of a contract as being void under the statute of frauds, the court will proceed to adjudge the return of what he has received, or compensation in value.

In *Gordonsville Mill. Co. v. Jones* (Tenn. Ch. App.) 57 S. W. 630, it was held that under the Code provision that, when the court at chancery refuses a creditor equitable relief, it may, notwithstanding, award him judgment on his claim, a complainant seeking to set aside an assignment upon the ground of fraud was, although unsuccessful, entitled to a decree for the amount of his debt.

In *More v. Ruggles*, 15 Wis. 275, it was held that where a summons was sued out for damages for breach of covenant and a petition filed claiming a materialman's lien on a building, the insufficiency of the proceedings for the purpose of enforcing the lien was no reason why the plaintiff should not take a personal judgment.

In *Leonard v. Rogan*, 20 Wis. 540, it was held that although, in an action to charge the separate estate of a married woman with 19 L.R.A. (N.S.)

the value of services rendered by an attorney with relation to it, equitable relief was denied upon the ground that the contract was one obligatory upon the married woman at law, judgment might nevertheless be given for the value of such services. The court said: "It by no means follows, because the plaintiff has demanded relief in equity when he should have asked a judgment at law for damages, that his action must be dismissed. Judgments at law and relief in equity are now granted by the same judicial tribunals. The old distinction between legal and equitable remedies is abolished, and the forms of pleading in all civil actions in courts of record are now the same. Rev. Stat. chap. 125, § 1. Except in cases where there is no answer, the plaintiff is entitled to any relief consistent with the case made by the complaint and embraced within the issue, although it be not the relief specifically demanded. Rev. Stat. chap. 132, § 29; *Emery v. Pease*, 20 N. Y. 64. If the plaintiff demands relief in equity when, upon the facts stated, he is only entitled to a judgment at law, or *vice versa*, his action does not, as formerly, fail because of the mistake. He may still have the judgment appropriate to the case made by the complaint. This is going, perhaps, somewhat further than this court has heretofore been required to go, but it is no doubt in strict accordance with the letter and spirit of the statutes referred to, and in harmony with the opinion of the highest court in the state of New York upon the same statutes, our legislature having borrowed the provisions from that state." It was admitted, however, that the defendant would have been entitled to a jury trial had she not waived the privilege by failing to demand it.

In accordance with the doctrine laid down in the preceding case, it was held in *Stroebe v. Fehl*, 22 Wis. 337, that a complaint which fails to make out a case for equitable relief will not be dismissed on demurrer if it states a cause of action at law for damages.

In *Hopkins v. Gilman*, 22 Wis. 476, it was held that although specific performance could not be granted of the contract set up in the complaint on account of the incompleteness of such contract in requiring the purchase price to be fixed by arbitrators, nevertheless equity might retain the suit for the purpose of awarding compensation for the value of the improvements.

—rule that pleadings must disclose legal cause of action.

But an allegation of grounds in plaintiff's complaint for equitable relief and nothing else, where proof of such grounds fails, does not permit the court to try without a jury a cause of action at law appearing to arise out of the transaction. *Bradley v. Aldrich*, 40 N. Y. 504, 100 Am. Dec. 528; *Brinekerhoff v. Bostwick*, 105 N. Y. 567, 12 N. E. 58. In the latter case it is said: "When a party alleges a cause of action of an equitable nature he must prove one, so far as the

question of a trial by jury is concerned, and he cannot escape such tribunal by alleging an equitable cause of action, and, while wholly failing to prove it, obtain a trial by the court of a common-law action arising out of the transaction."

See also to the same effect, *Gall v. Gall*, 17 App. Div. 312, 45 N. Y. Supp. 248; *Green v. Stewart*, 19 App. Div. 201, 45 N. Y. Supp. 982; *Vincent v. Moriarty*, 31 App. Div. 484, 52 N. Y. Supp. 519; *Horn v. Ludington*, 32 Wis. 73; *Wrigglesworth v. Wrigglesworth*, 45 Wis. 255.

In *Hawes v. Dobbs*, 44 N. Y. S. R. 890, 18 N. Y. Supp. 123, it is said: "Where a complaint sets forth merely a cause of action in equity, and equitable relief only is asked for, as was done in this case, even if the proof shows a right to a legal remedy, the plaintiff cannot obtain it in that action. And so, where a complaint is drawn only as in a common-law action, equitable relief cannot be granted to the plaintiff in that action. The clear distinction between equitable and legal causes of action, and the remedies appropriate to them, still exists, and a recovery must be had *secundum allegata et probata*. This has been stated in many reported cases, among them being *Heywood v. Buffalo*, 14 N. Y. 540; *Bradley v. Aldrich*, supra; *Mann v. Fairchild*, 2 Keyes, 111; *Peters v. Delaplaine*, 49 N. Y. 302; *Graham v. Read*, 57 N. Y. 681; *Stevens v. New York*, 84 N. Y. 296; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 83; *Phelps v. New York*, 25 Abb. N. C. 152, 11 N. Y. Supp. 657; *Arnold v. Angell*, 62 N. Y. 508."

In *Toplitz v. Bauer*, 26 App. Div. 125, 49 N. Y. Supp. 840, it is said that where a complaint alleges facts sufficient to sustain a cause of action in equity only, and such an action is brought on for trial as an equitable action, if the plaintiff fails to prove the facts entitling him to relief in equity, it is the duty of the court to dismiss the complaint, leaving the plaintiff to commence an action at law to recover for a legal cause of action, if any exists in his favor against the defendant; but that where a complaint alleges facts to constitute a cause of action either at law or in equity, and where, upon the trial before a court of equity, it appears that the plaintiff is not entitled to equitable relief, the court may then, in certain cases, retain the action and order it to be tried as an action at law to enforce a legal cause of action which the facts alleged in the complaint would show existed in favor of the plaintiff.

In *Von Beck v. Rondout*, 15 Abb. Pr. 48 (affirmed without opinion in 41 N. Y. 619), it was held that an action of a purely equitable nature cannot be retained for the purpose of recovering damages which the complaint does not demand.

In *Coit v. Fougere*, 36 Barb. 195, it was held that it would be plainly unjust, in a case brought to assert a vendor's lien, and where the right to such a lien was not established, to give the plaintiff a judgment for the unpaid purchase money, carrying 10 L.R.A. (N.S.)

with it the costs of an action which was defended to resist the enforcement of the lien, and would have been differently defended, or perhaps would not have been defended at all, if its purpose had been simply to recover a judgment for the consideration money of the sale.

In *Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529, it is said: "Under the Code, where law and equity are administered in the same court, a plaintiff cannot be permitted to deprive the defendant of the right to a jury trial by the making of allegations whereby an equitable issue is tendered, and then maintain the finding on the ground that sufficient facts were shown to warrant a recovery in a court of law."

—instances in which relief obtainable at law has been denied.

In *Miller v. St. Louis & K. C. R. Co.* 162 Mo. 424, 63 S. W. 85, it was held that where, in an action at law, the answer sets up an equitable defense, in which, however, no equity is found, the court will not retain the case to try on its equity side the purely legal issues that may be in it. The court said: "The uniting of law and equity in one suit, as authorized by our Code, does not confuse the two, but only requires both to be tried in one court; the issues in equity being for trial by the judge as a chancellor, the issues in law by the same judge with a jury."

In *W. J. Johnston Co. v. Hunt*, 66 Hun, 504, 21 N. Y. Supp. 314 (affirmed on opinion below, in 142 N. Y. 621, 37 N. E. 564), it is held that although it may be within the power of the court, in an action in which both equitable and legal relief are sought upon the same state of facts, to retain the action where the plaintiff fails to show himself entitled to equitable relief, and dispose of the question of legal relief as though the action had originally been brought only for such relief, yet it is discretionary with the court as to whether it will retain the action; and that it is a proper exercise of such discretion to dismiss a suit where the evidence discloses the fact that, at the commencement thereof, the plaintiff was not entitled to any equitable relief.

In *Whyte v. Builder's League*, 35 App. Div. 480, 54 N. Y. Supp. 822 (affirmed on other grounds in 164 N. Y. 429, 58 N. E. 517), it was held that where an action in equity to compel restoration of certain premises to their original condition, and for an injunction against interference with the plaintiff's use and occupancy thereof, and for damages, failed as an equitable action in its entire scope, the court was not bound to retain it for the purpose of ascertaining whether any damage was sustained by the plaintiffs by any act of the defendant.

In *Rosenheimer v. Standard Gaslight Co.* 30 App. Div. 482, 57 N. Y. Supp. 330, it was said that upon the denial of equitable relief in an action for an injunction against an alleged nuisance, and for damages, it

would have been impossible for the court to retain the case for compensation, and that, if the plaintiff had no right to resort to a court of equity, his complaint would inevitably have been dismissed.

In *Clark v. Smith*, 80 App. Div. 477, 86 N. Y. Supp. 472, an action to vacate a judgment and recover damages, which was based upon the fact that the plaintiff, after having been sued, paid the amount of his debt and the accrued costs, which payment not coming to the knowledge of the attorney in the case, judgment was taken by default, a majority of the appellate court concurred in the reversal of a judgment in favor of the plaintiff for damages. The justice writing the opinion for reversal said that the plaintiff himself having brought about the condition of affairs complained of was not entitled to equitable relief, and, having failed in his right to equitable relief, could not recover the damages, if any were sustained, since, although the award of damages is incident to the enforcement of equitable rights, it cannot of itself sustain a judgment in an equitable action.

In *American Ice Co. v. New York*, 51 Misc. 114, 100 N. Y. Supp. 748, it was held that where, in an action to restrain a city from completion of a public improvement until damages should be paid, it appeared that condemnation proceedings to acquire title to plaintiff's property were being prosecuted, the plaintiff was entitled neither to injunctive relief nor a judgment for damages. The court said: "The plaintiff correctly states the rule that, the jurisdiction of equity having once attached, the court may retain the cause for the purpose of awarding full and final relief in the premises. The plaintiff errs, however, in applying that rule to this case. Equity has never attached. The only equitable feature was the claim to injunctive relief. The right to that relief never existed. An action at law cannot be converted into one in equity merely by associating with a claim for damages a prayer for equitable relief which, under no circumstances, could be awarded. The substance of this action rests in the demand for damages. Those damages, whatever they may be, are recoverable in the pending condemnation proceedings." This case, however, after being affirmed without opinion in 122 App. Div. 888, 106 N. Y. Supp. 1115, was reversed in (N. Y.) 87 N. E. 765, upon the ground that the plaintiff, although not entitled to an absolute injunction, was entitled to one conditioned upon the failure of the city to move promptly in the condemnation proceedings.

In *Schroeder v. Ennis*, 5 N. Y. S. R. 881, it was held that where, in an action to compel the specific performance of an alleged agreement to execute a lease of certain premises, and to enjoin the defendant from taking summary proceedings to remove plaintiff from the premises as holding over after the expiration of his tenancy, it was found that the plaintiff never had a case for submission to a court of equity, the court would not pass upon his alleged legal defense

to the action of his landlord. The court said: "It was argued that the court, having once obtained equitable jurisdiction of the case, should retain it for the purpose of deciding all the questions and doing justice between the parties. If this be so, all that a party need do, to transfer his litigation to a court of equity, is to allege grounds of equitable jurisdiction, and, upon the trial, come in with a purely legal cause of action or defense. It must be the facts, and not the allegations, which call upon the court to exercise its equity jurisdiction."

A similar doctrine prevails where the equitable jurisdiction is statutory, as in the case of the enforcement of mechanics' liens. In such case it is held that, where no lien exists, such form of proceeding cannot be resorted to for the purpose of enforcing a mere personal contract between the parties, and the unfounded allegation of the existence of the lien does not authorize the substitution of such proceeding in place of the proper common-law action. See *Weyer v. Beach*, 79 N. Y. 409; *McDonald v. New York*, 58 App. Div. 73, 68 N. Y. Supp. 462 (reversed on other grounds in 170 N. Y. 409, 63 N. E. 437); *Castelli v. Traham*, 77 App. Div. 472, 78 N. Y. Supp. 950; *Gallick v. Engelhardt*, 36 Misc. 269, 73 N. Y. Supp. 309; *Sinclair v. Fitch*, 3 E. D. Smith, 677.

In *Dudley v. Third Order of St. Francis*, 138 N. Y. 451, 34 N. E. 281, it was held that, an action to foreclose a mortgage being a statutory proceeding, and the Code provisions relative thereto indicating that it was never intended to permit the joinder in the complaint of two separate causes of action, one at law, for the recovery of personal judgments on the bond for the debt, and the other in equity, to procure a sale of the land covered by the mortgage, a complaint in a foreclosure action contains only a cause of action in equity, although the giving of the bond is stated; and that therefore, when the plaintiff failed to establish the mortgage, he failed to establish his cause of action in its whole scope and meaning, and the court could not render judgment for the amount of the indebtedness. The court goes on to say that the established rule that when equity has obtained jurisdiction of the parties and the subject of the action it may adapt the relief to the exigencies of the case, even to the extent of rendering a personal judgment in order to prevent a failure of justice, does not apply to a case where it appears that there never was, in fact, any ground for equitable relief whatever, but the sole remedy was an action at law; and it was further said that the question is not one of a right to a jury trial, that mode of trial being waived by the plaintiff when he elects to bring an action for relief both legal and equitable in its nature in respect to the same cause of action, and by the defendant when he omits to insist upon it in the answer by taking a proper objection, which is usually done by a distinct allegation that an adequate remedy exists at law, or by demanding it, or raising the question at the proper time in cases

where he is entitled to that mode of trial according to the practice in equity cases.

In *Kinsey v. Bennett*, 37 S. C. 319, 15 S. E. 965, it was held that although where a complainant brings an action on the equity side of court for the purpose of obtaining some relief which that branch of the court is alone competent to render, and fails to establish his equitable demand, the action will not be dismissed, provided his allegations and proofs are sufficient to show that he is entitled to some legal relief, such rule will not permit a plaintiff, whose cause of action rests upon an alleged breach of trust, it being claimed that the defendant undertook to sell a tract of land conveyed to him for that purpose, and, after applying the proceeds to the payment of certain debts due by the plaintiff, to account for the balance, but who has failed to establish such trust, to have a decree upon the theory of a right of action for the purchase money of the land in question, but he must be remitted to another action upon such distinct and different cause of action.

In *Park v. Minneapolis, St. P. & S. Ste. M. R. Co.* 114 Wis. 347, 89 N. W. 542, it was held that where specific performance of a contract to build and operate a railway was refused because of its uncertainty and the impossibility of making the decree effective, no judgment for damages would be rendered in the absence of proof of an adequate remedy at law. The court said: "It must not be overlooked that, as a general rule, legal rights should be enforced in a court of law, where the constitutional right to trial by jury is preserved. Only in exceptional cases, where unnecessary hardship clearly demands, should courts of equity assume that province."

WISCONSIN SUPREME COURT.

C. O. BORING, Exr., etc., of Franklin J. Pool, Deceased, Resp't,

v.

ELI OTT, Appt.

(— Wis. —, 119 N. W. 865.)

Injunction — fraudulent judgment.

1. Equity will enjoin the enforcement of a judgment secured by perjury where the judgment debtor used diligence, but failed to discover the perjury in time to be available at the trial, or to secure the relief provided by statute in such cases.

Same — evidence.

2. Equity will not restrain the enforcement of a judgment on the ground that it was secured by perjury unless the perjury is established beyond all reasonable controversy by evidence clear, convincing, and satisfactory.

(January 26, 1909.)

Note. — For perjury as ground of relief against judgment, see subject note to *Graves v. Graves*, 10 L.R.A. (N.S.) 216. 19 L.R.A. (N.S.)

A PPEAL by defendant from a judgment of the Circuit Court for Ashland County in plaintiff's favor in an action brought perpetually to enjoin the enforcement of a certain judgment alleged to have been procured by perjury. Reversed.

Statement by Kerwin, J.:

This action was brought to perpetually enjoin the defendant, Eli Ott, from further prosecuting an action in which Ott was plaintiff and the plaintiff herein defendant in the circuit court for Ashland county, and enjoining the entry and enforcement of collection of such judgment or any part thereof out of the estate of F. J. Pool, deceased, and for other relief, which judgment was ordered by this court in *Ott v. Boring*, 131 Wis. 472, 110 N. W. 824, 111 N. W. 833, 11 A. & E. Ann. Cas. 857, where the facts upon which judgment was ordered are stated. The grounds of action to restrain the entry and collection of this judgment are that the contract between Pool and Ott, made in 1887, and upon which the judgment sought to be enjoined in this action was founded, was rescinded and canceled by mutual agreement between Pool and Ott in 1889, fifteen years before Pool's death, and that Ott concealed such fact from Pool's representatives, to whom it was unknown, and, after Pool's death, asserted his claim against the estate of Pool under such contract, which he represented to be in force and valid against the estate, and by fraudulent representations imposed upon and deceived the representatives of Pool and the court, and secured a judgment by fraud and perjury which was not discovered until the rendition of the judgment of this court heretofore referred to, although every reasonable effort to discover the same was made. Ott answered, denying generally the material allegations respecting misconduct and rescission, and set up the decision in *Ott v. Boring*, former action, as a bar, and also pleaded lack of diligence in former action.

On the trial of this action the court found as follows:

"That, in the fall of 1889, the defendant, Ott, was discharged by the late Franklin J. Pool from his employ, and a few days later was re-employed by said Pool solely as a clerk, at a salary of \$15 per week. That at the time of such re-employment the written contract or letter of October 17, 1887, was by agreement between them, as a condition of such re-employment, mutually canceled, rescinded, and abrogated, and said Ott voluntarily then surrendered up and waived all his rights under the same.

"That soon after the death of said Pool, in July, 1904, said Ott, concealing the fact

of such surrender and cancelation from the family of Pool and from the plaintiff, set up a claim under said contract of a quarter interest in the store business left by Pool, and filed with the county court his verified claim for such interest against said Pool's estate. That in the county, circuit, and supreme courts he asserted in his action thereon against said estate that he was entitled to said interest under said written letter or contract, and concealed the fact of such rescission and cancelation, and imposed the said agreement upon the estate and court as valid, and thereby procured a decision of the supreme court in his favor, sustaining and upholding his said claim. Such decision was rendered February 19, 1907. 131 Wis. 472, 110 N. W. 824, 111 N. W. 833, 11 A. & E. Ann. Cas. 857. That said verification of his claim as a valid one, and concealment of said surrender and cancelation, under the circumstances, was a fraud upon said estate and upon the court.

"That prior to August, 1904, when said Ott presented said claim to the family of said F. J. Pool, the family and heirs and executors of said Pool and their attorneys did not, nor did any of them, know, and had never heard, of the existence of said agreement of October 17, 1887. That in August, 1904, was the first time they or any of them ever learned of its existence.

"That between February 19, 1907, and February 22, 1907, the plaintiff's attorneys for the first time discovered that said agreement or letter of October 17, 1887, had been surrendered and canceled in the lifetime of said F. J. Pool, and prior to February 19, 1907, neither the family nor heirs of said Pool nor the executors of his estate, nor their attorneys, nor any of said persons, had known or learned, or had any means of knowing or learning, anything of that nature, and had no reason for believing that any such fact existed.

"That, prior to the trials which were had in the county and circuit courts upon said Ott's claim, the said executor and his attorneys used all reasonable and due diligence to ascertain any and all facts bearing upon the validity of said claim, and ascertained everything which was then ascertainable, and were not negligent in failing to discover the fact of said cancelation which afterwards came to light

"That after the discovery of said new facts between February 19, 1907, and February 22, 1907, the said executor or his attorneys were not guilty of negligence in not applying to the supreme court within thirty days from its decision for an enlargement of its mandate upon the facts then within their possession, or in not applying to the circuit court for a trial under the statute. 19 L.R.A. (N.S.)

"That the issue involved in this action was not involved, tried, and passed upon in the former action of Ott v. Boring, determined as aforesaid by the supreme court on February 19, 1907. 131 Wis. 472, 110 N. W. 824, 111 N. W. 833, 11 A. & E. Ann. Cas. 857."

And as conclusions of law the court found:

"That, in suppressing and concealing the fact of cancelation of said contract, said Ott procured the judgment in his favor in said former action by fraud.

"That the plaintiff is entitled to an injunction against the defendant, perpetually restraining and enjoining him, his heirs, executors, administrators, and assigns, from in any manner enforcing, or taking any steps to enforce, the judgment in his favor rendered or entered or to be entered, in this court under the mandate of the supreme court under said decision of February 19, 1907, in said action of Ott v. Boring, as executor, and to have the lien of the same set aside as a cloud upon the title to any real estate left by said F. J. Pool, deceased, upon which the same might appear to be a lien, and with leave to the plaintiff to apply to the court for a further decree upon the foot of the judgment, compelling the defendant Ott to satisfy said judgment, in whole or in part, if such relief should become necessary to protect the plaintiff or the estate of said F. J. Pool therefrom."

Judgment was rendered in favor of the plaintiff in accordance with the findings, from which judgment this appeal was taken.

Mr. Burr W. Jones, with Messrs. Sanborn, Lamoreux, & Pray and Horace B. Walmsley, for appellant.

Mr. James G. Flanders, with Mr. R. Sleight, for respondent:

Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.

Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; Stowell v. Eldred, 26 Wis. 504; Cooley, Torts, p. 475; 20 Cyc. Law & Proc. p. 8; Tucker v. Whittlesey, 74 Wis. 74, 41 N. W. 535; Crowns v. Forest Land Co. 102 Wis. 97, 78 N. W. 433; Zinc Carbonate Co. v. First Nat. Bank. 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; Johnson v. Huber, 106 Wis. 282, 82 N. W. 137; Balch v. Beach, 119 Wis. 77, 95 N. W. 132; 1 Black. Judgm. § 301; Brown v. Parker, 28 Wis. 21; Jewett v. Dringer, 31

N. J. Eq. 586; Freeman, Judgm. 3d ed. § 491; Shinkle v. Letcher, 47 Ill. 216; Kiser v. Winans, 20 Ind. 428; Deputy v. Tobias. 1 Blackf. 311, 12 Am. Dec. 243; Safe Deposit & T. Co. v. Gittings, 102 Md. 456, 4 L.R.A. (N.S.) 865, 62 Atl. 1030, 5 A. & E. Ann. Cas. 941; Putnam v. Clark, 35 N. J. Eq. 145; Roche v. Hoyt, 71 N. J. Eq. 323, 64 Atl. 174.

To warrant equitable interference it is sufficient that the party was reasonably diligent on the first trial.

Wilson v. Plank, 41 Wis. 94; Finch v. Phillips, 41 Wis. 387; Goldsworthy v. Linden, 75 Wis. 24, 43 N. W. 656; Smith v. Grover, 74 Wis. 171, 42 N. W. 112; Keely v. Jacobs, 87 Wis. 545, 58 N. W. 1107; Martin v. Clark, 111 Wis. 493, 87 N. W. 451; Whereatt v. Ellis, 70 Wis. 215, 5 Am. St. Rep. 164, 35 N. W. 314; Williams v. Miles, 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769; 14 Enc. Pl. & Pr. p. 799; Bonynge v. Waterbury, 12 Hun, 534; Stineman v. Beath, 36 Iowa, 73; Skinner v. Walker, 98 Ky. 729, 34 S. W. 233; Chicago & E. I. R. Co. v. Syster, 32 Ind. App. 239, 69 N. E. 476; Taylor v. Boardman, 25 Mich. 528; Freeman, Judgm. 3d ed. § 505, p. 548; 11 Enc. Pl. & Pr. p. 1200.

Kerwin, J., delivered the opinion of the court:

Counsel for appellant seasonably objected to any evidence under the complaint for the reason that it did not state facts sufficient to constitute a cause of action. The court overruled the objection, and this ruling is assigned as error. The basic ground upon which equity is invoked to restrain execution of the judgment is the alleged fraud and perjury in presenting and maintaining the claim against the estate of Pool when no such claim existed, because the original agreement between Pool and Ott had been canceled and rescinded, and the appellant continued in the employ of Pool under a contract of service only. The ground upon which the plaintiff's complaint can be sustained, if at all, is based upon the allegations of perjury in verifying the claim and sustaining it by committing perjury, diligence on the part of plaintiff on former trial, and failure to discover such fraud and perjury in time to be available in the former action. The claim was presented in the county court, disallowed, case appealed to the circuit court, general denial, statute of limitation and payment pleaded, there disallowed, and, on appeal to this court, reversed, and judgment ordered for Ott. After reciting the facts leading up to the reversal by this court in Ott v. Boring, 131 Wis. 472, 110 N. W. 824, 111 N. W. 833, 11 19 L.R.A. (N.S.)

A. & E. Ann. Cas. 857, the complaint in the present action sets up facts showing rescission and cancelation of the old contract, promise of surrender by Ott, making of the new agreement by which Ott agreed to continue in the employ of Pool on a salary, the alleged false claim that the old contract had been lost, concealment of it until after Pool's death, and intent to defraud the estate of Pool by the false claim that the contract was still in force, wilfully testifying thereto, and thus obtaining the judgment by fraud and perjury, which this action is brought to enjoin. It is strenuously insisted by appellant under this head that the former judgment is conclusive upon the parties to this action, and cannot be questioned in the instant case; while, on the part of the respondent, it is insisted that, the alleged rescission, cancelation, and perjury committed by plaintiff not having been discovered until after judgment in the former action, such question was not in fact litigated, and therefore cannot be held conclusive upon respondent. It is said that release and rescission are new matters, and must be pleaded; and, not having been pleaded or known to respondent at the time of former trial, he is not precluded by the judgment upon such issues. Of course, the doctrine is too well settled in this court to require citation of authority that the parties to an action are not only concluded by the judgment on all matters litigated, but all that might have been litigated between them upon the subject-matter of the suit, so that all defenses to the cause of action sued upon, whether set up or not, are concluded by the judgment in the same action. This general rule does not seem to be denied by respondent's counsel, but they contend that where a new defense arises, not known to the parties at the time of former trial, and which with reasonable diligence could not have been discovered, and which renders it inequitable and unconscionable to permit the other party to retain the fruits of a victory acquired by deceit and fraud, the general rule does not apply, but that equity will take hold for the purpose of granting relief. This subject was very fully considered in *Crowns v. Forest Land Co.* 102 Wis. 97, 78 N. W. 433, and it was there held that the bill of review under the old practice no longer obtains under the Code, but that the Code provides a complete system in itself, and that relief, therefore, from a judgment under our practice, must be obtained upon the grounds and in the manner prescribed by the Code. Section 2879, Stat., limits the time within which a motion for a new trial may be made on the ground of newly discovered evidence to one year from the date

of verdict or finding. This statute, however, does not deprive a defrauded party of remedy in a proper case. In *Stowell v. Eldred*, 26 Wis. 504, 507, 508, this court said: "The rule seems to be quite well settled that chancery will relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense by fraud or accident, or the acts of the opposite party, unmixed with negligence or fault on his part." The foregoing language is approved in *Crowns v. Forest Land Co.* supra, and other decisions of this court. In referring to this subject in *Nye v. Sochor*, 92 Wis. 40, 53 Am. St. Rep. 896, 65 N. W. 854, this court holds that relief in equity may be had against a judgment obtained by fraud, mistake, accident, or surprise unmixed with laches or negligence on the part of the suitor asking relief, and that perjury in obtaining a judgment is sufficient ground for equitable relief, where the party applying for relief is without fault. When a proper case is made, an action may be maintained to restrain the enforcement of the judgment. In such cases the action is not for a new trial or to review the judgment, but is directed against the party claiming under the judgment, to prevent the execution of it. So, in the present action, the judgment is conclusive upon the parties to it and upon the subject-matter litigated, and relief can be had only in a direct action upon facts showing a right to enjoin its execution. *Crowns v. Forest Land Co.* supra; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132.

The general rule laid down in the leading case of *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, applicable to this class of actions, is perhaps not broad enough to cover all cases which might arise where a court of equity would enjoin the enforcement of a judgment. In fact, it would be difficult to formulate any general rule sufficiently comprehensive and accurate to fit all cases. The *Throckmorton* Case probably comes as near to stating a general rule applicable to cases of the class under consideration as any in the books. In that case it is said: "The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic, or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." This court approved the *Throckmorton* rule in the case of *Uecker v. Thiedt*, 133 Wis. 19 L.R.A. (N.S.)

148, 113 N. W. 447, and others, but it was not its intention to exclude all cases not coming within the *Throckmorton* rule. To do so would be in conflict with other decisions of this court, later considered. Even the *Throckmorton* Case does not assume to go farther than to state a general rule, and, after stating several instances where equity will take jurisdiction, continues: "There is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these and similar cases which show that there has never been a real contest in the trial or hearing of the case are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing." Just what fraud "extrinsic or collateral" is sufficient to warrant a court to act is not very clearly defined under the authorities, and, as before observed, necessarily so from the difficulty of prescribing a rule.

It will be seen that the United States Supreme Court in a later case went a step farther than it did in the *Throckmorton* Case, and extended the rule to any case where, from the facts, it appeared to be against conscience to permit the execution of a judgment. *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62. In the above case the fraud consisted in the use of a forged letter in obtaining a judgment, which was not discovered within time to be available by a new trial, and but for the use of such letter the judgment would not have been secured. The court said: "Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery,"—citing several authorities, including the *Throckmorton* Case. In *Pico v. Cohn*, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac.

970, 27 Pac. 537, relied upon by appellant, where the Throckmorton rule is approved, the court lays down the doctrine that in some cases a former judgment may be annulled for fraud; and it will be seen by an examination of the authorities that it is not easy to determine what frauds may be regarded extrinsic or collateral to the matter tried by the first court. The reason of the rule seems to be based upon the idea that there must be an end to litigation, and therefore an issue which has been tried and passed upon by the first court should not be retried in an action to enjoin the judgment; otherwise, litigation would be interminable. While the issue might have been litigated, and, in a sense, was, because the continued existence of the contract was the basis, at least in part, of the recovery, still the fact that there was no adversary trial upon the issue of rescission which would have been a defense if established in favor of Boring is an element which should appeal to the conscience of the chancellor in determining the right to equitable relief. In the Throckmorton Case it is said the fraud must be "extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." It is not easy to see, however, why an issue determined in favor of the prevailing party solely by perjury does not amount to such a fraud, where such perjury was unknown to the defeated party, and could not, by the exercise of reasonable diligence, have been discovered. It would seem that a judgment thus obtained is as unconscionable as one secured against a party by keeping him away from court or by other corrupt means, and thereby preventing a fair trial upon the merits. *Marshall v. Holmes*, supra; *Tucker v. Whittlesey*, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101; *Crowns v. Forest Land Co.* 102 Wis. 97, 78 N. W. 433; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; *Johnson v. Huber*, 106 Wis. 283, 82 N. W. 137; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132; *Stowell v. Eldred*, 26 Wis. 504. While in *Crowns v. Forest Land Co.* supra, the question was one largely of procedure, the court, in no uncertain terms, stated that the new procedure under the Code does not "attempt to devalue the courts of the jurisdiction they formerly possessed to protect the rights of parties when fraud had intervened;" but that the remedy must be pursued in the manner prescribed by the Code. The court said: "Courts of equity under the old régime had the power of control over the parties, and would prevent them from asserting rights based upon judgments tainted by fraud or covin. That power exists to-day, but it 19 L.R.A. (N.S.)

must be invoked and enforced in harmony with the true spirit and in accordance with the positive requirements of the new order. . . . But suppose, as in this case, the facts upon which the fraudulent character of the transactions resulting in the judgment sought to be attacked depends were not discovered until the expiration of the year, is the party without remedy? While it may rightly be said that the ground upon which defendant seeks relief is newly discovered evidence, yet it is evidence showing fraud and collusion, concealed by the parties to it, and which, it is claimed, has resulted most harmfully to the defendant. This was a favorite subject of relief in equity."

In *Zinc Carbonate Co. v. First Nat. Bank*, supra, this court, speaking upon the subject respecting an action to enjoin a judgment, said: "In such independent action the complaint may be spoken of as a bill in the nature of a bill of review, in the sense that it is the pleading on the part of a plaintiff to accomplish, in effect, the purpose of the former bill of review. Strictly speaking, bills of review and bills in the nature of bills of review, as such pleadings were known to the old chancery practice, are not known to the Code." And, after discussing the limitations upon motions to open judgments, the opinion proceeds: "Neither does the limitation upon proceedings by motion to open a judgment upon some ground going to the right of plaintiff to the relief granted militate at all against jurisdiction in equity to protect a person from a judgment obtained against him by fraud." This court again had occasion to consider this subject in *Balch v. Beach*, supra, and we cannot do better than quote from the opinion: "(1) A court of equity has jurisdiction to relieve against a judgment upon the ground that it is contrary to equity where there is no other remedy upon several different grounds, and among them fraud upon the party seeking the relief by the person who obtained the judgment; such party not being guilty of any inexcusable ignorance or negligence in the matter. *Stowell v. Eldred*, supra; *Barber v. Rukeyser*, 39 Wis. 590; *Hiles v. Mosher*, 44 Wis. 601; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193; *Nevill v. Clifford*, 55 Wis. 161, 12 N. W. 419; *Crowns v. Forest Land Co.* supra. (2) The jurisdiction of equity is not exercised to disturb a judgment. That can only be done according to methods provided by the Code. But it acts directly upon the party who is in a position to, and might, if not restrained of his liberty, enforce the judgment, tying his hands so as to prevent him from doing so, thus leaving the judgment good in form, but valueless and harmless in fact. *Crowns v. Forest Land Co.* supra; *Zinc Carbonate*

Co. v. First Nat. Bank, 103 Wis. 135, 137, 74 Am. St. Rep. 845, 79 N. W. 229; Johnson v. Huber, 106 Wis. 282, 82 N. W. 137; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571. . . . Above all and over all is the supreme principle to which the vigilant, clean-handed, but wronged, party may resort when all legal remedies fail, and even precedents for an equitable remedy also, fitting the situation with exactness as to facts,—that equity suffers no wrong to go without a remedy; the wrong being of sufficient gravity to be appreciated by the conscience of the chancellor, and application being made to its jurisdiction seasonably and with clean hands. Its power and mastery or invention and the flexibility of its arm enable it to fit an infinite variety of situations successfully where otherwise wrongs would go unrighted. Pom. Eq. Jur. 109. Its administration is guarded and guided by precedents which, by judicial policy, fence in its operations more or less closely according to subjects; but in its nature it is expansive, and so may break away *ex necessitate*, and set a new mark to meet a new situation, and does not hesitate to do so when otherwise just rights would fail of vindication. Land, Log, & Lumber Co. v. McIntyre, 100 Wis. 258, 69 Am. St. Rep. 925, 75 N. W. 969." The court in Stowell v. Eldred, 26 Wis. 504, held that equity will restrain the execution of a judgment obtained by perjury, and the rule there laid down has never been departed from, but repeatedly approved in subsequent cases by this court. Balch v. Beach, 119 Wis. 77, 95 N. W. 132; Crowns v. Forest Land Co. 102 Wis. 97, 78 N. W. 433; Barber v. Rukeyser, 39 Wis. 590; Hiles v. Mosher, 44 Wis. 601; Nye v. Sochor, 92 Wis. 40, 53 Am. St. Rep. 896, 65 N. W. 854; Jilson v. Stebbins, 41 Wis. 235; Tucker v. Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101.

It is insisted by counsel that the late case of Uecker v. Thiedt, 133 Wis. 148, 113 N. W. 447, is in conflict with the Stowell Case. We do not so understand it. In the Uecker Case it appears that there was no fraud which induced the rendition of the judgment, and the court so held. Moreover, it is said in the opinion that there was nothing in the case showing that the judgment attacked was inequitable or unfair. Nor is anything said in the case tending in any way to discredit the Stowell Case or other cases in this court. As we have seen, the Stowell Case is well supported by subsequent decisions of this court, and is not wholly without support in other jurisdictions, as will be seen by an examination of the following cases: Maddox v. Apperson, 14 Lea, 596; Peagram v. King, 9 N. C. (2 Hawks) 295; Moore v. Gulley, 144 N. C. 81, 10 L.R.A. (N.S.)

(N.S.) 242, 56 S. E. 681, where it is held there must be a conviction for perjury. Nelson v. First Nat. Bank (C. C.) 70 Fed. 526; Galena & S. W. R. Co. v. Ennor, 116 Ill. 55, 4 N. E. 762; Moore v. Parker, 25 Iowa, 355; Glover v. Hedges, 1 N. J. Eq. 113; Jewett v. Dringer, 31 N. J. Eq. 586. It is true there is much conflict in the authorities upon this subject, but we see no reason for departing from the rule heretofore laid down and followed by this court. We believe it is in harmony with the general rules of equity jurisprudence, and best calculated to promote the doctrine so often enunciated by this and other courts, "that equity suffers no wrong to go without a remedy, the wrong being of sufficient gravity to be appreciated by the conscience of the chancellor, and application being made to its jurisdiction seasonably and with clean hands." [119 Wis. 87.]

On the allegations of the complaint, we think it showed a case in equity to enjoin the judgment on the ground that it was obtained solely upon the fraud and perjured evidence of defendant, and that plaintiff could not, with due diligence, have discovered the fraud or perjury in time to be available in the first action. Perhaps no court has gone farther than this in upholding the doctrine that equity allows no wrong to go without a remedy, as evidenced by the language heretofore quoted from the Balch Case. That language is a vigorous statement of the doctrine founded upon sound principles and policy. We believe that no new mark need be set in the present case in holding that the allegations of the complaint are sufficient to state a case for relief in equity. If no case is made by the complaint, it would seem that the language quoted from Balch v. Beach, 119 Wis. 77, 95 N. W. 132, rests in a fiction not capable of practical application. We therefore conclude that the complaint stated a cause of action, and no error was committed in overruling the objection to evidence under it.

2. It is further assigned as error that the findings are not supported by the evidence. It is established by all the authorities that a very high degree of proof in such cases is required. Many cases holding that there must be a conviction for perjury before equity will interfere, while others hold that it must be established beyond reasonable doubt, either by admission, documentary evidence, or by such other proof as to leave no reasonable ground for doubt. Moore v. Gulley, *supra*; Peagram v. King, 9 N. C. (2 Hawks) 608, 11 Am. Dec. 793; Woodruff v. Johnston, 29 Jones & S. 348, 19 N. Y. Supp. 861; Bloss v. Hull, 27 W. Va. 503; Moore v. Parker, 25 Iowa, 355; Jones v. South, 3

the defendant has a defense which he did not seasonably discover, and is free from negligence in that regard, of course, has no substantial support. It would include a multitude of situations where equity might lay hold to disturb adjudications, leaving no stability to judgments, and defeating the public policy that a time must come as to all controversies when they will be considered at rest; remedies having gone as far in the vindication of justice as is practicable; so far that to go further for the purposes of a situation now and then arising would, in general, do a far greater wrong than to leave the few which are within the realms of mere possibility beyond the boundary of the practicable.

That the unqualified statement contained in the *Stowell* Case was not guarded as it should have been is suggested by the fact that it has never been since applied to relieve from the effect of mere perjury, but, as to fraud, has been confined to fraud upon the court or fraud upon the defeated party by preventing—within the strict meaning of the term, suggesting physical prevention or something equivalent, not mere failure of disclosure and abuse of fiduciary or trust relations and collusion between the prevailing party and the representative or representatives of the adverse party—him from making his defense. The suggested limitations are vindicated by the settled law as we find it laid down in all the standard text-books and substantially all authorities.

It is laid down that the causes for equitable interference are divided into two major classes: 1st, fraud by the prevailing party; 2d, excusable negligence to present a defense, not attributable to the adverse party. *Freeman*, Judgm. 4th ed. § 488.

The first class does not relate to fraud respecting the merits and creating the condition in the action passed upon by the court, but fraud extrinsic to the action, either practised upon the court or upon the party. *Freeman*, Judgm. 4th ed. § 489. That is, some act ulterior to the merits, by which the party is prevented from presenting, or induced not to present, his defense. That includes fraud upon the court by presenting the case for judgment under false pretense of having complied with the law as to giving notice to the adverse party so far as the nature of the case would permit, or fraud upon the party by inducing him to absent himself or otherwise keeping him from the trial either by some false pretense or physical prevention, or keeping him away or intimidating him by threats, or taking judgment contrary to an agreement rendering the making of a defense the adversary has unnecessary, or where the attorney for the defeated party corruptly permitted judgment.

ment to be taken, and like situations. All relate, as will be seen, to purely extrinsic matters.—extrinsic fraud. It would take much time to go into details. Suffice it to say that, in all cases, the element of fraud is extrinsic, that it does not have to do with the merits of the case, as by merely making false proof, wilfully or otherwise.

We do not need to discuss the second major class, as it does not, in any view, include such a case as the one in hand. Such class relates to mere excusable neglect on the part of the person asking relief, not chargeable at all to any wrongful conduct on the part of the person against whom relief is sought. But all such relate to matters of an extrinsic character. The subject is dealt with at length along these lines in 2 *Freeman*, Judgm. 4th ed. §§ 488-496, inclusive, and *Black*, Judgm. 2d ed. §§ 365-387, inclusive.

So the supreme test of competency for equitable relief is whether the facts constituting the fraud are extrinsic. If they are intrinsic in any sense, competency does not exist. That suggests at once that mere perjury, as in this case, does not satisfy the test.

That was evidently overlooked in the *Stowell* Case. Consider that with the test we find laid down at § 489 in *Freeman* on Judgments, 4th ed. vol. 2:

"Whenever an issue exists in any action or proceeding, each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counter proofs. Where he has an opportunity to do this, and does not avail himself of it, or, though availing himself of it, is unable to overcome the effect upon the court or jury of the evidence offered by his adversary, he cannot, in effect, obtain a retrial of the issue before another tribunal by charging that the judgment against him was procured by perjury; and this has been held to continue to be the rule, notwithstanding the existence of a statute authorizing actions to set aside judgments obtained by means of perjury or subornation of perjury."

And in *Black* on Judgments, 2d ed. vol. 1, § 372:

"In some other jurisdictions, it is thought that if a party to a suit intentionally procures and produces false testimony, suborning his witnesses to perjury, and conspiring with them to secure a judgment, this amounts to such fraud as will enable the adverse party, if defeated in the suit, to secure an injunction against the judgment. But this doctrine is denied in other states, and indeed, the general current of authority is now in favor of the rule that perjury

committed by the successful party or his witnesses at the trial is no sufficient ground for vacating the judgment or enjoining its enforcement."

So firmly established in American jurisprudence is that rule, that it has been recognized as not open to invasion except by legislative authorization, and even in face of a plain statute of Minnesota that "in all cases where judgment has been or hereafter may be, obtained in any court of record by means of the perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice, or representation . . ."—the court regarded the letter of the written law as going to such a dangerous length, as regards equitable interference on the ground of mere perjury in obtaining the judgment, as not to have been intended to apply to a case where the subject-matter was in issue in the action, and the losing party had no right to depend upon the evidence of his adversary to disprove the latter's claim or to establish the former's defense. The reasoning of the court on this subject in *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797, affirmed in *Watkins v. Landon*, 67 Minn. 136, 69 N. W. 711, is so logical and so directly in line with the general current of American authority that I cannot do better than to quote from it at length: "Besides the reason that the act is in derogation of the common law, there is another reason for a strict construction, furnished by the consequences to which a large construction would lead. All who are familiar with the trial of causes know how ready the defeated party is, however full an opportunity he may have had to present his case, to charge that the result was brought about by false swearing and perjury of the successful party and his witnesses. That is often the feeling of the defeated party, especially where there is a direct conflict between the testimony on one side and that on the other. Had these defendants been defeated in the first action, they might have felt and alleged that it was through perjury on the part of the defense. Should they be defeated in this action, and their former judgment be vacated by the judgment in this, they might allege that the result was reached through perjury of the opposite party; and so on, *ad infinitum*, as often as the matter should be tried and a judgment rendered. Where, if the statute allows an action to be brought to set aside any judgment upon the naked allegation of perjury,

will be the end of litigation? When will controversies between litigious parties be finally determined? If the statute permits controversies to be in that manner perpetually kept open, it is certainly a very mischievous one. We cannot think the legislature intended to go that length."

Except a very few not well-considered cases here and there, we might call the roll of the state and Federal courts in support of the foregoing. My brethren confess a conflict of authority, but fail to confess the very meager and illogical character of the adjudications out of harmony with what we have seen to exist, and fail to confess that the *Stowell Case*, as to the particular subject in hand, stands alone in this court, and fail to confess that, in most of the cases where it has been cited, in this and other courts, reference to which is made in the court's opinion, substantially all the references are to situations falling within the remediable class, not such as we now have.

As indicated, I have made reference to substantially all the cases in this court. I will now refer to three of the foreign citations as a type of all. *Jewett v. Dringer*, 31 N. J. Eq. 586. The sole question was whether the court of original jurisdiction could entertain a bill to review a decree entered upon a remittitur from the supreme court, and it was held not. The court incidentally said that it could entertain a bill to avoid a judgment entered therein and procured by fraud, but what the court had in mind by the term "fraud" is not suggested. Reference to other cases in that court will easily show that mere perjured testimony, given in obtaining the judgment, was not thought of. The case has not, as I view it, the remotest bearing on the situation now under treatment.

In *Moore v. Parker*, 25 Iowa. 355, the action was for relief from fraud *aliunde* the trial, facts extrinsic, within the rule we have stated. As in *Jewett v. Dringer*, *supra*, no such thing as false testimony in obtaining the judgment is suggested as a proper ground for relief. The same is true of *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762. On the subject now in hand the court said:

"It cannot be allowed as a ground for setting aside a judgment, that there was false testimony given on the trial, or false assertions as to liability, previously made. If this were admitted, there would be little stability in judgments."

Wherein do such authorities support the doctrine of the *Stowell Case*? If they have any bearing thereon I am entirely unable to discover it. A multitude of authorities such as my brethren seem to think point the opinion might be added to the few cited.

tice in individual cases." [98 U. S. 68, 69, 25 L. ed. 96.]

If we were to take time to indicate with appropriate citations the multitude of cases in the courts of this country where that rule and logic have been adopted, the language of the Federal court being quoted, and it is expressly pointed out that perjury in the case is matter intrinsic, not collateral, and so not within the rule as to relief, this opinion would be extended to a very great length. Pages would be occupied with mere titles of cases and where they may be found. The following are a few of the most striking of such cases, directly on the point: *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077, where not only perjury, but subornation of perjury, was held not to be a ground for relief. To the same effect are *Gray v. Barton*, 62 Mich. 197, 28 N. W. 813; *Pico v. Cohn*, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; *Woodruff v. Johnston*, 29 Jones & S. 348, 19 N. Y. Supp. 861; *Demerit v. Lyford*, 27 N. H. 541; *Kretschmar v. Ruprecht*, 230 Ill. 492, 82 N. E. 836; *Graves v. Graves*, 132 Iowa, 199, 10 L.R.A. (N.S.) 216, 109 N. W. 707, 10 A. & E. Ann. Cas. 1104; *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; *Mahoney v. State Ins. Co.* 133 Iowa, 570, 9 L.R.A. (N.S.) 490, 110 N. W. 1041; *Richards v. Moran*, 137 Iowa, 220, 114 N. W. 1035; *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797; *Hamilton v. McLean*, 139 Mo. 678, 41 S. W. 224; *United States v. Flint*, 4 Sawy. 42, Fed. Cas. No. 15,121; *United States v. Gleeson*, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778; *United States v. White* (C. C.) 9 Sawy. 125, 17 Fed. 561; *Cotzhausen v. Kerting* (C. C.) 29 Fed. 821; *Ritchie v. McMullen*, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522; *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49; *Hanley v. Hanley*, 114 Cal. 690, 46 Pac. 736; *Pepin v. Lautman*, 28 Ind. App. 74, 62 N. E. 60; *Steen v. March*, 132 Cal. 616, 64 Pac. 994; *Gusman v. Hearsey*, 28 La. Ann. 709, 26 Am. Rep. 104; *Verplanck v. Van Buren*, 11 Hun, 328; *Wabash R. Co. v. Mirrieles*, 182 Mo. 126, 81 S. W. 437; *Neun v. Blackstone Bldg. & L. Asso.* 149 Mo. 74, 50 S. W. 436; *Friese v. Hummel*, 26 Or. 145, 46 Am. St. Rep. 610, 37 Pac. 458; *Codde v. Mahiat*, 109 Mich. 186, 66 N. W. 1093; *Ames v. Snider*, 55 Ill. 498; *Adams v. Secor*, 6 Kan. 542. Later Kansas cases depend on statutory change of the rule.

The treatment by my brethren of *Pico v. Cohn*, supra, and similar cases, as if such cases recognize fraud of the nature here involved to be sufficient to warrant such an action as this, because they hold "that in some cases a former judgment may be an-

nulled for fraud," and the statement by my brethren that just what is included in the term "extrinsic fraud" is not easily determinable, as if the uncertainty gives range to include perjured testimony in the action,—seems very weak support, since, in the California case referred to, and many that followed it, and the very cases suggesting the uncertainty referred to, all agree that "fraud extrinsic" does not include perjury in the action, but unquestionably excludes it.

Now, a word on the suggestion by my brethren that *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62, where relief was held proper upon the ground that the judgment sought to be set aside was procured by means of plaintiff therein leading the court to believe that he contracted with the defendant through one Boyd, and that he was duly authorized in that regard in writing,—by producing a letter purporting to have been written by the plaintiff to that effect, which was a forgery, modified the Throckmorton rule. The Throckmorton Case was only incidentally referred to, with nothing to indicate expressly modification of it in any way. However, the case bears all earmarks of having been decided without full appreciation of the situation the court had created. It was probably supposed that the forgery of the instrument, and use of it to obtain the contract, ostensibly on the credit of the plaintiff, not the use of it upon the trial, was the real ground of the mischief, and so was fraud extrinsic. It cannot be thought for a moment that any infraction of the rule—which had existed without question for some thirteen years, and become the law of the land in all Federal and all state courts—was intended. That is rendered unmistakable from the fact that in many cases decided since 1891, when the adjudication in question occurred, the Throckmorton rule is found vindicated in all its integrity, particularly as to the very point in controversy in this case. *United States v. Gleeson*, supra; *Hilton v. Guyot*, 159 U. S. 113–207, 40 L. ed. 95–123, 16 Sup. Ct. Rep. 139; *Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 639, 107 Fed. 781.

True, after the *Marshall Case* a controversy arose as to whether the Throckmorton rule, in some of its aspects, had not been modified by the later case, creating an irreconcilable conflict. The Supreme Court was appealed to in *Graver v. Fautot*, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 257, to settle the matter, but did not reach the supposed difficulty. In *Meehan v. Valentine*, 145 U. S. 618, 36 L. ed. 839, 12 Sup. Ct. Rep. 972, and again in *Corey v. Toland*,

154 U. S. 499, 38 L. ed. 1062, 14 Sup. Ct. Rep. 1144, an appeal was made to the Supreme Court for a writ of certiorari to review the judgment, upon the ground that the lower court committed a serious error of law in adhering to the Throckmorton rule instead of the supposed infraction of it. Both applications were denied. It was expressly affirmed in *Hilton v. Guyot*, supra, in 1894. It was said in *United States v. Gleeson*, supra, not to have been displaced at all by *Marshall v. Holmes*, supra, and for more than ten years it has been regarded as the unquestionable rule for the Federal and state courts. In view of this history, I submit that the decision here cannot be justified upon the ground that the doctrine of the Throckmorton Case has been at all disturbed by the court which decided it.

We now turn to our own decisions and show that the rule so firmly established elsewhere has been unqualifiedly adopted here, in place of the rule in *Stowell v. Eldred*, 26 Wis. 504.

In *Uecker v. Thiedt*, 133 Wis. 148, 113 N. W. 447, decided so recently as to be fresh in memory of us all, the court, speaking by Mr. Justice Dodge, said:

"Fraud which can be made the basis of an attack upon a solemn judgment of a court of record must have directly induced the rendition of the judgment, not merely have induced or brought about a condition upon the real existence of which the court acted as a basis of its decree,"—citing *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, and other cases to which I have referred. What was left out to make an unmistakable repudiation of the *Stowell Case* except the addition, almost necessarily to be inferred, "*Stowell v. Eldred*, supra, overruled?" The two cannot stand together. How can one say there is nothing said in the later case in any way to discredit the early one, merely because the facts of the two were different, since in both the court intended to state a rule of general application? I leave the reader of our opinions to answer this, each for himself. True, there was no fraud in the *Uecker Case*, as it turned out. True, the court said: "There was nothing in the case showing that the judgment attacked was inequitable or unfair." But both fraud and inequity were claimed, and it was to the claim the court addressed the rule the same as in the *Stowell Case*. The fact that in the one it stood the test and in the other it did not, since the measuring tests radically differ, does not make the cases harmonize by the logic I must apply.

Later in *Scheer v. Ulrich*, 113 Wis. 311, 113 N. W. 661, to which my brethren do not 19 L.R.A. (N.S.)

refer, the Throckmorton rule was again cited with added definiteness, reaffirming the previous approval thereof. That would seem to firmly entrench it in our jurisprudence. I will not say more, excepting to assert that one or the other of the rules must give way, and that the inconsiderate promulgation in the *Stowell Case* must be that one if we are to be both in harmony with ourselves and with the great weight of authority elsewhere.

In passing, I should make this further brief reference to cases in my brethren's opinion supposed to support the decision. In *Nelson v. First Nat. Bank (C. C.)* 70 Fed. 526, relief on the ground of perjury was denied, but such relief was held competent under some circumstances. It was a Minnesota case, obviously governed by the Minnesota statute providing for such relief, which statute has been so restricted, as we have seen, as not to materially avoid the Throckmorton rule.

Moore v. Parker, 25 Iowa, 355, we have referred to. If it supports the decision here, and I think it does not at all, there is a statute on the subject of relief on the ground of fraud, and, moreover, the subject was set at rest in *Graves v. Graves*, 132 Iowa, 199, 10 L.R.A. (N.S.) 216, 109 N. W. 707, 10 A. & E. Ann. Cas. 1104, where all previous adjudications were reviewed and the court definitely adopted the Throckmorton rule, saying that perjury in obtaining a judgment is not a sufficient ground for an action of this sort.

Galena & S. W. R. Co. v. Ennor, 116 Ill. 55, 4 N. E. 762, as we have seen, is directly opposed instead of in favor of the position now adopted.

In *Maddox v. Apperson*, 14 Lea, 596, the case did not go on the question here at issue. The Throckmorton rule in its general aspects was approved, but it was said that if the term "extrinsic fraud," as distinguished from "intrinsic," would bar relief where a judgment is obtained by suppressing evidence which the prevailing party, by his relation to the adverse party, is bound to disclose, fiduciary relations of some sort being suggested, the court would not go that far.

Moore v. Gulley, 144 N. C. 81, 10 L.R.A. (N.S.) 242, 56 S. E. 681, was governed by a very ancient rule in North Carolina that equity would relieve from a judgment obtained by perjured testimony, conditioned upon the perjury being first established by a due prosecution and conviction. The North Carolina doctrine is recognized in the books as peculiar to that state. *Woodruff v. Johnston*, 29 Jones & S. 348, 19 N. Y. Supp. 861, cited to the point that relief such as is now sought is proper, the perjury be-

ing conclusively proved as by a precedent conviction, directly holds, as we have seen, that such an action cannot be maintained at all. The incidental observation, which attracted my brethren's attention, that there must be a conviction before a new trial can be granted on the ground of perjury, had reference to *Holtz v. Schmidt*, 12 Jones & S. 327, where there was a motion in the action for a new trial, not an equitable action to avoid the judgment. As to the latter, as we have seen, it is said perjury is not a ground of action at all.

Bloss v. Hull, 27 W. Va. 503, as I understand it, is of the same nature. Other cases cited, concluding the list, are either under special statutes, or do not refer to such a situation as we have here, or have been displaced by later decisions.

I will not pursue the matter further. If there is any substantial support for the adherence to the early decision in *Stowell v. Eldred*, supra, I am unable to find it.

Thus, it seems the court after twice, just recently, having adopted the Throckmorton rule, has put aside the opportunity to say directly what is so plainly said inferentially, that the early case is overruled. No other case stands at all in the way of bringing this court into full harmony with the judicial world.

I personally reassert the rule with as much force as, standing alone, I can, so well stated by Mr. Justice Dodge for the court in *Uecker v. Thiedt*, supra. Fraud, to be the basis of attack upon a solemn judgment of a court, must be extrinsic, and have directly induced the judgment. Mere perjured testimony creating a fictitious condition upon which the court acted as a real one, resulting in the judgment, is not sufficient.

That rule might now and then render a wrong remediless, but, as the learned Federal court and many of the state courts have said, the contrary rule is fraught with great mischiefs, for it would render strife by means of judicial instrumentalities endless. Hardly a hotly contested action is tried but that the defeated party honestly believes his defeat is attributable to perjured testimony on the other side. In that situation, and with such a rule as I contend against, it would be possible for contest to follow contest, as the Minnesota court aptly said, "*ad infinitum*, as often as the matter be tried and a judgment rendered."

The foregoing no more infracts the rule, "There is no wrong without a remedy," than, as said by Mr. Justice Shaw, "it does the one that fraud vitiates everything." As in the latter the presumed infallibility of judgments, after ordinary litigation has run its course, displaces the maxim, by es-

topping the party from setting up the fraud, closing the mouth on one side and the ear on the other, so it makes right, in contemplation of law, what independently of it, from a mere ethical standpoint, is wrong. As has been said, "There is no wrong without a remedy;" but there is no wrong, in legal contemplation, as to that upon which the law's instrumentalities have set their seal, in the ultimate, of right. *Judicia sunt tanquam juris dicta, et pro veritate accipiuntur.*

The findings of the trial court should be approved, but the judgment reversed because the proved perjury under the circumstances is not relievable in the manner sought.

Petition for rehearing denied March 9, 1909.

CALIFORNIA SUPREME COURT.

SUMNER CAHILL, by Guardian *ad Litem*,
Appt.,
v.

E. B. & A. L. STONE & COMPANY et al,
Respts.

(153 Cal. 571, 96 Pac. 84.)

Negligence — dangerous appliance — children.

1. One who, in constructing a railroad in a public street, rightfully leaves a loaded push car standing unfastened and unattended upon a track, may be liable for injury thereby caused to a child not guilty of contributory negligence, who has been permitted to play upon it, where the car is on a grade down which, if it starts, it cannot

Subject Note. — Attractive nuisance.

I. Introduction, 1095.

II. Origin of the doctrine, 1100.

III. Basis of liability.

a. Intentional injuries, 1107.

b. Implied invitation, 1110.

c. Child not regarded as trespasser, 1114.

d. *Sic utere tuo ut alienum non laedas*, 1115.

e. Circumstances showing negligence, 1115.

IV. Extent of application.

a. Attraction on private premises.

1. Dangerous things in general, 1124.

2. Explosives, 1127.

3. Lumber, building material, etc., 1129.

4. Dangerous machinery and appliances.

(a) In general, 1130.

(b) Standing railroad cars, 1136.

(c) Moving cars and vehicles, 1139.

be readily stopped, and the injury is caused by the child's being caught and crushed while attempting to stop the car after it has been set in motion down the grade.

Same — loaded push car.

2. A loaded push car standing upon rails upon which it may be easily moved by children, and of sufficient weight to crush a person over whose body it might pass, is a dangerous thing for children to be allowed to play with.

Same — contributory negligence — infant.

3. There is no conclusive presumption of law that a twelve-year-old boy is able to foresee the danger of being crushed by a loaded push car which he and other children are pushing along a track, or that he has sufficient wisdom to avoid it; at least, not in the face of an averment to the contrary in the pleadings.

Pleading — contributory negligence.

4. Contributory negligence is matter of defense where it does not appear upon the face of the complaint or by the evidence of plaintiff.

(May 15, 1908.)

APPEAL by plaintiff from a judgment of the Superior Court for Alameda County in defendants' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. Thomas E. Haven and Robert C. Porter, for appellant:

Defendant had knowledge of a state of facts charging him with a duty of care toward plaintiff.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; Barrett v. Southern P. Co. 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; Callahan v. Eel River & E. R. Co. 92 Cal. 89, 28 Pac. 104; Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; O'Leary v. Michigan State Teleph. Co. 146 Mich. 243, 109 N. W. 434; McAllister v. Seattle Brewing & Malting Co. 44 Wash. 179, 87 Pac. 68.

Plaintiff was not guilty of contributory negligence as a matter of law.

Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; Biggs v. Consolidated Barb-Wire Co. 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4; Missouri, K. & T. R. Co. v. Rodgers, 89 Tex. 675, 36 S. W. 243; Smith v. North Jersey Street R. Co. 73 N. J. L. 295, 67 Atl. 753; Jenson v. Will & F. Co. 150 Cal. 398, 89 Pac. 113; Foley v. California Horseshoe Co. 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; Schierhold v. North Beach & M. R. Co. 40 Cal. 453; Union P. R. Co. v. Dunden, 37 Kan. 1, 14 Pac. 501; O'Mara v. Hudson River R. Co. 38 N. Y. 445, 98 Am. Dec. 61.

Messrs. Reed & Nusbaumer and B. H. Griffins for respondents.

IV. a.—continued.

5. Dangerous places.

- (a) In general, 1140.
- (b) Ponds, reservoirs, water ways, etc., 1143.
- (c) Railroad tracks and structures, 1150.
- (d) Excavations, 1152.
- b. Attractions in highway, 1154.
- c. Unattractive thing in attractive place, 1162.
- d. Degree of care, 1163.
- e. Proximate cause, 1165.
- f. Age limit for application of doctrine, 1165.

I. Introduction.

During the last thirty-five years the courts have been called upon many times to impose liability on landowners for injuries to trespassing children by dangerous, unguarded machinery or agencies, on the theory that they were, to the knowledge of the owner, attractive to the children, who, unable to appreciate their peril, were thus lured to their injury. The rule adopted in those cases favoring liability has come to be known as the "attractive nuisance" doctrine, or the doctrine of the turntable cases. It has provoked an extended discussion, in which there has been some show of temper as well as sentiment.

For example, Judge Thompson, in his *Law* 19 L.R.A. (N.S.)

of Negligence, vol. 1, § 1031, says: "It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed; and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed, or maimed for life. In view of what has preceded, the author regrets that he cannot say, as he said in his first edition, that such is not the law. He limits himself to expressing the opinion that it ought [not] to be the law, and to citing with commendation the few decisions which hold that it is [not] the law. Nevertheless, a few decisions of enlightened and humane courts are found, more or less tending to the conclusion that the owner of any machine or other thing which, from its nature, is especially attractive to children, who are likely to attempt to play with it in obedience to their childish instincts, and yet which is especially dangerous to them,—is under the duty of exercising reasonable care to the end of keeping it fastened, guarded, or protected so as to prevent them from injuring themselves while playing or coming in contact with it." He also refers to the jurisdic-

Shaw, J., delivered the opinion of the court:

The defendants separately demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were sustained without leave to amend. Judgment was given for the defendants thereon, and plaintiff appeals.

The action is to recover damages for injuries sustained, alleged to have been caused by the negligence of the defendants. The only questions presented are whether or not the facts show that the defendants were chargeable with neglect of any duty owing by them to plaintiff, and whether or not the facts stated show that the neglect of the plaintiff caused or contributed to his injury. The following is a statement of the facts alleged: The plaintiff, at the time of the accident, was twelve years of age. The defendants were constructing a railroad track in and upon one of the public streets in the city of Oakland. The track was laid to a point near the crossing of Fifty-Sixth street. It was placed in a trench some 2 feet deep, with sharp banks on each side, situated about 2 feet distance from the rails. A push car heavily loaded with steel rails was, by the defendants, negligently left standing on this track in the street, unguarded by any person, uninclosed, unlocked, and unfastened, without any brake or device for stopping it when started. It was of

such weight that, when put in motion even on a very slight grade, it could not be readily stopped. The grade of the track at that point descended slightly toward Fifty-Sixth street. This was in the center of a populous residence district of the city where many children lived. The lots abutting the street opposite where the car stood were not inclosed, and children were accustomed to congregate there for play. On that day, and during all the time of the construction of the roadbed and track, children from five to fourteen years of age, with the knowledge and consent of the defendants, were accustomed to congregate upon and around said push car and play upon said car. and defendants then well knew of the danger from said car and track to children in that vicinity. The plaintiff lived with his parents about 250 yards distant from the point where the car was left on the track. Other children at play on said push car had put it in motion. "Plaintiff was then and there attracted to said car by its said condition and appearance and said surroundings as a place of play, and said plaintiff was then and there too young and inexperienced to foresee the danger therefrom, and plaintiff then and there got upon said car with said other children," and, in the course of his play upon the said car, and in an attempt to stop it as it was running down the rails upon which it had been left standing by the defendants, he was caught between the side of

tions in which liability is denied as jurisdictions in which property is put above humanity.

In *Berry v. St. Louis, M. & S. E. R. Co.* 214 Mo. 593, 114 S. W. 27, a turntable case, the court, in reaffirming the soundness of the turntable doctrine, also said: "It seems to us good law and good ethics. To hold otherwise would be to exalt mere money and property and put down humanity—would be to offend against little ones; and there is high authority for the proposition that it were better that a millstone were hung about the neck for drowning purposes than that such offense be given."

On the other hand, in *Ryan v. Towar*, 128 Mich. 463, 25 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644, the court said: "There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. The average citizen has learned that the surest way to be overrun by children is to give them to understand that their presence is distasteful. The consequence is that they will roam at will over private premises; and, as a rule, this is tolerated so long as no damage is done. The remedy which the law affords for the trifling trespasses of children is inadequate. No one ever thinks of suing them, and to attempt to remove a crowd of boys from private premises by gently laying on of hands, and using no more force than 19 L.R.A. (N.S.)

necessary to put them off, would be a roaring farce, with all honor to the juveniles." In commenting on this language, the court, in *Edgington v. Burlington. C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95, declared that it was sufficient to say that the hoodlums so described found no immunity or protection in the law; and, as the court interpreted it, their mental acuteness was open to no discount or disparagement. They knew the difference between right and wrong, and understood the meaning of trespass as well as the property owner. Ordinarily, they were at no loss to care for themselves. They disregarded property rights for mere love of mischief, and took risks out of mere bravado or in conscious defiance of moral or legal restraint. When a boy was thus injured, we might pity his folly, but justly say, as the law said, that, having intelligently assumed the risk, he ought not to recover damages.

Great alarm has been shown by some of the courts as to the harmful results which might be expected to follow the adoption of the attractive nuisance doctrine, and the difficulties that would be experienced in applying it. But, in some of these cases, it is evident that the dangers have been much overdrawn.

In *Ritz v. Wheeling*, 45 W. Va. 267, 43 L.R.A. 148, 31 S. E. 993, the court said of the *Stout Case*, *infra*, the first of the turn-

the car and the bank of said trench, and his foot was thereby thrown beneath the car wheel and badly crushed. He sues for the damage resulting from this injury.

The contrary not being alleged, it is to be assumed that the defendants had the lawful right, under permission from the proper public authorities, to lay their track in the streets, and leave the push car standing thereon. The car being thus rightfully in the street, the plaintiff had no right to go upon it, or to interfere with it in any way, without the consent of the defendants. He would have been, with respect to the car, technically a trespasser, except for the allegation that children were accustomed to play upon it with the knowledge and consent of the defendants.

We cannot perceive wherein the case presented by the complaint, its absolute truth being unqualifiedly admitted by the demurrer, is to be distinguished from the line of decisions commonly known as the "turntable cases." These cases rest upon the same general principle as those which hold liable the owner of premises over which is a path which, with his knowledge and consent, is frequented by the public, and in which he places a dangerous and concealed obstruction which causes injury to a person passing along the path. See 37 Century Dig. cols. 390-393, for citations. For like reasons, one who places an attractive but dangerous contrivance in a place frequented by

children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injury to them, and this because he is charged with knowledge of the fact that children are likely to be attracted thereto, and are usually unable to foresee, comprehend, and avoid the danger into which he thus knowingly allures them. The leading case on this subject in this state is *Barrett v. Southern P. Co.* 91 Cal. 302, 25 Am. St. Rep. 186, 27 Pac. 666, where it was said: "If defendant ought reasonably to have anticipated that, leaving this turntable unguarded and exposed, an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. . . . A child of immature years is expected to exercise only such care and self-restraint as belongs to childhood; and a reasonable man must be presumed to know this, and required to govern his actions accordingly. . . . And it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense,"—citing cases. The same doctrine was af-

table cases, that it, "if carried to the length to which it is sought to be carried, would exact of every property owner the utmost watchfulness, vigilance, and expenditure to guard against hurt to children, else he would be every moment in danger of ruinous damages. It attacks the rights of free use of one's property in lawful business. A railroad liable because it happened to leave a turntable unlocked, as turntables often are, on its own track,—a necessary appliance in a lawful business! Ought a farmer to be liable for failing to put a picket fence around his pond, necessary for his cattle? If he does not, some little boy will climb the fence into the farmer's field, drown in the pond, and the farmer is sued on the same principle. The dam that contains water to turn the mill wheel, having a path around it, shaded with willows, is very alluring to the child and the man. Must the miller enclose it? The canal, with its towpath and frogs, is very attractive to the little boy or girl, and dangerous, too. If a child drown in it is the company liable? How many more instances of things useful in lawful business, and withal very attractive to children, and very dangerous, might be put? And the rule contended for says that if the thing causing the injury be attractive or seductive, the liability attends it. How many things are or may be so to children? 'A child's will is the wind's will.' Almost 19 L.R.A. (N.S.)

everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the mill pond, canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things attract the child, as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him?"

In *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402, the court said that some of the cases had undoubtedly gone too far. By adopting the extreme or extraordinary standard of duty on the part of the landowner, on the one side, and, on the other side, by attributing the conduct of all children to their childish instincts, so as to exempt them from the charge of contributory negligence regardless of age or mental capacity, it was obvious that the rule of the turntable cases was capable of indefinite and unbounded applicability. To the irrepressible spirit of curiosity and intermeddling of an average boy there was no limit to the objects that could be made attractive playthings. In the exercise of his youthful ingenuity he could make a plaything out of almost everything, and then so use it as to expose himself to danger.

firmed in *Callahan v. Eel River & E. R. Co.* 92 Cal. 89, 28 Pac. 104. See 21 Am. & Eng. Enc. Law, p. 474, for a full citation of cases. The rule, of course, is not to be confined to turntables, but applies to any attractive and dangerous machinery so placed. 1 Kinkead, Torts, § 26; 2 Cooley, Torts, 3d ed. p. 1270.

It is true that, in this state, the rule has been strictly limited to the particular character of cases mentioned in the *Barrett Case*. In *Peters v. Bowman*, 115 Cal. 349, 56 Am. St. Rep. 106, 47 Pac. 113, 598, wherein it was held that the owner of a lot was not liable for the death of a boy drowned in a pond on his premises, Mr. Justice McFarland, speaking of the so-called "turntable cases," says: "The rule as thus applied rested on the ground that the immature judgment of a young child could not well determine or provide against the danger of meddling with such machinery, and that therefore the railroad company was liable for legal negligence in erecting it and leaving it exposed as an attraction to children, and a temptation to them to intermeddle with it." It is further stated that the principle of these "turntable cases," while well established in this state, is an exception to the general rule that the owner of land is under no legal duty to keep it in safe condition for others than those whom he invites there.

It is claimed by the respondents that later cases have practically repudiated the

rule. An examination of the decisions, however, discloses the fact that in each case there was some feature by which it is distinguishable from cases similar to *Barrett v. Southern P. Co.*, supra, and also from the case at bar. The case of *George v. Los Angeles R. Co.* 126 Cal. 357, 46 L.R.A. 829, 77 Am. St. Rep. 184, 58 Pac. 819, is much relied upon as a case holding to the contrary. It is somewhat difficult to agree to the statement made in that case, that the two instructions there considered were not contradictory of each other, but, conceding that they are not conflicting, it is apparent that the instruction chiefly relied on by respondents included some acts of due care on the part of the defendants in that case which do not appear to have been exercised by respondents here. In that case a boy was injured while playing upon trailer cars allowed by the defendant to stand on the railroad track in a street in the city of Pasadena. The jury were instructed that if they found that the cars were held by brakes of the ordinary kind, set in a manner to hold them unless loosened by someone, and that the only danger connected with the car was one open to the observation, and which could be comprehended by a boy of plaintiff's age and of average intelligence, the plaintiff could not recover. One of the conditions of the instruction was that the jury should find, as it did, that the defendant had exercised care and set the brakes

If all this was to be charged to natural childish instincts, and the owners of property were to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property; and the duty of the protection of children would be charged upon every member of the community except the parents or the children themselves. The plaintiff was denied recovery in this case on the ground of contributory negligence upon the part of the injured child, who was over ten years of age.

"We did not mean by this," said the court in *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899, "that we would not apply the doctrine to any but 'turntable cases,' but merely that we would not extend the doctrine to cases which, upon their facts, do not come strictly and fully within the principle upon which those cases rest. We would not extend it to an ordinary case of a landowner merely allowing a pool or pond of water to stand on a vacant lot. To bring a case of such a pond within the principle of these cases it would have to be exceptional and peculiar in its circumstances."

In *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 A. & E. Ann. Cas. 497, the court said a very practical difficulty that confronted the attempt to lay down any legal rule that depended for its limita-

tions upon the attractiveness of objects to children of tender years lay in the extreme improbability that any man, however prudent, would be able to foresee what might or might not be attractive to children.

In *Conrad v. Baltimore & O. R. Co.* (W. Va.) 16 L.R.A. (N.S.) 1129, 61 S. E. 44, the court said: "We are not unmindful of the peculiarities and frailties of children, nor insensible of the imperious duty, founded upon considerations of humanity and public policy, to throw around them every just and wholesome safeguard; and it would be highly repugnant to our sympathies and natural impulses to withhold from a crippled child any possible right the law gives him; but it is not the province of courts to make laws, or give rights not conferred by law, and we could not do so in this instance without enunciating a principle which, carried to its logical results, would impose an extensive and burdensome restraint upon the dominion of owners over their own property."

The courts denying the soundness of the attractive nuisance doctrine do not assert that the children should look after themselves, but the position taken in these cases is that parents have the duty primarily of looking after children, and that society has a right to expect that it will be performed, and to act accordingly. *Iamurri v. Saginaw City Gas Co.* 148 Mich. 27, 111 N. W. 884.

so that the car would be held in place. In the present case the allegation is that the car was negligently left unguarded, uninclosed, unlocked, and unfastened. The distinction is pointed out in *Loftus v. De-hail*, 133 Cal. 217, 65 Pac. 379. It is that the "turntable cases" rest in part upon the proposition that the danger created by the act of the owner could be easily removed by the simple device of locking or fastening the dangerous machinery, and that, while the owner of such machinery is not held to the exercise of great care in protecting it against the trespasses of children, it is required to exercise ordinary care to that end. In *Studer v. Southern P. Co.* 121 Cal. 404, 66 Am. St. Rep. 39, 53 Pac. 942, the court was not considering the effect of the allegations of a complaint admitted to be true by a demurrer, and averring that the defendant was negligent, and that the child was too young and inexperienced to foresee the danger, but was considering the conceded fact that the boy was of ordinary capacity and intelligence, and the undisputed evidence which the trial court had held sufficient to establish contributory negligence on his part. Many other cases are cited by the respondents in which similar questions arising upon the evidence were considered, and in which it was held that, under the proof made, the child was guilty of contributory negligence either in exposing

himself to the danger or in failing to avoid it. *Tucker v. New York C. & H. R. R. Co.* 136 N. Y. 668, 33 N. E. 335; *Merryman v. Chicago, R. I. & P. R. Co.* 85 Iowa, 634, 52 N. W. 545; *Carson v. Chicago, R. I. & P. R. Co.* 96 Iowa, 583, 65 N. W. 831; *Brown v. European & N. A. R. Co.* 58 Me. 384; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402; *Kaumeier v. City Electric R. Co.* 116 Mich. 306, 40 L.R.A. 385, 72 Am. St. Rep. 525, 74 N. W. 481. It is, of course, possible in any case that the evidence may show that a child of twelve years of age is guilty of contributory negligence. It is not at all improbable that the evidence in this case would be strongly to that effect. The defendants did not see fit to await the coming in of the evidence, but interposed a demurrer which admits the truth of the allegations of the complaint. The cases involving a consideration of the effect of undisputed evidence showing negligence on the part of the child or evidence upon which a jury has so decided are not applicable to the present case.

It is contended that the car was not in itself dangerous, and *Kaumeier v. City Electric R. Co.* supra, is cited as holding this proposition. It may be admitted that such a car would not be dangerous when not in motion. The same is generally true of any ordinary machinery. But we cannot agree

In *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 457, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410, the court said that the doctrine of the turntable cases shifted the duty of watchfulness and care from the shoulders of parents, where the Creator had placed it, to the shoulders of the landowners using their property to make a living; and thus materially detracted from the full ownership of property, sacred under the Constitution. It was an infringement upon the right of property.

In some of the cases holding that there is no rule of the common law upon which the doctrine can be founded, it is suggested that the proper remedy is a resort to the legislature.

In *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 226, 4 L.R.A. (N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862, the court said that the common law applied alike to all landowners under like conditions, and that it would be an anomaly to hold that a doctrine or rule of common law which had its origin before there were either railroads or turntables applied only to railroad companies in the use of their lands on which they had dangerous machinery. While the courts should and did extend the application of the common law to the new conditions of advancing civilization, they might not create a new principle or abrogate a known one. If new conditions could 19 L.R.A. (N.S.)

not be properly met by the application of existing laws, the supplying of the needed laws was the province of the legislature, and not of the judicial department of the government. The legislature could change the common law as far as it might be necessary to regulate the use of turntables and other dangerous appliances, and leave untouched the common-law rights of the ordinary landed proprietor.

In *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 63, 38 L.R.A. 573, 66 Am. St. Rep. 859, 41 S. W. 62, the court said, in referring to the turntable cases: "The difficulty about these cases is that they either impose upon owners of property a duty not before imposed by law, or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In these cases the courts, yielding to the hardships of individual instances where owners have been guilty of moral, though not legal, wrongs, in permitting attractive and dangerous turntables and water holes to remain unguarded on their premises in populous cities, to the destruction of little children, have passed beyond the safe and ancient landmarks of the common law, and assumed legislative functions in imposing a duty where none existed."

Before entering upon a further discussion of the subject of attractive nuisances, attention should be called to the fact that, under the common law, there was an excep-

to the proposition that a car set upon rails, upon which it may easily be moved by children, and of sufficient weight to crush a person over whose body it might pass, is not a dangerous thing for children to be allowed to play with. They have an instinctive desire to see machinery in motion, and take delight in riding, and, if they have access to anything upon wheels, they will usually set it going if able to do so, especially if they can ride upon it themselves. In the "turntable cases" the turntable would be harmless if left at rest. The danger arises from the propensity of children to set it in motion. The car in question was dangerous for the same reason.

It is claimed that, as the boy was twelve years of age, he must be considered capable of exercising care for his own protection, and chargeable with negligence to the same extent as a mature person. There is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age. *Consolidated City & C. P. R. Co. v. Carlson*, 58 Kan. 66, 48 Pac. 635. In that case it is said: "The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger is one of fact, falling within the province of the jury to determine." The child there referred to was ten years of age. In *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 223, 44 L.R.A. 655, 56 Pac. 4, the same rule was applied to a boy of fourteen years, the court saying: "We cannot say, as a

matter of law, at what age a boy would be possessed of such intelligence, foresight, and judgment as to charge him with contributory negligence in a case like the present." In the case at bar, the question of plaintiff's possession of sufficient intelligence and foresight is foreclosed, so far as the pleading is concerned, by the allegation that "he was too young and inexperienced to foresee the danger." It may be conceded that many boys of the age of twelve years would have perceived the danger attending the acts of the plaintiff which led to his injury. There is, however, no conclusive presumption that a twelve-year-old boy is able to foresee such danger, or that he has sufficient wisdom to avoid it. The question is one of fact, to be shown by the evidence, and is not to be presumed in the face of an averment to the contrary. *Jenson v. Will & F. Co.* 150 Cal. 408, 89 Pac. 113; *Foley v. California Horse-shoe Co.* 115 Cal. 190, 194, 56 Am. St. Rep. 87, 47 Pac. 42. If the defendants had gone to trial and awaited the production of evidence upon the subject, it may be that contributory negligence would have been clearly shown. But, by the allegations of the complaint, upon which they chose to rest their case, no such negligence appears. Contributory negligence is matter of defense, where it does not appear upon the face of the complaint, or by the evidence for the plaintiff.

The judgment is reversed.

We concur: Angellotti, J.; Sloss, J.

tion to the owner's nonliability to persons entering without his permission where he made a change in the condition of his land adjacent to a public highway, so as to endanger the safety of travelers who might, without fault on their part, accidentally stray from the highway. This is adverted to in *WHEELING & L. E. R. Co. v. HARVEY*, and *SWARTS v. AKRON WATER WORKS Co.*, and must not be confused with the subject of attractive nuisances. Cases of injuries to children turning upon the fact that the dangerous condition of the land was adjacent to the highway are not included in the note.

II. Origin of the doctrine.

All courts point to *Lynch v. Nurdin*, 1 Q. B. 29, decided in 1841, as the pioneer case on what has now come to be known as the attractive nuisance doctrine; but not until the first turntable case had been decided by the Supreme Court of the United States, in 1873, was there any extended discussion of the questions involved in that doctrine.

In the original turntable case (*Stout v. Sioux City & P. R. Co.* Fed. Cas. No. 13,503, second trial in 2 Dill. 294, Fed. Cas. No. 13,504), the turntable was constructed in the ordinary manner, and was located in 19 L.R.A. (N.S.)

a hamlet of about 100 persons, on uninclosed ground belonging to the railroad company, about one quarter of a mile distant from its depot house. The plaintiff, a six-year-old boy who lived with his parents about three quarters of a mile distant from the turntable, was injured while at play on the turntable. The complaint was based upon the theory that the turntable, as it was constructed, was of a dangerous nature and character when unlocked and unguarded, and that, being in a place much resorted to by the public, and where children were wont to go and play, it was the duty of the defendant to keep the same securely locked or fastened so as to prevent it from being turned or played with by children, or to keep the same guarded so as to prevent injuries to them.

A recovery in favor of the plaintiff in 2 Dill. 294, Fed. Cas. No. 13,504, was affirmed in 17 Wall. 657, 21 L. ed. 745. Mr. Justice Hunt, in writing the opinion of the court, after declaring that the fact that a turntable was a dangerous machine, likely to cause injury to children who resorted to it, might fairly have been inferred from the injury which actually occurred, and that the jury was justified in believing, upon evidence, that children had been at play upon

CONNECTICUT SUPREME COURT OF ERRORS.

KATE L. WILMOT, Admrx., etc., of Alva F. Wilmot, Deceased,
v.

MICHAEL MCPADDEN, Jr., et al., Appts.

(79 Conn. 367, 65 Atl. 157.)

Master — independent contractor — removal of building.

1. Neither one who purchases a building to be torn down and removed from the premises, and who is a suitable person for the purpose, nor his agents, is a servant of the landowner, so as to render him liable for their negligent conduct in the performance of the work.

Same — care — immateriality.

2. Whether or not a landowner used due and proper care in selecting one to whom to sell a building to be removed from his land is immaterial if the person is found to have been competent in fact.

Unsafe premises — protection against children.

3. Persons engaged in the demolition of a building which is left with standing chimneys on Saturday night are not, although the building is uninclosed, bound to anticipate that children may, during the next day, trespass upon the property undermine the chimneys, and be injured by their fall, so as to be bound to protect against such an occurrence.

Evidence — immateriality.

4. Upon the question of the safety of chimneys left standing during the demolition of a building, evidence is immaterial that a person, in passing the building,

the turntable on other occasions, that they would probably resort to it, and that the defendant should have anticipated that such would be the case, said that this could certainly have been prevented by locking the turntable, which could have been done at an inconsiderable expense. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, and that it was negligent, and that its negligence caused the injury to the plaintiff. Though the evidence was not strong, and the negligence was slight, the court was not able to say that there was not evidence sufficient to justify the verdict.

Four cases were relied on as authorities for the position taken by the court, that the plaintiff's right of recovery was not affected by the fact that he was a trespasser at the time of the accident. These cases were *Lynch v. Nurdin*, supra; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413, and *Bird v. Holbrook*, 4 Bing. 628, and these cases have been cited many times since in support of the attractive nuisance doctrine.

In *Lynch v. Nurdin*, supra, the pioneer case, the defendant left his horse and cart

walked on the opposite side of the street because he was afraid the chimney would fall.

Trial — questions to witness — immaterial error.

5. Mere refusal to enforce formal rules for the questioning of witnesses is not ground for new trial where no material harm is done to the objecting party.

(December 18, 1906.)

APPEAL by defendants from a judgment of the Superior Court for Fairfield County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

Statement by Hamersley, J.:

Action to recover damages for injuries to the plaintiff's intestate, resulting in his death, alleged to have been caused by the negligence of the defendants, brought to the superior court in Fairfield county, and tried to the jury before Roraback, J. Verdict and judgment for the plaintiff for \$750, and appeal by the defendants, claiming error in the rulings of the court during the trial, in the denial of their requests to charge, and in the charge of the court.

The judgment appealed from was rendered upon a retrial of the cause. See 78 Conn. 276, 61 Atl. 1069. The defendants Patrick Heery and Martin Whalen made a joint defense, and, in their answer, denied material allegations in the complaint; moreover they alleged that the plaintiff's intestate

in the highway. The plaintiff, a boy under seven years of age, in the absence of the cartman, got upon the cart, and another boy led the horse on. The plaintiff, who, at that time, was getting off the shaft, fell, and was run over by the wheel, and had his leg broken. It was held that the fact that the plaintiff was a trespasser would not deprive him of his remedy. Lord Denman, Ch. J., said: "But the question remains, Can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no

tate was a trespasser on their premises, and that, if said premises were in a dangerous condition, they were rendered so by the acts of the plaintiff's intestate, or other trespassers, and that such acts were the occasion of the injury to him. The defendant Michael McPadden made a separate defense through a separate counsel, and, prior to the second trial, filed a substituted answer. This answer contains a denial of the material allegations of the complaint, and, by way of a second defense in the nature of a plea in bar, alleges the following facts: (1) On May 3d, 1903, McPadden was the owner of the lot of land described in the complaint. (2) On April 28, 1903, McPadden sold to the defendant Heery, for a valuable consideration, a two-story frame building standing upon said premises, and surrendered to him the possession and control thereof. (3) Said Heery was a suitable person to whom to sell said building, and he agreed to remove the same in a safe manner, and within a reasonable time; and, on the day following the purchase, he began to demolish the building, and remove it from McPadden's lot. (4) Said building was in a safe condition, capable of being taken down and removed without danger to any person; and, in its character and situation, would not be a source of danger in the process of such demolition and removal. (5) McPadden did not reserve, or exercise, any control over said work, or in the se-

lection of the servants and agents of said Heery by whom said work was in fact performed. (6) The acts and omissions complained of were not rendered necessary in the proper demolition and removal of said building, but any dangerous conditions existing on said 3d day of May, 1903, and caused by the state of said building or parts thereof, and by its alleged unguarded condition, were created solely by the mode of performing said work of demolition and removal, in which the defendant McPadden had no part. The court sustained a demurrer to this second defense "for the reason that it does not appear from the pleading questioned that the defendant took necessary and reasonable precaution in selecting the contractor." McPadden thereupon amended his second defense by adding the following: "(7) The defendants Heery and Whalen were masons and builders by trade, and competent and experienced in the kind of work involved in the performance of said contract, which required peculiar knowledge and experience, and this defendant used due care in selecting them to perform the same." Upon the trial, the court treated McPadden's second defense as equivalent to the defense of "independent contractor." Upon McPadden's request to charge and the charge of the court in respect to the legal effect of proving the facts alleged in McPadden's second defense, questions similar to those raised by the demurrer were raised

proportion to that of the defendant, which produced it."

Whether this case has been overruled, or whether it is still the law of England, the courts do not seem to know. There appears to be as much difference in opinion on this subject as there is upon the attractive nuisance doctrine itself. But it has been doubted, certainly in several cases not dealing with that doctrine, and at least two later cases on the question appear to be in conflict with it.

In *Hughes v. Macfie*, 2 Hurlst. & C. 744, a cellar lid was left leaning nearly upright against a warehouse. The plaintiff, a child of tender years, pulled this lid over upon himself while at play. Pollock, C. B., said: "Had he been an adult, it is clear he could have maintained no action. He would voluntarily have meddled, for no lawful purpose, with that which, if left alone, would not have hurt him. He would therefore have contributed by his own negligence to his damage. We think the fact of the plaintiff being of tender years makes no difference. His touching the flap was for no lawful purpose, and, if he could maintain the action, he could equally do so if the flap had been placed inside the defendants' premises, within sight and reach of the child."

There was also another action growing out of the name accident. *Abbott v. Macfie*, 2 Hurlst. & C. 744. In the *Abbott Case* it 19 L.R.A. (N.S.)

was held that the plaintiff, who was also hurt by the fall of the door, could recover if he was not playing with the other plaintiff, so as to be a joint actor with him. This fact not appearing, the case was sent back, the jury rendering a verdict for the defendants.

This, said the court, in *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95, was a nice distinction, which, assuming both children too young to exercise care or prudence, a few courts of this day would be willing to follow.

In *Mangan v. Atterton*, L. R. 1 Exch. 239, a machine was exposed for sale in a public street, and a four-year-old boy, at the direction of an elder brother, put his fingers between the exposed cogwheels on one side of the machine while one of his companions turned an unfastened handle on the other side. It was held that there was no liability for the resulting injury to the child. Bramwell, B., said that the defendant was no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them. "It may seem a harsh way of putting it," he continued, "but suppose this machine had been of a very delicate construction, and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tortfeasor? This shows that it is impossible to hold the defendant liable.

and determined in the same way. In his separate appeal, McPadden assigns as error these rulings of the court. The negligence, charged in the complaint, and denied by all of the defendants, is stated as follows: "On said 3d day of May, 1903, said premises were uninclosed, and the building was unguarded by any obstruction, and was of a situation and character calculated to attract children thereupon, and was carelessly and negligently maintained by the defendants in a condition likely to cause injuries to children who might go in and upon and around said building. The defendants did not maintain a watchman about or upon said premises to give notice of, or to guard against, any danger to persons going in or near or upon said building, or give any notice of the dangerous condition of said building."

Mr. Henry E. Shannon, for appellant McPadden, Jr.:

A landowner who sells an old house to competent and experienced masons and builders, under an agreement that they shall demolish and remove it in a safe and proper manner, is not responsible to a stranger who is injured by the negligent acts or omissions of such independent contractors.

Wilmot v. McPadden, 78 Conn. 277, 61 Atl. 1069; Reynolds v. Van Beuren, 155 N. Y. 126, 42 L.R.A. 129, 49 N. E. 263; Wood-

fall. Land. & T. 13th ed. 735; Knauss v. Brua, 107 Pa. 85; Fow v. Roberts, 108 Pa. 489; Lowell v. Spaulding, 4 Cush. 277, 50 Am. Dec. 775; Larue v. Farren Hotel Co. 116 Mass. 67; Cunningham v. Cambridge Sav. Bank, 138 Mass. 480; Clancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391; Wolf v. Kilpatrick, 101 N. Y. 146, 54 Am. Rep. 672, 4 N. E. 188.

Messrs. Chamberlain & Hull, for other appellants:

Defendant cannot be liable for an injury which arises from the unsafe condition of his premises when this condition arose from the acts of trespassers which the defendant could not have reasonably anticipated.

Fitzmaurice v. Connecticut R. & Lighting Co. 78 Conn. 406, 3 L.R.A.(N.S.) 149, 112 Am. St. Rep. 159, 62 Atl. 620; Haesley v. Winona & St. P. R. Co. 46 Minn. 233, 24 Am. St. Rep. 220, 48 N. W. 1023; Dooley v. Sullivan, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566; Theissen v. Belle Plaine, 81 Iowa, 118, 46 N. W. 854; Welsh v. Lansing, 111 Mich. 589, 70 N. W. 129; Myers v. Kansas City, 108 Mo. 480, 18 S. W. 914; Klatt v. Milwaukee, 53 Wis. 198, 40 Am. Rep. 759, 10 N. W. 162; Mullen v. Rutland, 55 Vt. 77; Mahoney v. Libbey, 123 Mass. 20, 25 Am. Rep. 6.

There is no place for the "attractive premises" doctrine.

But, further, I can see no evidence of negligence in him. If his act in exposing this machine was negligence, will his act in exposing it again be called wilfully mischievous? If that could not be said, then it is not negligence, for between negligence and wilful mischief there is no difference but of degree."

In Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393, it is pointed out that there was nothing to show that the defendant in the last-mentioned case, or in the Macfie Cases, knew or had reason to apprehend, that the dangerous agency would be likely to attract children.

The Macfie and Mangan Cases, *supra*, are apparently in conflict with Lynch v. Nurdin, but Mr. Justice Harlan, as was stated in WHEELING & L. E. R. Co. v. HARVEY and SWARTS v. AKRON WATERWORKS CO., doubts the correctness of the statement often made, that the early case has been overruled by Mangan v. Atterton, *supra*, and refers to Clark v. Chambers, L. R. 3 Q. B. Div. 327, in which Manisty, J., in commenting on the Mangan Case, says: "If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and among them children, have to pass, a dangerous machine 19 L.R.A.(N.S.)

which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character; and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief which the unlawful act or negligence of the defendant has given occasion."

The same view as to the effect of Clark v. Chambers is taken in Smith v. Hayes, 29 Ont. Rep. 283, and Edgington v. Burlington, C. R. & N. R. Co. *supra*.

But in Clark v. Chambers, the court was not dealing with the case of a trespasser, much less one of tender years. In that case the defendant had placed on his own premises a hurdle with *cheraux de frise* on top to keep the public from looking into his grounds. Someone had removed the hurdle to another place, and the plaintiff, not knowing of its removal, ran against it in the dark while he was passing along the highway, and was hurt. If, in the language quoted, the court, instead of referring to this situation, was referring to the situation in the Mangan Case, the statement is *obiter* at least.

The latest English cases, however, approve the Lynch Case and the attractive nuisance doctrine.

In Harrold v. Watney [1898] 2 Q. B. 322, where a fence at the side of a highway be-

McGuinness v. Butler, 159 Mass. 233, 38 Am. St. Rep. 412, 34 N. E. 259.

The doctrine is not law.

Nolan v. New York, N. H. & H. R. Co. 53 Conn. 472, 4 Atl. 106; Frost v. Eastern R. Co. 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L.R.A. 833, 68 Am. St. Rep. 727, 40 Atl. 682.

Messrs. Beers & Foster, for appellee:

It appears from the pleading that it was not a bona fide sale, but was a contract for the removal of the building; and, as such, the defendant McPadden was bound by the rule of "independent contractor."

Lawrence v. Shipman, 39 Conn. 590; Norwalk Gaslight Co. v. Norwalk, 63 Conn. 504, 28 Atl. 32; Wilmot v. McPadden, 78 Conn. 276, 61 Atl. 1069.

If the jury finds as a fact that a child is of such tender years that he does not know when and where he is trespassing, such child cannot be guilty of contributory negligence.

Birge v. Gardiner, 19 Conn. 507, 50 Am. Dec. 261; Daley v. Norwich & W. R. Co. 26 Conn. 591, 68 Am. Dec. 413; Murphy v. Derby Street R. Co. 73 Conn. 249, 47 Atl. 120; Fitzmaurice v. Connecticut R. & Lighting Co. 78 Conn. 406, 3 L.R.A.(N.S.) 149, 112 Am. St. Rep. 159, 62 Atl. 620; Watson, Damages for Personal Injuries, 290-297.

Hamersley, J., delivered the opinion of the court:

This case was before us at the October term, 1905, when the judgment rendered upon a former trial was set aside. See 78 Conn. 276, 61 Atl. 1069. This appeal is taken from the judgment rendered upon a retrial of the cause.

The trial court erred in sustaining the plaintiff's demurrer to the second defense of the substituted answer of the defendant McPadden. Upon the sale of a house standing upon the vendor's land to a suitable person for the purpose and upon the conditions stated in the second defense, neither the vendee nor his agents, while engaged in moving the property sold, are the servants of the vendor, for whose careless conduct the vendor can be held liable under the doctrine of *respondent superior*.

The court also erred in substantially charging the jury that, if they should find from the evidence that the defendants Heery and Whalen, in the removal of the house, were acting as contractors in a business independent from McPadden, and that all the facts alleged in McPadden's second defense have been proved, and that Heery, to whom the building was sold, was a competent and experienced person to properly and safely perform the work involved in the removal of the building, it would be necessary, in order

came so rotten as to constitute a nuisance, it was held that the owner was liable for injury to a boy who, in indulging the natural instincts of one of his age, climbed upon it, causing it to fall upon him. And in this case it was said that *Lynch v. Nurdin* had never been overruled.

In a House of Lords decision not yet reported, the attractive nuisance doctrine seems to have been upheld in a turntable case. In this case a turntable was maintained on ground adjacent to a public road. There was a gap in a hedge large enough to permit a child to pass through. There was evidence that, on one previous occasion, at least, a man in the employment of the company had seen boys at play on the turntable, and that they ran away at his approach. It was held that although the defective condition of the hedge was not the efficient cause of the accident, yet, that there was evidence of negligence on the part of the company sufficient to go to the jury. This seems to be in line with the doctrine of the *Stout Case*.

The critics of the attractive nuisance doctrine do not regard *Lynch v. Nurdin*, supra, as a very strong authority in its favor.

In *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 A. & E. Ann. Cas. 497, the court, in referring to that case, said that, curiously enough, the existence of a duty to the playing children, whose breach would constitute actionable negligence, was not 19 L.R.A.(N.S.)

made the subject of argument. It appeared clearly that no question was raised before the court upon this point. Defendant's negligence having been conceded by counsel, the remarks of the chief justice were hardly to be treated as a considered judgment upon that question. The only controverted point that seemed to have been determined was that, although the plaintiff's own act co-operated to produce his injury, he was not, for that reason, debarred from recovering compensation in respect to defendant's negligence, and this because of the plaintiff's tender years.

In *Ryan v. Towar*, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644, the court said that the *Lynch Case* seemed to have gone off upon the questions of negligence and contributory negligence, no question of trespass being discussed. The inference was perhaps a proper one that it was found by the jury that the owner was negligently in leaving his horse loose in the public street, and that the child had shown as much prudence as could be expected of him.

In *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261, the second authority mentioned in the *Stout Case* on the question of the effect of trespass on the right of recovery, a boy under seven years of age was injured by a heavy gate which had been erected on defendant's land, along a highway. The boy, as he was passing, put his hands upon the gate, and shook it, causing it to

to relieve McPadden from liability for the negligence of Heery and Whalen, that they should also find that McPadden used due and proper care in selecting a competent person to perform this work. It is possible that the court, in detailing the conditions that would relieve McPadden from liability on the theory of his having employed Heery as an independent contractor, did not intend to make the finding of every condition detailed essential to such relief; but a careful reading of the whole charge, in connection with the denial of McPadden's request to charge, compels the conviction that the jury must have so understood the instructions of the court. If all the other facts alleged in McPadden's second defense were found to be true, it would be manifestly immaterial to the sufficiency of that defense whether the jury were satisfied or not satisfied that McPadden used due and proper care in selecting Heery, whom they find to have been in fact a competent person to perform the work he undertook to perform as an independent contractor. The court should have so charged the jury. *Lawrence v. Shipman*, 39 Conn. 590; *Corbin v. American Mills*, 27 Conn. 274, 280, 71 Am. Dec. 63; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 524, 525, 529, 28 Atl. 32; *Wilmot v. McPadden*, 78 Conn. 276, 61 Atl. 1069. For this reason there is error in McPadden's appeal, and the judgment against him must be set aside.

fall upon him. It was urged that he was a trespasser, and that, although of tender years, was responsible for the civil consequences of his trespass; but the court refused to decide the question, and held the defendant liable on the ground of gross negligence.

In *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283, the court asserts that the last-mentioned case rests upon the doctrine that the owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. That is not, of course, the attractive nuisance doctrine.

In *Fitzmaurice v. Connecticut R. & Lighting Co.* 78 Conn. 406, 3 L.R.A. (N.S.) 149, 112 Am. St. Rep. 159, 62 Atl. 620, it was held that the doctrine announced in *Birge v. Gardiner*, supra, did not apply where a child strayed upon defendant's land, remote from a highway, over a broken fence, and was burned on a heap of hot ashes, since, in such a case, the child was a mere trespasser, and the presence of the child could not reasonably have been anticipated, and the dangerous object was not one calculated to attract children. This was not a repudiation of the attractive nuisance doctrine, and might be taken as an inferential indorsement of it.

In *WILMOT v. MCPADDEN*, however, the 19 L.R.A. (N.S.)

The other errors assigned in McPadden's appeal are substantially the same as those assigned in the appeal of Heery and Whalen, and they will be considered together. The following facts appear from the record to have been practically conceded: On and some time prior to May 3, 1903, the defendant McPadden owned a piece of land in Bridgeport, fronting on Pembroke street, which piece of land was uninclosed. On part of this land there stood a building in which Alva F. Wilmot (the plaintiff's intestate) lived with his parents; there was also on another part of the land a dwelling house of wood on a stone foundation, with brick chimneys, which house was old, and in a dilapidated condition. For a few days prior to May 3d the defendants Heery and Whalen, acting under authority derived from McPadden, were engaged in taking down and removing the said dwelling house. At the close of work on Saturday, May 2d, all of the house had been removed except the foundation, the first floor, and two brick chimneys. On the afternoon of the following day, Sunday, Alva Wilmot, then about seven and one half years of age, with other children of about his own age, was upon the first floor of said house when one of said chimneys collapsed and fell, and, in falling, injured Alva so that he shortly afterward died. The children were on the first floor of the house without warrant or permission of the defendants. When the work-

court says it deals with the attractive nuisance question for the first time, and repudiates it, declaring it was not involved in the case of *Birge v. Gardiner*, supra.

The next authority cited in the *Stout Case* was *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413. In this case a child less than three years of age was hurt while playing on a railroad track by a passing train. The fact that the plaintiff herself participated in causing the injury by being on the track, or being there without authority, and therefore being a trespasser, was held not to stand in the way of recovery. The court said that, if she was a trespasser, she was only technically so, and, under the charge given in the case, the jury must have found that she was moved only by the impulse of childish instinct, and was not old enough to be charged with fault or blame for being in a place of danger. The court is here evidently referring to the childish instinct as it bears upon the question of contributory negligence.

In *Bird v. Holbrook*, the last authority cited in the *Stout Case* upon the question of trespass, the plaintiff was injured by spring guns. This case has no bearing upon the attractive nuisance doctrine, but is authority only for the rule that the mere fact that a person is a trespasser will not prevent him from recovering damages for injuries received from spring guns.

men left the house on Saturday night, and on the Sunday following, it was uninclosed and unguarded by any obstruction, and no watchman was maintained, or other notice given of the condition of the building. The plaintiff, in her complaint, alleges that the injuries and death of her intestate were caused solely by the negligence of the defendants, and this negligence is described as follows: "In maintaining, on said May 3d, said land uninclosed, and the remnants of said dwelling house (being of a character to attract children thereupon, and of a character likely to cause injuries to children who might go upon it) unguarded, and in not maintaining a watchman or otherwise giving notice of the dangerous character of said building.

Upon the trial there were two contested issues of fact: (1) "Was the chimney which fell down left by the defendants on Saturday night in an unsafe condition, with its supports removed, so that it was in danger of toppling over, and without being properly shored, or propped up?" The plaintiff claimed to have proved the affirmative of this issue. The court's statement of the law applicable to the fact of such unsafe condition (if the jury should find it proved), in connection with the other facts, is not specially assigned as error. (2) "Were the bricks supporting the chimney, which the defendants had left in a safe condition on Saturday night, removed on Sunday after-

noon by the plaintiff's intestate and another child, a little older, digging out the supporting bricks with sticks they had obtained for that purpose, so that the chimney fell down in consequence of its being thus undermined?" The defendants offered evidence to prove, and claimed to have proved, the affirmative of this issue. They asked, and were entitled to, a statement by the court of the law defining their liability upon the state of facts as thus claimed by them to have been proved. The court, having instructed the jury that the denial of the plaintiff's allegation that, on May 3d, the uninclosed and unguarded building was of a character to attract children, and was in a condition likely to cause injury to children who might go into it, raised one of the controlling issues of the case; and having stated to the jury that the plaintiff claimed, as of the substance of his charge of negligence, that the partly demolished building, with its standing chimneys, unguarded and uninclosed, and near a public street, was a place calculated to attract young children, and likely to cause injury to children, which the defendants were bound to anticipate; and having stated that the defendants, on the other hand, contended that there was, under the circumstances, no duty on their part on May 3d to inclose the building, or maintain a watchman, that the building stood on a private lot, removed from the street, that the boy Alva was only a trespasser without

Peckham, J., in *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068, said that the difference between *Bird v. Holbrook*, 4 Bing. 628, and a turntable case, was so plain as to require no discussion.

One other case frequently cited as an authority for the attractive nuisance doctrine is *Townsend v. Wathen*, 9 East, 277. In this case the owner set spring traps on his land so near the plaintiff's courtyard, where the latter's dogs were kept, that they might scent the bait without committing any trespass on the defendant's property, and plaintiff's dogs were thereby enticed from the highway into the traps and wounded. Lord Ellenborough, Ch. J., said that every man must be taken to contemplate the probable consequences of the act he does. And therefore, when the defendant caused traps scented with the strongest meats to be placed so near to plaintiff's house as to influence the instinct of those animals, and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. What difference was there, in reason, between drawing the dog into the trap by means of his instinct, which he could not resist, and putting him there by manual force? It appeared in this case that the defendant rewarded his gamekeeper at the rate of so much a head for every dog that he caught. 19 L.R.A.(N.S.)

It will be observed from an examination of the foregoing cases that, up to the time the *Stout* Case was decided, in 1874, there was very little authority for the attractive nuisance doctrine, and in England even up to the present day there has been but little discussion of the subject.

It is therefore the turntable cases which are responsible for the great impulse given to the discussion, and it is to turntables that the doctrine of attractive nuisance has been mostly applied. It will be found by an examination of the cases in this note that while there has been an effort made to extend the doctrine announced in those cases to injuries received in other ways by trespassing children, the effort has not met with great success. The present tendency in this country seems to be to restrict it to the narrowest limits, and to put railroad turntables in a class by themselves. It will be impossible to discuss the doctrine of attractive nuisances without a reference to some of the leading turntable cases on which it is founded, and such cases as are necessary for this purpose will be mentioned in this note. A full list of the turntable cases, showing the jurisdictions in which the doctrine has been adopted or rejected, will be found in a note to *Pannill v. Potomac, F. & P. R. Co.* 4 L.R.A.(N.S.) 80.

As has already been seen, the English and American cases relied on to support the doc-

invitation, and that, if the premises were in a dangerous condition, they were rendered so without the knowledge of the defendants, by the acts of the boy Alva and his associates, over which the defendants had no control and should in no way be made responsible,—thereupon charged the jury as follows: "If you find that said building and chimneys were left in a safe condition by the defendants, and that the chimney causing the injuries was rendered dangerous and unsafe solely by the improper conduct of this boy Alva or his associates, which was the sole cause of its toppling over and falling, then, gentlemen, under such circumstances, you should find for the defendants, unless you further believe and find from the evidence that such conduct and action upon the part of the children could have been fairly and reasonably contemplated upon the part of the defendants."

We think there is error in this charge. Generally speaking, actionable negligence, as related to the circumstances of this case, implies (1) careless conduct in doing a lawful act without actual intention of injuring another; (2) consequent damage to another who, at the time and place, has the legal right to require of the actor the exercise of ordinary care in doing their lawful act. The essence of actionable negligence is the infringement of the legal right of another, or, in other words, the violation of a duty imposed by law in respect to another. Upon

trine of the turntable cases were either not analogous, or, in any event, not very satisfactory authority. Even the Stout Case, the first of the turntable authorities, is not as strong as some of the decisions of the state courts in which the doctrine is adopted and amplified. In fact, in the Stout Case, it seems to have been taken for granted that the railroad company owed a duty of reasonable care to prevent injury to the child. Of course, if the company owed such a duty, the question whether it had been fulfilled might well have been left to the jury, under the circumstances of that case. This point is well brought out in *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 63, 38 L.R.A. 573, 66 Am St. Rep. 859, 41 S. W. 62, in which it was said that "in the Stout Case, there were three questions to be determined: (1) Did the law impose upon the company a duty to use care to keep its property in such condition that persons going thereon without its invitation would not be injured? (2) Was the child, six years old, guilty of contributory negligence? and (3) Was the company guilty of negligence in leaving the turntable unlocked? The first and most important question, without an affirmative answer to which the third could not rise, was not even referred to; and, if we may judge from the opinion, that learned court's attention was not called to its presence in the case; the second was admitted by the 19 L.R.A. (N.S.)

the state of facts as claimed by the defendants, it is plain that they had the legal right to take down, and remove, the building standing on their land, to suspend the work of demolition during Sunday, to leave the chimney in question—then in a safe condition—uninclosed and unguarded, and without using any means of notification to the public of the patent condition of the building; and that, in doing this, they in fact exercised ordinary care, and neither infringed the legal rights of others, nor violated any duty imposed upon them by law in respect to others. It is plain that the plaintiff's intestate, at the time of receiving his injury, had no legal right to be upon that part of the defendants' land, and, being there, had no right to interfere with the chimney there standing, and to change it from a safe to a dangerous structure. But the claim is urged that, when the defendants suspended their lawful work on Saturday night, they might reasonably have anticipated that some person might, on the following day, unlawfully enter their land, undermine the chimney, and receive fatal injuries from its fall thus brought about; and that the law imposed upon the defendants the legal duty of using appropriate means for the prevention of such unlawful entry, and gave to the plaintiff's intestate the legal right to demand of the defendants the use of ordinary care for the purpose of preventing him from exposing himself to

railroad in favor of plaintiff; and the third, if the first were determined in the affirmative, was clearly a disputed question of fact, which the court correctly held was settled by the verdict. The main force of the opinion is spent upon this third question, in attempting to show that the evidence was of such a character that the jury were justified in finding that the company had not used such care in guarding the turntable as a reasonably prudent person would have done under similar circumstances. There could have been no doubt upon this question. The opinion of the court would have been much more satisfactory if it had undertaken to establish, instead of assuming, the affirmative of the first question."

Thus, the attractive nuisance doctrine was not built upon very firm foundations. How it has been amplified and extended will be seen by an examination of the cases in the following subdivisions of the note.

III. Basis of liability.

a. Intentional injuries.

The reasons which have been given in support of the attractive nuisance doctrine will now be considered.

In *Ryan v. Towar*, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644, the court said that it might be true

dangers created by his unlawful act. It may be true that these defendants, in suspending, on Saturday night, the work of taking down the building on their land, situate, as it was, on the street of a populous city, could have fairly and reasonably contemplated that some heedless and thoughtless persons might, on the following Sunday, unlawfully enter upon their land, recklessly amuse themselves by digging away the supports of the chimney, left in a perfectly safe condition, and thus cause it to fall upon themselves. But, whether this be true or not, it is not true that such persons had any legal right to require the defendants, under such circumstances, to surround their property with barriers, or to use other means adequate to prevent their entry on the land. The law on this point is settled beyond controversy. The owner of land holds his property subject to certain legal rights of others and their correlative duties; he cannot use it so as to endanger others entitled to the use of the adjoining highway or adjoining land, or of others whom he brings or invites to come upon his land, without using that care commensurate to the occasion. He may be liable to those unlawfully on his land, who are hurt through concealed sources of danger prepared with the intention of injuring such persons. But

the owner or tenant of land has the right of exclusive possession; whoever violates this right is a trespasser; and such trespasser assumes all risk of danger which is incident to the condition of the premises; as to him, the owner does not owe the legal duty of exercising care in keeping his premises in a safe condition for his use, especially when the trespasser is wrongfully interfering with the condition of the property as left by the owner. A similar rule of reciprocal right and duty is applicable to one who enters upon the land of another as a mere licensee. *Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 528, 537, 32 L.R.A. 530, 50 Am. St. Rep. 124, 34 Atl. 491; *Rooney v. Woolworth*, 74 Conn. 720, 723, 52 Atl. 411; *Frost v. Eastern R. Co.* 64 N. H. 220, 221, 10 Am. St. Rep. 396, 9 Atl. 790.

In the present case, the land (as claimed by the defendants) was in a perfectly safe condition as respects all persons not intermeddling with its condition, and a trespasser, by his own act, rendered the safe condition unsafe, and in consequence suffered harm; and the claim is that, notwithstanding the defendants clearly owed no legal duty to such trespasser, they did owe a legal duty to children who might be tempted by the (to them) attractive condition of the land to do the same acts. In

that, in a majority of the turntable cases, which were necessarily few, the *Stout Case*, supra, had been followed, but there should be a legal principle underlying the rule laid down in that case, and that principle had been assiduously sought for by some of the courts, without success. Others had asserted different reasons for following it. One gave us to understand that a child was licensed to go wherever he could find that which attracted him; a Texas court had held that children of tender years could not be trespassers; while other authorities were content to rest their approbation of and adherence to the alleged rule upon the inhumanity of the doctrine that a landowner must not be held responsible for injuries suffered by trespassing children when, by ordinary thoughtfulness and care, he could have anticipated and prevented it; and the generic term "attractive nuisances" was applied to the great variety of things which might naturally be expected to allure young children upon private premises. The term "attractive nuisance," as applied, was a new one in the books, and the plausible applications of the well-known principle that one must so occupy his own as not to do harm to the rights of others should not be construed to so restrict the use of private lands as to make it necessary to guard and protect trespassers.

Before liability can arise under the common law for an injury received by one person upon the land of another it must be shown: (1) That the injury was inten-

tional or wanton; or (2) that, if not intentional, it was received by a person who was invited upon the premises by the landowner because of a failure of the landowner to exercise due care for the safety of him to whom the invitation was extended.

A trespasser falls within the protection of the first rule, but not, of course, the second, since, in going upon the land under such circumstances, he would not be a trespasser. In case of an injury to an infant trespasser, received while at play on a turntable or other dangerous machine or instrumentality, a recovery could not be justified unless, first, the case were deemed to fall within one or the other, or both, of the above-mentioned rules; or, second, a statutory duty to avoid injury in such cases were imposed. In the absence of statute, the courts have invoked both of the above-mentioned rules to justify recovery. These rules will be examined in the order named. First, the rule as to intentional injury:

In *Townsend v. Wathen*, 9 East, 277, supra, where the dogs were lured to the traps by the bait, there was clearly an intention to catch them in that manner, although the landowner might not have intended to entrap the plaintiff's dogs. Nevertheless, there was an intention to lure the dogs to the traps. In the turntable cases the dangerous machinery is said to be a trap for the children, who are lured to it by their love of motion as the dogs were drawn to the traps by the scent of the bait. Are the cases analogous?

other words, that whenever the owner or possessor of land which, although in a perfectly safe condition, may yet be likely to tempt children to come upon it, and there create a condition dangerous to themselves, the law imposes upon such owner or possessor the legal duty of protecting such children from exposing themselves to such danger, and gives to such children the legal right to require of the owner or possessor the use of ordinary care and diligence in anticipating such conduct by children, and in the use of appropriate means for protecting them against themselves. We think this claim has no solid foundation. Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen." *Holbrook v. Aldrich*, 168 Mass. 16, 36 L.R.A. 495, 60 Am. St. Rep. 364, 46 N. E. 115. The legal duty of restraining children from going into unsafe places is imposed by law upon their parents, and those who stand *in loco parentis*, and is not imposed upon strangers. The natural instinct to help the helpless would induce anyone, in a position

properly to do so, to restrain a child from exposing itself to danger; but to impose the duty of exercising such restraint as a legal duty upon all strangers, or upon a particular class of strangers, such as the occupants of all tenements that might seem to the childish mind attractive, would prove impracticable and intolerable. The parental duty of restraint implies the parental power of correction, or of the use of preventive force.

It is true that in cases where the plaintiff seeks to recover damages alleged to have been caused by the negligence of the defendant, and it is claimed that the fault of the plaintiff concurred with that of the defendant in producing the injury, that the conduct required of the defendant may be affected by the helplessness of the plaintiff; what might be careful conduct in dealing with a vigorous person or an adult might well be careless conduct in dealing with an infirm person or a child, and conduct of the plaintiff which might establish his negligence or fault if he were a vigorous person or an adult might fail to establish such fault if he were infirm or a young child; and so it has been held in such cases that the youth of the plaintiff, as indicating his helplessness and incapacity to commit a fault, may be considered in determining the question of

In an article on Liability of Landowners to Children, by Jeremiah Smith, 11 Harvard Law Review, 349,—the ablest criticism of the attractive nuisance doctrine that has been written,—he says: "The decision in *Townsend v. Wathen*, supra, is not in point to establish the liability of a railroad to a child attracted by a turntable upon defendant's premises unless it is proved that the railroad company maintained the turntable with the express intention of catching and maiming the children of the neighborhood, and that the directors were in the habit of rewarding the section foreman at a certain rate per head for each innocent babe thus slaughtered. When Lord Ellenborough intimates that there is no difference between 'drawing the animal into the trap by means of his instinct, which he cannot resist,' and 'putting him there by manual force,' the learned judge is evidently speaking in both cases in reference to results intentionally produced; i. e., acts done with the intent of bringing the animal into the trap."

In this article he also says: "Failure to advert to probable consequences, or even knowledge that certain consequences are probable, is not equivalent to intent or desire that such consequences shall follow. In such cases it may or may not be right to hold the landowner liable on the ground of negligence. That is a separate question. . . . But it is not right to hold him liable on the ground of intention where no intent actually existed. Nor is it right, while considering whether to hold him on the 19 L.R.A. (N.S.)

ground of negligence, to throw into the scale against him the argument that he must be regarded as having actually intended the result. This sort of reasoning, carried to its logical extreme, would annihilate the distinction between negligence and intention. It also blurs the distinction between knowledge and intent."

As to the importance of maintaining the distinction between intentional injury and negligence, he says: "If, . . . as a general rule, defendants are professedly held liable on the ground of negligence, and if full damages are recoverable for negligence, why spend time in criticizing the language of the court, implying that the same result might also be reached on another and distinct ground; viz., implied intention? The answer is twofold. First: Because all this talk implying the existence of intent tends to obscure the issue as to negligence. Second: Because this talk tends to prejudice the defendant in the decision upon the issue of negligence."

Peckham, J., in *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1069, in referring to *Townsend v. Wathen*, supra, points out that the act of the defendant was not done in the prosecution of his immediate and proper business, but was a mere malicious, successful attempt to entice his neighbor's animals upon his property, the enticement being effected by the means spoken of; and said that to liken a turntable case to the allurement of dogs by the spreading of tainted meat

his contributory negligence as well as that of the defendant's negligence. *Wilmot v. McPadden*, 78 Conn. 276, 283, 61 Atl. 1069. To this extent the instinct of humanity and the claims of the helpless are recognized as elements in determining what is ordinary care in cases where such care is imposed upon one as a legal duty; but these cases have no legitimate relation to the broad proposition that must be maintained to support the charge of the court as given, viz.: the law attaches to the ownership or possession of land which, in its lawful and proper use, may be in a condition attractive to children and dangerous to them, the legal duty in the owner or possessor of protecting children from yielding to the temptation to unlawfully enter his land, and there heedlessly exposed themselves to danger. The distinction between the latter and the former proposition may become difficult to draw in some of the infinite variety of cases where the claim of liability for negligence is made, but, in its essence, the distinction is clear and vital. In the former an injury occurs to one of two persons, each in the exercise of a legal right subject to the right of the other, and requiring, of necessity, reasonable care in each. Liability for the injury is incurred by the one in fault. If both are

in fault, there is no liability. In the latter the injury occurs to one not in the exercise of a legal right, and the liability is placed upon one who, in the exercise of his legal right, has infringed no right of others. It is the distinction between a liability arising from one's own fault, and a liability arising from another's misfortune; between the enforcement of a debt and the compulsion of a gift.

The theory of a liability in innocent land-owners for injuries directly resulting from the acts of children trespassing on their premises finds support in a line of cases commonly called "the turntable cases" (*Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 691, 31 Am. Rep. 203; *Barrett v. Southern P. Co.* 91 Cal. 296, 301, 25 Am. St. Rep. 186, 27 Pac. 666; and others), and is vigorously rejected by courts in other jurisdictions. We have never had occasion to deal directly with this question. It was not involved in *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; any expressions that might favor the doctrine, in *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413, are modified and corrected in *Nolan v. New York, N. H. & H. R. Co.* 53

over traps on defendant's lands, done for the very purpose of injury, was to lose sight of the different principles upon which the cases rested.

Or, to put it a little more clearly, as was stated in *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 226, 4 L.R.A. (N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862, this "is to lose sight of the difference between negligence and intentional wrongdoing."

In *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 63, 38 L.R.A. 573, 66 Am. St. Rep. 859, 41 S. W. 62, in holding a railroad company not liable for the death of a child drowned in a pool of water on its premises, the court said it did not wish to be understood as holding that one was not liable for injuries to persons going onto his land uninvited; that is, where a pit was sunk, or a gun was set on one's land to injure trespassers. In such cases the liability was based upon the breach of a duty imposed by law not intentionally to injure even a trespasser; and such intent might be evidenced by circumstances, as where one secretly dug a pit across a pathway over his land where he had reason to believe another would pass at night. In such cases the liability was not based upon the assumption that the owner owed a duty to the uninvited person to keep his premises reasonably safe, but upon the fact that he owed a duty to such person not intentionally to injure him. The failure to observe this distinction has led to much confusion.

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So far as intention or implied intention to injure is concerned, *Townsend v. Wathen*, supra, and the turntable cases, are not alike, since the prime object of the turntable is not to catch children.

b. Implied invitation.

The other rule, that of implied invitation, is the one more generally relied upon.

In *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393, one of the early cases in which the turntable doctrine announced in the *Stout Case* was taken up and elucidated, the injured child was not considered a voluntary trespasser, the court saying that the turntable, being attractive, presented to the natural instincts of young children a strong temptation, and such children following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the case of a child who was injured on a turntable and that of a voluntary trespasser, capable of using case, consisted in this: That the child was induced to come upon a turntable by the company's own conduct, and that, as to him, the turntable was a hidden danger and a trap.

In *Chicago & E. R. Co. v. Fox*, 38 Ind. App. 268, 70 N. E. 81, where a six-and-one-half-year-old child was injured while playing on an unfastened turntable, the court, in holding the company liable, said that the du-

Conn. 461, 474, 4 Atl. 106; and in *Rohloff v. Fair Haven & W. R. Co.* 76 Conn. 689, 694, 58 Atl. 5, and in *Fitzmaurice v. Connecticut R. & Lighting Co.* 78 Conn. 406, 3 L.R.A.(N.S.) 149, 112 Am. St. Rep. 159, 62 Atl. 620, we left the question an open one.

For the reasons above indicated we are satisfied that, upon the facts assumed in the charge under discussion, the plaintiff's intestate, whether regarded as a mere licensee or a trespasser, assumed all risk of danger which was incident to the then condition of the premises, notwithstanding his age was seven and one half years. This view of the law is substantially maintained in the following cases: *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682; *Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068.

The objection to the charge of the court in relation to the measure of damages is not well taken. The plaintiff, if entitled to recover at all, is entitled to recover damages on the same grounds and measured by the

same rule as if the action had been brought by her intestate in his lifetime. *Wilmot v. McPadden*, 78 Conn. 284, 61 Atl. 1069.

During the trial the plaintiff produced a witness who testified that, on the Sunday in question, on his way to church, he walked on the side of the street next the defendants' premises, and, on his return from church, walked on the opposite side of the street. Thereupon, and against the objection of the defendants, the court permitted the question, "Why did you do so?" The witness answered: "Because I was afraid that the chimney would fall upon me." The matter was not pursued further. For the purpose of drawing from the witness his opinion based upon observation of the actual condition of the chimney the form of the question was not correct, and unless asked for this purpose it was inadmissible. But the answer it elicited was immaterial. The unfounded, cautious timidity of this witness was not a fact relevant to the actual condition of the chimney. It is not necessarily error for a court to refuse to enforce formal rules for the questioning of witnesses; at times this course may be advisable; and such conduct of the court, involving no material harm to an objecting party, cannot be sufficient ground for a new

trial. The objection to the charge of the court in relation to the measure of damages is not well taken. The plaintiff, if entitled to recover at all, is entitled to recover damages on the same grounds and measured by the

ty of the defendant in such cases might be based upon what might be called one species of implied invitation not involving the actual intention or wish of the defendant that the plaintiff should come upon the defendant's premises, or do the act which resulted in his injury, but consisting in leaving a thing exposed and unguarded which was of such a nature as to tempt and allure young children or others not *sui juris*, to play with it, or otherwise to use it, at a place where, within the knowledge of the defendant, such incompetent persons assembled or were likely to do so, the injurious thing being such that the defendant might enjoy the use of such property for the purpose to which it was adapted and for which it was intended without leaving it in a condition thus dangerous to such persons, it being of such a nature that, at slight expense, he might secure it when not in such use so that it would not be thus dangerous.

In the same case, pointing out the limitations of the doctrine, the court said that the so-called invitation or tortious allurements which would be a violation of duty would not be involved where the defendant could not carry on his lawful business or pursuit in the necessary and ordinary manner, and, at the same time, take precautions to prevent injury to such incompetent persons through the indulgence of their natural instinct to seek enjoyment or diversion; in which case, the injury being attributable, not to the fault of the injured person, but rather to the indulgence of an innocent instinct, no blame was attached to the defend-

ant. "Thus, for instance," said the court, "would be the case of the intrusion of a child upon a railway train during its temporary stoppage at a station for the discharge and the reception of passengers, where the child enters the car along with other persons. In such case the railway company does nothing not incident to the usual and necessary way of conducting its lawful business. So might be the case of a child jumping upon the steps of a moving railway train. But a turntable, not constantly, but only occasionally, used to change the direction of locomotive engines, may, without undue interference with the company's full enjoyment thereof, be securely fastened when not in use, without great expense or inconvenience, and such precaution may even tend to the preservation of the property itself, which, however, would be a matter within its own discretion."

In *Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790, a turntable case, the court, in discussing the question whether the defendant was liable on the ground of implied invitation, said: "One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or inclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond or blueberry pas-

trial, and ought not to be assigned as error.

There is error. The judgment of the Superior Court is set aside, and the cause remanded for further proceedings according to law.

In this opinion the other Judges concur.

KENTUCKY COURT OF APPEALS.

WILLIS SWARTWOOD'S GUARDIAN et al., Appts.,
v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

(— Ky. —, 111 S. W. 305.)

Railroad — trespassing children — active care.

1. A railroad company is not required to maintain in populous communities a lookout for children who are in the habit of jumping on and off its cars while in motion, and provide against injuries to them.

Negligence — attractive nuisance — injury to child.

2. That a railroad company has left a pile

of lumber legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Referring to this language, the court, in *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95, said that, if intended as sarcasm, it was proper to observe that there was not a rule known to the law, no matter how sacred or universally recognized, which would not, by an extreme and exaggerated application of its principles, be made to appear ridiculous.

In *Walker v. Potomac, F. & P. R. Co.* supra, the court said that no landowner supposed for a moment that, by growing fruit trees near the highway or where boys were accustomed to play, however much they might be tempted to climb the trees and take his fruit, he was extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believed that a landowner, as a matter of fact, whether a railroad company or a private individual, who made changes in his own land in the course of the beneficial user, which changes were reasonable and lawful, but which were attractive to children, and might expose them to danger if they should yield to the attraction, was, by that act alone, inviting them upon his premises.

In *Turess v. New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614, the position is 19 L.R.A. (N.S.)

of sand unguarded on a vacant lot adjacent to its tracks, which is attractive to children, will not render it liable to a child who, attracted thereto to play, attempts to board a passing train, to its injury.

(June 12, 1908.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Kenton County in defendants' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Mr. B. F. Graziana for appellants.

Messrs. Benjamin D. Warfield, S. D. Rouse, John Galvin, and Maurice Galvin for appellees.

O'Rear, Ch. J., delivered the opinion of the court:

The question for decision in this case is whether railroad companies whose lines traverse cities and towns, or other populous communities, must maintain a lookout for children who are in the habit of jumping on and off the cars while in motion, although the railroad people did not know the particular child who might be injured by such

taken that the liability of a railroad company to a child hurt while playing on a turntable cannot arise out of a duty imposed on the company by reason of a supposed implied invitation. The opinion of the court in this case is sufficiently stated in *Briscoe v. Henderson Lighting & P. Co.* This is as strong a criticism of the implied invitation doctrine as is to be found in any of the cases.

The doctrine of constructive invitation was also repudiated in *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283, and it was held that a child drawn upon the company's premises by the attractiveness of a turntable was a mere trespasser, and that the company was therefore not liable for injury to it while at play thereon. In this case the court said that the cases relied upon to establish the company's liability might be divided into two classes. Those of the first class rested upon the proposition that, if a turntable was of a dangerous nature and character when unlocked or unguarded, in a place much resorted to by the public, and where children were wont to go and play, it was the duty of the railroad company owning the turntable to keep the same securely locked and fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded. The second class of cases proceeded upon the doctrine of constructive invitation; that is, that, if a person was allured or tempted by some act of the railroad company to enter upon its land, he was not a trespasser.

The classification suggested by the court is hardly scientific, since the doctrine of

practice was in fact upon its cars, and to provide against such injuries.

The petition in this case, which was held bad on demurrer, alleged that the infant plaintiff, aged eight years, was attracted to appellees' trains in the city of Covington by other children jumping on and off the cars while in motion, stealing rides, and that the defendants were aware of the practices of such children at that point; that a watchman of the appellees, whose duty it was to lower and raise a nearby gate across a street railroad intersection, also knew of the practice of the children, but, on the occasion of the plaintiff's injury, took no precaution to learn whether he was on the train or not; that plaintiff, following the practice of the other children, and in attempting to jump on one of the moving cars, slipped and fell beneath it, thereby having a foot cut off. It is not charged that the defendants knew that plaintiff was attempting to make his perilous try at the time he did it, or that defendants neglected to use any precaution to save him from injury after discovering his peril. So the question comes down to the point stated in the beginning of this opinion. It is a fact of which we all know that railroads traverse streets and lots in our cities on their grade; that there is little

or no protection against trespassing upon the railroad tracks; that children and others do so in spite of the well-known dangers of the practice. The legislature has not taken action to require the railroad companies or the cities to maintain barriers against such trespassers. The habit of such trespassing, including, perhaps, the childish tendency and practice of clambering onto the moving cars to get a short free ride, is well known also to everybody, including, of course, the railroad people. If the operators of the train know of the actual presence of such trespassers, for such they are, they are required by the humaneness of the law to not injure them if, with the means at their command, they can avoid doing so. Nor will the inconvenience and annoyance entailed be counted. The courts have never gone further than that. The legislature may, but it has not. Any other rule, particularly the one contended for by appellant, would require practically that such railroads should police all their lines and vehicles in such cities and towns in anticipation of the dangers to thoughtless and heedless persons. Because of their inexperience and childish instincts, infants of tender years are not always held to the same strict accountability as adults in such matters. The latter are

constructive invitation mentioned as the basis upon which the second class of cases proceed is merely the reason given for imposing a duty in the first class referred to.

A few cases may be referred to in which the question of what may or may not be considered an implied invitation, which will render a landowner liable for injuries to trespassing children, was decided.

Merely abstaining from driving children off of a lot is not an invitation which will impose any duty or responsibility for the condition thereof upon the owner of the land. *Galligan v. Metacomet Mfg. Co.* 143 Mass. 527, 10 N. E. 171.

Nor can one who goes into railroad yards, not for amusement, but to pick up grain scattered along the right of way, be said to have been invited upon the premises by the company, so as to render it liable for subsequent injury under the doctrine of the turntable cases. *Union Stock Yard & Transit Co. v. Butler*, 92 Ill. App. 166.

A railroad company which leases part of its premises on one side of a switch yard for a circus does not thereby extend an implied invitation to a twelve-year-old boy to take a short cut to the show grounds over the switch yard, so as to render the company liable for his death, where he is run over while crossing the tracks, especially where he is twice warned to keep out. *Clark v. Northern P. R. Co.* 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636.

That children are in the habit of crossing the land of a company which maintains a building in which there is an unused water

wheel does not amount to an invitation to go upon the land, so as to render the company liable for injury to a child, received while attempting to rescue another child caught by the wheel with which it was playing. *Ryan v. Towar*, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644. The court said that, as to the question of license or invitation, there was no difference between children and adults.

Tacit permission to boys to enter a barn does not amount to an invitation which will fasten liability upon the owner for the death of a seven-year-old boy who goes into the building in the absence of employees of the owner, and is killed by the falling of a door upon him. *Formall v. Standard Oil Co.* 127 Mich. 496, 86 N. W. 946.

In *Wilson v. Atchison, T. & S. F. R. Co.* 66 Kan. 183, 71 Pac. 282, it was held that the fact that a slowly-moving train might be a temptation to boys to mount and ride thereon could not be regarded as an invitation by a railway company to do so, and that the boy who went upon such a train without invitation or right was a trespasser, and the extent of the duty of the company toward him was not to injure him wantonly or recklessly.

Where the sole negligence charged against the company is that its servants invited the injured boy to assist them in turning the turntable, the case is not within the attractive nuisance rule. *Belt R. Co. v. Charters*, 123 Ill. App. 322.

In *Gay v. Essex Electric Street R. Co.* 159 Mass. 238, 21 L.R.A. 448, 38 Am. St. Rep.

charged with their own negligence in wilfully going into such perilous places without right to do so; but, even if they were not negligent, as for example, if they were insane, the rule would not be different. So the rule is not based entirely upon the negligence or even wrong of the so-called trespasser. Rather, the reason a recovery is denied is because the railroad company has not been legally negligent of any duty owed to such person. Without legal duty there cannot be actionable negligence. The duty is not owing, because, as such person had not the right to be at the place, his presence need not be expected, and need not therefore be provided against. It is true it is known that such trespasses are probable; but they are sporadic. The railroads are required to serve the public by running their trains over their tracks. They are held to a rather strict accountability in many matters connected therewith. To require this additional duty would be to put railroad operations beneath the rights of trespassers upon the railway tracks. It would be hard, if not impracticable, to draw a line between wilful trespassers and those of other degrees, or between those who trespass in

towns and those who trespass in the country. Both quarters are alike subject to the practice, though with varying frequency. Hence, no distinction is recognized as existing with respect to such.

The courts have gone as far as seems allowable within the principles of the common law, in applying the doctrine of liability to technical trespassers; where for example, the public uses a railroad as a street or passway for such time and with such frequency as to show with reasonable certainty that they are present at all times, the railroad company, by its acquiescence, seemingly assenting to and inviting such use, the traveler is not deemed a trespasser, or, if he is, the company is charged with notice of the fact of his presence. It may be thought harsh and arbitrary to draw a line between such and children who are allowed to habitually trespass on the moving cars. But the line must, of necessity, be drawn somewhere. And, where the gradation becomes shadowy and indistinct, it may appear that the line is drawn arbitrarily. But it is not so in this instance. A very practical differentiation exists logically. The public—which, of course, includes everybody—may

415, 34 N. E. 186, it was held that leaving street cars in a street was not an invitation or license to children to play upon them, although the street car company knew that they were calculated to attract children, and did attract them.

Recovery of damages for injuries to children in the turntable and kindred cases can hardly be justified on the ground of implied invitation, as that doctrine was formerly understood, any more than it can be justified on the ground of implied intention to injure; but, if the circumstances of the cases are such that the landowner ought to be made liable, there is perhaps no great sin in extending the doctrine of implied invitation to meet the demands of advancing civilization. The whole doctrine of implied invitation is no doubt founded in "judicial legislation," ready as the judges would be to deny it. The courts adopting the attractive nuisance doctrine have "legislated" once more, that is all; but this is not saying that, as between the children and the landowner, the judges, in throwing this weight in the scale in favor of the little ones, have done well or ill. Certainly the dire results that some of the courts have feared have not yet come to pass, and probably much good has been done in the way of forcing the guarding of exposed machinery dangerous to children, and preventing them from trespassing in places where they are liable to be hurt.

c. Child not regarded as trespasser.

In some of the cases, the injured child seems to be regarded as not a trespasser, not 19 L.R.A. (N.S.)

on the ground that he went upon the premises on an implied invitation, but because he is a child too young to commit a trespass.

In *Lewis v. Cleveland, C. C. & St. L. R. Co.* (Ind. App.) 84 N. E. 23, it was said that the courts of Indiana do not regard as a trespasser a child of tender years, attracted by something on the premises which appeals to his curiosity.

In *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103, in sustaining a verdict in favor of a twelve-year-old boy hurt while playing on a turntable, the court said that it appeared that the turntable was uninclosed and near a pond to which boys went to fish. The entry upon such a place was not a trespass in a child which would deprive it of the right to recover for an injury resulting from the attempted use of the dangerous machine to which children would be attracted for sport or pastime.

And in *Ft. Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L.R.A. 781, 16 S. W. 1093, where the turntable was located not far from the business portion of a town, in an open and uninclosed place where persons were in the habit of passing, there being nothing to prevent free access to the place, and where children had frequently resorted to play on the turntable, and where accidents had happened previous to the injury of the plaintiff, the court held, on the authority of the last-mentioned case, that the entry upon such a place by a child was not a trespass which would deprive it of the right to recover for the injury.

In *Lynchburg Telegraph Co. v. Booker*, 103 Va. 594, 50 S. E. 148, it was held that a child who thrusts his hand through a rail-

obtain an easement in land by prescription. The particular land thereby is dedicated to the public use. As railroads do run upon streets of cities, it is not inconsistent that streets may be opened up along the railroad track. If the railroad, in fact, so dedicates its track in a city, or allows it to be so used for such a length of time as that the public right attaches as if there had been such dedication, then the public are there as a matter of right; or, at least, the railroad, because of its acquiescence and seeming invitation, will not be heard to deny it. Its duty in that event is to maintain a lookout for such persons, knowing they are probably present; and to take precautions against injuring them. But this rule of presumptive dedication does not apply as to sparsely settled sections, or where the use is comparatively infrequent, and without semblance of an assertion of a public right. These rules obtain without any respect to the ages or mental conditions of those using such ways. Now, as to the cars, there is no such thing as the public's acquiring a right to use them by prescription. There is no precedent for such a claim, and no principle in law analogous to it. All who venture unbidden by

the company, and unknown to it, upon its trains, do so at their own peril, as they can have no right, and the company therefore owes them no duty, in such case. This rule also applies from the very necessity of the matter, without respect to the age or condition of the trespasser; for the court must deal with the question first of legal duty, not compassionate innocence.

Counsel for appellant cites and relies upon *Louisville & N. R. Co. v. Popp*, 96 Ky. 103, 27 S. W. 992; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, and a line of cases known as the "turntable cases." In *Louisville & N. R. Co. v. Popp*, supra, the injured child was known to be on the car by the trainmen when they bumped other cars against it so violently and negligently as to throw the plaintiff off and hurt him. The principle on which the recovery was allowed in that case is one firmly fixed; namely, the known presence of a trespasser imposes the duty on the trainmen to use care not to injure him. They have the right to eject him because he is a trespasser; but not to kill or maim him. *Bransom v. Labrot*, supra, rests on the same principle as the turntable cases; namely, the negligent leav-

ing, and grasps a live wire on private premises, mistaking it for a string, was not such a trespasser as would relieve the owner of the wire from responsibility for resulting injuries. The court said that, in legal contemplation, it might be that any unauthorized entry upon the premises of another whose title extended to the center of the earth downward and without limit upward, by putting one's hand through or over the boundary fence, was a trespass. But it would certainly seem that the trespass had reached its vanishing point when it was committed by a child eight years of age. The owner of the premises would find it difficult to maintain such a defense if he had knowingly permitted so grievous a danger to exist within reach of a public street, and thereby caused an injury to one incapable of contributory negligence.

d. Sic utere tuo ut alienum non laedas.

In some of the turntable cases reference has been made to the maxim *Sic utere tuo ut alienum non laedas* as a reason for imposing liability for injuries to children.

In *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 226, 4 L.R.A.(N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862, the court said that there might be more, but there was one, conclusive answer to this argument, and that was that it referred only to acts of the landowner, the effects of which extended beyond the limits of his property.

e. Circumstances showing negligence.

The reasons for imposing a duty on the 39 L.R.A.(N.S.)

landowner to avoid injuries to trespassing children having been given, what has been deemed to amount to a breach of this duty, that is, what constitutes the negligence upon which the liability arises, will now be considered. The grounds upon which railroads have been held liable in the turntable cases may be summed up as:

1. That the turntable is easily accessible to children.

2. That it is peculiarly attractive to children, and calculated to entice them.

3. That, when set in motion, it is a source of latent danger.

4. That it was left unguarded and unfastened, although, at slight expense, it could have been guarded and fastened.

5. That the company knew that children were accustomed to play there, and ought to have known the danger to them.

In *Gates v. Northern P. R. Co.* 37 Mont. 103, 94 Pac. 751, in reversing a judgment in favor of the plaintiff for the death of an eleven-year-old child killed by the toppling over of a car, set bottom side up on the slope of an embankment, the case not having been brought within the requirements for recovery under the attractive nuisance doctrine, Brantly, Ch. J., did not approve the doctrine of the turntable cases, but Smith, J., who wrote the opinion of the court, and Holloway, J., both approved it, and the former said that, in his opinion, when the owner or occupier of grounds brought or artificially created something thereon especially attractive to children, as shown by the nature of the thing itself, and the fact that a child was, or children were, attracted to it, and left it so exposed that

ing upon one's lands unguarded, dangerous contrivances attractive to children, whereby they are lured onto the real property of the negligent owner, and sustain injury. But that principle has not a place here. The cars were not left in unguarded lots, but were being used in the only way the conditions permitted them to be used at the time and place.

So far, we have discussed this case omitting to mention another allegation of the petition which appellant seems to place some stress upon as supporting a right to recover in this action; that is, it is alleged that on an open lot owned by defendants, adjacent to their track where the injury occurred, defendants had placed a pile of sand and left it unguarded, which was attractive to children, and did attract them and the plaintiff to that point to play; that whilst they were there the train came along, when plaintiff left the sand pile, and attempted to board the cars. The allegation as to the sand is wholly redundant. The sand had no connection with the injury, and was not a proximate cause of it. If the plaintiff had been injured by the sand, or by rolling or slipping from it under the train, and thereby got hurt, a different question would be presented. But such was not the fact.

they were likely to come in contact with it, either as a plaything or an object of curiosity, and where their coming in contact with it or playing about it was obviously dangerous to them, the person exposing the dangerous thing should reasonably anticipate the injury that was likely to happen to them from its being so exposed, and was bound to use ordinary care to guard it so as to prevent injury to them. Holloway, J., said: "At present I am not prepared to go further than to say that I think such landowner should be held liable to the injured child only in a case presenting all the following facts: (1) That the injured child was too young and inexperienced to appreciate the danger, and was therefore incapable of contributory negligence; (2) that the injury was caused by an unguarded dangerous machine or other dangerous thing peculiarly attractive to children of the class to which the injured one belongs; (3) that the landowner impliedly invited children of that class to come upon his premises. This invitation may be implied from the fact that the landowner knew, or, in the exercise of ordinary care, ought to have known, that such children were in the habit of coming on his premises to play or to gratify their childish curiosity."

As a usual thing, it will be found that, in most of the turntable cases in which the railroad companies were made to pay for the injuries inflicted, the table was in a place easily accessible to children.

In *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203, the doctrine of 19 L.R.A. (N.S.)

We are of the opinion that the ruling on the demurrer was without error; and the judgment must be affirmed.

NORTH CAROLINA SUPREME COURT.

WALTER H. BRISCOE, by Next Friend,
v.
HENDERSON LIGHTING & POWER COMPANY, Appt.

(148 N. C. 396, 62 S. E. 600.)

Pleading — alleyway — meaning.

1. The use of the term "alleyway," in describing the place where a personal injury occurred, does not, of itself, imply that the strip of land was dedicated to public use.

Dangerous premises — attractions — liability.

2. The mere erection of a building with large windows and doors through which can be seen machinery constantly in motion, upon a lot unfenced from the highway, which is calculated to allure children to see the machinery, does not render the owner liable for injury to a child falling into an insecurely covered well of hot water in an open space some distance from the building, where there is nothing to show that chil-

attractive nuisances was applied to a turntable located in an open prairie within less than half a mile of a populous city, where persons frequently passed and repassed, and where boys often played; the court saying that it would naturally attract boys and induce them to ride upon it, as all men ought to know. "Everybody knows," said the court, "that, by nature and by instinct, boys love to ride, and love to move by other means than their own locomotion. They will cling to the hind ends of moving wagons; ride upon swings and swinging gates; slide upon cellar doors and the rails of staircases; pull sleds up hill in order to ride down upon them on the snow, and even pay to ride upon imitation horses and imitation chariots swung around in a circle by means of steam or horse power. This last is very much like riding around in a circle upon a turntable. Now, everybody knowing the nature and the instincts common to all boys must act accordingly. No person has a right to leave, even on his own land, dangerous machinery, calculated to attract and entice boys to it, there to be injured, unless he first take proper steps to guard against all danger; and any person who thus does leave dangerous machinery exposed without first providing against all danger is guilty of negligence."

"Here," said the court, in *Ryan v. Towar*, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644, commenting on the last-mentioned case, "we have the doctrine of the turntable cases carried to its natural and logical result. We have only to add

children had ever been allured to the premises by the machinery, or that the injured child was so allured.

Same — open space — theater.

3. The mere maintenance of an insecurely covered well of hot water upon an open space unfenced from the street, near the rear of a theater, will not render the owner liable for injury to a thirteen-year old child of average intelligence, who falls into it, although the child was allured to the place by a desire to see what was going on in the rear part of the theater.

(October 14, 1908.)

APPEAL by defendant from a judgment of the Superior Court for Vance County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Connor, J.:

The plaintiff, suing by his next friend, alleges: That the defendant is a duly chartered corporation, engaged in supplying light to the inhabitants of Henderson, North Carolina, and heat and power to some of them. That the defendant has and operates its light and power and heating plant on

Spring street, very near Main street of the town of Henderson, in a populous part of the said town, where there is much passing. That the defendant has and operates a large, attractive brick building, very large dynamos, shaftings, and pulleys, engines and boilers, and, by means of large doors and windows, these machines may be seen from the street, the railway tracks, and the alley near by. That Spring street crosses Main street at a point 114 feet from defendant's said plant. That defendant's manager, Mr. Woodsworth, lives on the corner made by the intersection of said streets, his residence lot being 61½ feet on Main street and 114 on Spring street. That next to his lot is the Grand Theater, on a lot 54 feet on Main street and running back 110 feet. That the light and power plant extends from Spring street across or along the rear of these two lots, and the space between the power plant building and the rear of Mr. Woodsworth's lot, which is inclosed by a high fence, and the rear wall of the Grand Theater, forms an alleyway about ——— feet wide, extending from Spring street, at a point near the Southern Depot, to an open lot which extends around the north side of the theater building to Main

that every man who leaves a wheelbarrow or a lawn mower or a spade upon his lawn; a rake, with its sharp teeth pointing upward, upon the ground or leaning against a fence; a bed of mortar prepared for use in his new house; a wagon in his barnyard, upon which children may climb, and from which they may fall; or who turns in his lot a kicking horse or a cow with calf,— does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door and the usual apertures through which the accumulations of the stable are thrown be kept locked and fastened, lest twelve-year-old boys get in and be hurt by the animals, or by climbing into the haymow and falling from beams? May a man keep a ladder, or a grindstone, or a scythe, or a plow, or a reaper, without danger of being called upon to reward trespassing children whose parents owe, and may be presumed to perform, the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish pond? and must he guard ravines and precipices upon his land? Such is the evolution of the law less than thirty years after the decision of *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received, and due 19 L.R.A. (N.S.)

merely to negligence of the persons trespassed upon."

On the other hand, where the turntable on which a nine-year-old boy was hurt was not in a public street, or in a place where persons generally were in the habit of passing, it was held that, in view of its isolated position, the company was not guilty of such want of care as would lawfully charge it with damages for the accident. *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269.

In *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484, the court did not regard the last-mentioned case as opposing, but rather as endorsing, the doctrine of the turntable cases.

Simply because a turntable, however, is located in an out-of-the-way place, 28 rods from the nearest highway, does not relieve the company from keeping watch to find out whether it is being used by children, where there are no fences or obstructions to prevent children from gathering upon it. *Berg v. Minneapolis & St. L. R. Co.* 95 Minn. 404, 104 N. W. 293, 5 A. & E. Ann. Cas. 375.

The turntable or other injury-producing agency must next be attractive or alluring to the infantile mind under the attractive nuisance doctrine, and many of the cases in jurisdictions where the doctrine is recognized turn upon this question. It is because of the attractiveness of the thing, of course, which draws the child upon the premises, that the invitation is implied.

In an action against a company for injury to a boy of tender years by a turntable, it

street. That this open alleyway is the property of, or in possession and control of, the defendant. That the said theater building and the residence of the said manager are heated or warmed by hot air, or steam, or hot water, supplied by pipes extending underground from engines in defendant's power plant across said alley into said buildings. That just on the edge of said alleyway, and next to the manager's fence and the theater building, are three small wells or receptacles several feet deep, into which the hot water from the heating pipes of said plant escapes. That these wells are filled or nearly filled all of the time with very hot water, and that this condition existed at the time hereinafter referred to. That the defendant, in the month of October, 1907, unlawfully, negligently, carelessly, and wrongfully permitted said alleyway to remain open in immediate proximity to Spring street, and did unlawfully, wrongfully, and negligently fail to cover up securely or in any manner guard one of said hot water wells, but unlawfully covered or permitted to be covered the said well with a thin and weak covering, which the plaintiff believes was a banana case. That the plaintiff, being only a small boy, with the intelligence, usual in boys of his

age, in passing through said alleyway at said time, did not and could not see the well or hole of hot water aforesaid, or know that it was under the thin, weak piece of wood; and, not having been guarded or cautioned against it, stepped upon the thin wood covering, which instantly gave way, and precipitated plaintiff into said hole or well of hot water, which instantly, before he could extricate himself, burned and scalded the plaintiff's right foot and leg so that the skin and parts of the flesh came off, and the remaining flesh was lacerated and wounded and made dangerously sore from the bottom of the foot to 3 inches above the knee, and the plaintiff suffered great pain and anguish of body for a long time, and was put to great cost and expense for nursing and for medicines, and for attendance and services of a physician, to the plaintiff's damage of \$2,000. The plaintiff further alleges that the entrances to the engine rooms and the power house and the theater were in said alley, and the machinery, being constantly in motion, is calculated to attract and allure boys and others to see the machinery and what may be seen in the theater, and the defendant was negligent and at fault in permitting said wells to remain in said alleyway, uncovered or defectively covered, and

should be alleged that the child was drawn to it by childish curiosity, or that the table was attractive to children, or that the injured boy was then so young that he was unable to appreciate the danger of the situation. *Belt R. Co. v. Charters*, 123 Ill. App. 322.

To fix upon a railroad company the charge of negligence in the maintenance of a turntable attractive to children, it must be established that the turntable, having regard to its construction and situation, was of a kind which, if left unfastened or unguarded, was likely to attract children, or that the danger was so apparent that the defendant ought, in the exercise of ordinary prudence, to have anticipated that children would resort to the machine and be injured by it. *Alabama G. S. R. Co. v. Crocker*, 131 Ala. 584, 31 So. 561.

So it was held that, in an action for injury sustained by a boy of tender years on a turntable, based on the theory that it was an attractive nuisance, evidence tending to prove that other boys had been seen around the turntable before the accident, and that it was situate in a residence district, is admissible. *Belt R. Co. v. Charters*, supra.

In *San Antonio & A. P. R. Co. v. Morgan*, 92 Tex. 98, 46 S. W. 28, reversing (Tex. Civ. App.) 45 S. W. 169, the court said that, in so far as the turntable and other cases involving injuries upon dangerous machinery on private property might be considered to lay down the broad proposition that the owner could be held liable without proof of

either an intent to injure or an invitation, it did not think they were based upon sound principle. It was contended in this case that when an owner placed or permitted anything to be upon his property which was attractive to another, who was thereby induced to go thereon, the invitation might be inferred as a fact by the court or jury. But it was held that, in order to amount to an implied invitation, the owner must maintain upon his premises something which, on account of its nature and surroundings, was especially and unusually attractive. The petition in the case, having failed to show an invitation, in that it neither alleged a direct invitation nor alleged that the turntable upon which the injury was caused was unusually attractive, and having failed to allege that there was any intent to injure, was held demurrable.

But, in *San Antonio & A. P. R. Co. v. Morgan*, 24 Tex. Civ. App. 62, 58 S. W. 544, it was held that it was not necessary specifically to set up an implied invitation where the petition alleged that the turntable was a dangerous machine for children of tender years and immature judgment to play with, on account of its nature and surroundings, and especially because they could easily revolve it and ride upon it; that when it was not locked it was especially and unusually calculated to attract, and did attract, such children, and appealed to their instinct to play, and that it tempted and lured them and thereby caused them to enter thereon when it was not locked, to turn it round and ride thereon, and in other

such negligence was the direct and proximate cause of the plaintiff's great injury and suffering.

The defendant demurred to the complaint for that it did not state facts sufficient to constitute a cause of action, in that it did not allege or appear: (1) That the defendant owed the plaintiff or the public the duty of keeping said alleyway (so-called) on or across its own premises open or free from obstruction so as to be used by the public, or that defendant owed the plaintiff any special duty whatsoever. (2) That the plaintiff or the public had any right to go upon the premises of the defendant or upon the alleyway, or to use the same for any purpose whatsoever. (3) That the alleyway was used by the plaintiff or the public, or that defendant knew that the plaintiff was in the habit of going on said premises, or had ever invited him there. (4) That the defendant knew that the alleged alleyway was a common resort of children of tender years in which to congregate and play, or that defendant was guilty of any act constituting negligence. For that it did appear from the allegations of the complaint: (5) That the open alleyway where the plaintiff alleges he was injured was the private prop-

erty of the defendant, and that defendant was in the possession and control thereof, and was using the same for the purposes permitted in its charter. (6) That the plaintiff was a trespasser upon the premises of the defendant, and was of such age as to be guilty of contributory negligence, and that the injury of which he complains was due to his own negligence, and not to the negligence of defendant.

His Honor overruled the demurrer, and gave defendant time to file answer. Defendant excepted and appealed.

Messrs. A. C. Zollcoffer and J. H. Bridgers, for appellant:

More attractiveness to children will not justify a recovery, and especially where the injury complained of occurred on the private property of the owner.

Kramer v. Southern R. Co. 127 N. C. 330, 52 L.R.A. 359, 37 S. E. 468; Schmidt v. Kansas City Distilling Co. 90 Mo. 284, 59 Am. Rep. 17, 1 S. W. 865, 2 S. W. 417; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Hargreaves v. Deacon, 25 Mich. 5; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Jamurri v. Saginaw City Gas Co. 148 Mich. 27, 111 N. W. 884.

ways to make it a means of childish sport and diversion, the children being ignorant of the danger they thereby incurred, and that the defendant had knowledge of the practice of children to amuse themselves by playing thereon.

In *San Antonio & A. P. R. Co. v. Morgan* (Tex. Civ. App.) 46 S. W. 672, a case in which the petition was almost identical with that in the last-mentioned case, it was said, on rehearing, that, to arrive at the conclusion in that case, it became necessary to overrule a long line of decisions, ranging through more than 30 volumes of the Texas reports.

The language of the court in *San Antonio & A. P. R. Co. v. Morgan*, supra, as to the necessity of showing invitation to bring a case within the turntable doctrine, was approved in *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, rehearing denied in 32 Mont. 192, 80 Pac. 373.

In *Denison & P. Suburban R. Co. v. Harlan*, 39 Tex. Civ. App. 427, 87 S. W. 732, it was contended in effect that inasmuch as there was no evidence of direct invitation to the injured child to ride upon the turntable, the invitation being implied only from the attractiveness of the turntable for children, it was permissible to give positive proof that the turntable was no more attractive than ordinary pools of water where they could fish or paddle or sail boats. The court, however, held that such evidence was immaterial, and that the issue was whether or not the maintenance of the particular turntable where located, unlocked, unfenced, and unguarded, so that it could be and was used

by children as a plaything, rendered it so peculiarly and unusually calculated to attract them as to constitute an implied invitation to them to go upon and use it to their amusement.

In *Barrett v. Southern P. Co.* 91 Cal. 296, 24 Am. St. Rep. 186, 27 Pac. 666, in holding that it was not an answer to the claim of liability against the company that the child was a trespasser, and that, if it had not meddled with the defendant's property, it would not have been hurt, and that the law imposed no duty upon the defendant to make its premises a safe playground for children, the court said that in the forum of law, as well as of common sense, a child of immature years was expected to exercise only such care and self-restraint as belonged to childhood; and a reasonable man must be presumed to know this, and required to govern his actions accordingly. It was a matter of common experience that children of tender years were guided in their actions by childish instincts, and were lacking in that discretion which was ordinarily sufficient to enable those of more mature years to appreciate and avoid dangers; and, in proportion to this lack of judgment on their part, the care which must be observed toward them by others was increased.

In *Houck v. Chicago & A. R. Co.* 116 Mo. App. 559, 92 S. W. 738, the court said that difficulty had been experienced in stating a principle for the turntable decisions which could be reconciled with the proposition that the owner of premises was not responsible for injuries to trespassers on them, received in consequence of the condition of the prem-

Messrs. T. T. Hicks and J. C. Kittrell, for appellee:

An owner is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care if he has held out any inducement, invitation, or allurement, either express or implied, by which they have been led to enter thereon.

Bunch v. Edenton, 90 N. C. 435; Barrett v. Southern P. Co. 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; State v. Moore, 83 Am. Dec. 166, note; Wharton, Crim. Law, 10th ed. § 464; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 395; Sioux City & P. R. Co. v. Stout, 17 Wall. 660, 21 L. ed. 748; Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 205; Hydraulic Works Co. v. Orr, 83 Pa. 332.

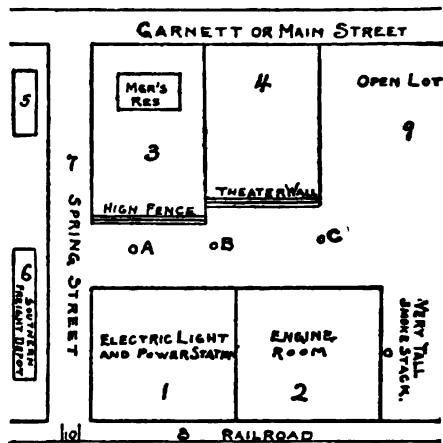
Connor, J., delivered the opinion of the court:

The diagram attached to the complaint shows that the defendant's power house and

ises, when there was no carelessness or wilful conduct by the owner. The court thought the controlling circumstance was the extent to which the machinery was likely, from its construction and situation, to attract children, together with the dangerous character of the appliance. According to the rule in analogous matters it should be for the jury to say whether the attractiveness or danger was so great as to hold the owner liable if an injury occurred; but the cases showed that the court had exercised much control over this question.

In Smalley v. Rio Grande Western R. Co. (Utah) 98 Pac. 311, the court said that it was not the keeping or leaving of all kinds of dangerous and attractive machines or other instruments upon premises that rendered the owner or occupant liable if he did not take precautions to guard or protect them, or to prevent intrusions and unauthorized visits of children. The instrument or agency must not only be dangerous and attractive, but the circumstances of leaving and maintaining it must also be such as to induce young children to believe that they are at liberty to enter and handle or play about it. That is, it must be made to appear, either from the character of the instrument or agency itself, or from the manner and circumstances under which it was maintained or left about the premises, or from other conduct on the part of the owner or occupant of the premises, that an inducement or its equivalent was held out to young children to enter. Not necessarily the doing of something on the part of the owner or occupant for the purpose of inducing the entry, but the doing of something other than a mere operation of the machine or instrument in the ordinary and

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engine room are located on Spring street, which intersects with Main street. The manager's residence fronts on Main street. At its intersection with Spring street, adjacent to the dwelling fronting on Main street, is the theater, and adjacent thereto is an

usual manner, which had the effect of causing or inducing the entry.

In Alabama G. S. R. Co. v. Crocker, supra, the court said: "Common prudence forbids that one may arrange even on his own premises that which he knows, or, in the exercise of common judgment and prudence ought to know, will naturally attract others into unsuspected danger or great bodily harm. It is the apparent probability of danger, rather than rights of property, that determines the duty and measure of care required of the author of such a contrivance, for ordinarily the duty of avoiding known danger to others may, under some circumstances, operate to require care for persons who may be at the place of danger without right."

But, in Friedman v. Snare & T. Co. 71 N. J. L. 805, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 A. & E. Ann. Cas. 497, the court said that the fact that a dangerous place or object was attractive to children of tender years was legitimately significant where the question of their own want of care was raised. But there were fundamental and insuperable difficulties standing in the way of adopting the rule that the mere attractiveness of private property gave to the persons attracted rights against the owner. One difficulty was that the rule *pro tanto* ignored the distinction between *meum* and *teum*. And on what principle was it to be limited to cases of trespass? Why did it not apply equally to the conversion of personal property or even to larceny? If those who temporarily, and for limited purposes, converted the private property of their neighbors to their own use, were not to be excused, but justified, where, by reason of their tender years, they were tempted to trespass, and, at the same time, were to have rights of action against the

open or vacant lot. In the rear of the dwelling there is a high fence. Between this fence and the power and engine house is a vacant space, called, in the complaint, an "alleyway," opening on Spring street, and extending the distance of the width of the power and engine house on one side and the dwelling and theater on the other, and finding an outlet into the vacant lot. The width of this "alleyway" is not given, but the depth of the lot upon which the dwelling is located is 114 feet from the corner of Main street. In the space, or alleyway, the defendant has dug three small wells or receptacles several feet deep, into which the hot water from the heating pipes escapes. "The dwelling and the theater are heated by hot air or steam, supplied by pipes extending underground from defendant's engines, across said alleyway into said buildings." The wells are usually full of hot water. The distance of the wells from Spring street is not given, but from the map it appears that the one into which plaintiff fell is about 62 feet from said street, and just back of the rear wall of the theater. For the

purpose of operating its business of supplying light to the city of Henderson, the defendant has erected "a large, attractive brick building, very large dynamos, shaftings, and pulleys, engines and boilers, and, by means of large doors and windows, these machines may be seen from the streets, the railway tracks, and the alley near by." It is further alleged that the entrance to the power and engine rooms are in the said "alleyway," and "the machinery, being constantly in motion, is calculated to attract and allure boys and others to see the machinery and what may be seen in the theater." Plaintiff, a boy of thirteen, "with the intelligence usual in boys of said age," passing through said alleyway on October —, 1907, not knowing or being warned of the existence of said wells, and the one in controversy not being securely covered, stepped into it and was injured. The negligence alleged is not covering up securely or in any way guarding "one of said wells," but permitting it to be covered with a thin, weak covering, etc. The demurrer is based upon the failure of the plaintiff to allege

true owners for the failure to exercise care about rendering the property suitable for their use, why might not those who, under similar temptations, converted the property of others wholly to their own use, be likewise justified, and, instead of the right of action, gain a complete title to the property by simply appropriating it?

In *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L.R.A. 833, 68 Am. St. Rep. 727, 40 Atl. 682, it was held that a railroad company was not liable for injury to a child by a turntable, although the table was located in an open field, on the land of the company, within 90 feet of a public street, and was entirely unguarded and unprotected. It was held to be erroneous to leave the case to the jury on the theory that, if the turntable was a structure of a character to tempt children to meddle with it, and dangerous to them, the railroad company was chargeable with the duty of using reasonable care to protect them from harm, the negligent performance of which would render the company liable for the injuries received.

In the following cases in which the attractive nuisance doctrine was invoked, the element of "attractiveness" was not present.

The turntable doctrine does not apply to a case in which a ten-year-old girl leaves the highway to go across land used by a city as a dumping ground for garbage and manure, the refuse forming a crust over an excavation filled with water, upon which crust the child attempts to walk, and through which she breaks, and falls into the water, and is drowned, since there is nothing alluring or enticing to children upon the premises. *Dehanitz v. St. Paul*, 73 Minn. 385, 76 N. W. 48.

No liability arises under the turntable 10 L.R.A. (N.S.)

doctrine against the owner of premises attractive to children for injuries to a nine-year-old boy, caused by catching his clothes in an unprotected revolving shaft, where the injured boy was not in fact attracted to the spot, and was not induced to go there by reason of his childish instincts and inclinations. *O'Leary v. Brooks Elevator Co.* 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919.

And where a child fifteen months old was run over by an engine, it was held that there was nothing to bring the case within the doctrine of the attractive nuisance cases, where there was neither allegation nor proof that there was anything in the railroad track, its ties or rails, to attract or hold out an implied invitation to such a child as to require a railroad to guard its right of way against children. *Cowley v. Chicago & A. R. Co.* 87 Ill. App. 123.

In *Norman v. Bartholomew*, 104 Ill. App. 667, it was held that an eight-year-old boy who was hurt by a mangle in a laundry could not be said to have been attracted by the machinery, so as to render the owner liable under the doctrine of the turntable cases, where it appeared that his mother, who worked in the laundry, called him into the room in order to restrain him from quarreling with another boy. The court said that there was no disposition to extend the turntable doctrine to cases not clearly within the rule.

A depot is not a place which allures children of tender years, or holds out to them an implied invitation or special attraction to visit it. *Ling v. Great Northern R. Co.* 165 Fed. 813.

A four-year-old boy who is induced to go into a railroad switch yard by his elder brother, in order that the latter may have him under supervision while picking up

any facts showing that defendant owed him any duty in respect to placing, using, or covering the wells upon its premises. The plaintiff does not allege that the space called an "alleyway" was ever used, or intended to be used, either as a public or private way for passing upon or over defendant's premises, nor does he allege that he ever so used it. He does not allege the purpose for which he entered upon the premises, or that any relation existed between defendant and himself entitling him to enter upon the alleyway. For the purpose of bringing himself within a class of cases decided by the courts, imposing a higher degree of care upon persons having upon their premises structures or other things which are calculated to attract children, he says that "the machinery, being constantly in motion, is calculated to attract and allure boys," etc., "to see the machinery and what may be in the theater." He does not allege that boys were ever, in fact, allowed to go into the alleyway for either purpose, or that he was so attracted or allured. It appears from the complaint that the alleyway belonged to

and was under the control of defendant, and that the premises were being used for a lawful purpose, and that the wells were useful and necessary for such purpose.

The liability of owners of premises adjacent to the public highways for injuries sustained by persons using such highways by reason of obstructions or pits placed so near thereto as to render them dangerous is well settled. *Bunch v. Edenton*, 90 N. C. 431; *Walker v. Reidsville*, 96 N. C. 382, 2 S. E. 74. No question of that kind is presented by the complaint, because it is not alleged that plaintiff, while using the highway, fell into the well. He expressly negatives this suggestion by saying that, "in passing through said alleyway," he was injured. The well was 62 feet from the street. While the term "alleyway" is used to describe the space upon which the wells were dug, plaintiff does not allege that it was used by the public, or that the public were, either expressly or impliedly, invited to use it as a public passway, or that any persons so used it. The use of the term "alleyway" does not of itself imply that the strip of

grain that is scattered along the tracks, is not attracted to the premises by any activity of enterprise that is there being carried on, so as to make the company liable under the attractive nuisance doctrine for his subsequent injury while trying to leave the place. *Union Stock Yard & Transit Co. v. Butler*, 92 Ill. App. 166.

For other cases in which the element of attractiveness has been held absent, see IV. *infra*.

In the cases in which the attractive nuisance doctrine is discussed, it will be observed that the dangerous character of the thing causing the injury is mentioned; that is, the fact that it is in itself, in the position in which it is, inherently dangerous to children; and many of the cases turn upon this ground. A point is also made that the danger must not be obvious.

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fasten it; but it can be fastened so easily, and at so slight an expense, and the moral duty to protect those unable to protect themselves is so high, that it is not surprising that liability should have been imposed in these cases. The practicability and expense of guarding the thing or place often marks the dividing line between a case in which the attractive nuisance doctrine is applied and one in which it is not. It might be practicable to lock a turntable when not in use; but it would be impossible to lock the revolving entrance door to a building, and have it of any use; and so it would be, if not impossible, at least too much to expect, that an artificial pond should be protected by a fence high or fast enough to keep a small boy out if he desired to reach it to fish or swim. All the ridicule to which the doctrine has been subjected has been due to the suggested application of it in situations where application would be ridiculous, because imposing a duty impossible of performance, or practically so. A very important fact which must be taken into consideration in connection with the turntable cases is the ease with which the table can be protected. This requirement of the doctrine prevents its application to a very wide range of cases.

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S. R. Co. 147 N. C. 142, 60 S. E. 912. After a careful re-examination of the question in the light of numerous well-considered authorities, we see no reason to change our opinion as expressed in that case. In view of the adoption of the "stock law" in this state, and the custom generally prevailing in our towns, of dispensing with fences around lots, the question becomes of more practical importance with us than heretofore. It would impose an unreasonable burden upon the owners of cultivated lands and of lots in towns to require them to guard every pathway or alley used for their own convenience against the intrusion of trespassers, or, in default thereof, be held liable for every injury sustained in passing over their premises or through their property. We do not find that any court has so held. In *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, it is said: "The owner of the land is not bound to protect or provide safeguards for wrongdoers. . . . No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely

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Another element going to make up the liability of the landowner in the attractive nuisance cases is his knowledge that the place is attractive. But this need not necessarily be actual knowledge. Having the knowledge that the dangerous thing is attractive to children, and that children resort to it, he is said to extend an implied invitation to them to come upon the premises.

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any facts showing that defendant owed him any duty in respect to placing, using, or covering the wells upon its premises. The plaintiff does not allege that the space called an "alleyway" was ever used, or intended to be used, either as a public or private way for passing upon or over defendant's premises, nor does he allege that he ever so used it. He does not allege the purpose for which he entered upon the premises, or that any relation existed between defendant and himself entitling him to enter upon the alleyway. For the purpose of bringing himself within a class of cases decided by the courts, imposing a higher degree of care upon persons having upon their premises structures or other things which are calculated to attract children, he says that "the machinery, being constantly in motion, is calculated to attract and allure boys," etc., "to see the machinery and what may be in the theater." He does not allege that boys were ever, in fact, allowed to go into the alleyway for either purpose, or that he was so attracted or allured. It appears from the complaint that the alleyway belonged to

and was under the control of defendant, and that the premises were being used for a lawful purpose, and that the wells were useful and necessary for such purpose.

The liability of owners of premises adjacent to the public highways for injuries sustained by persons using such highways by reason of obstructions or pits placed so near thereto as to render them dangerous is well settled. *Bunch v. Edenton*, 90 N. C. 431; *Walker v. Reidsville*, 96 N. C. 382, 2 S. E. 74. No question of that kind is presented by the complaint, because it is not alleged that plaintiff, while using the highway, fell into the well. He expressly negatives this suggestion by saying that, "in passing through said alleyway," he was injured. The well was 62 feet from the street. While the term "alleyway" is used to describe the space upon which the wells were dug, plaintiff does not allege that it was used by the public, or that the public were, either expressly or impliedly, invited to use it as a public passway, or that any persons so used it. The use of the term "alleyway" does not of itself imply that the strip of

grain that is scattered along the tracks, is not attracted to the premises by any activity of enterprise that is there being carried on, so as to make the company liable under the attractive nuisance doctrine for his subsequent injury while trying to leave the place. *Union Stock Yard & Transit Co. v. Butler*, 92 Ill. App. 166.

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for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place, for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon." In *Union Stock Yards & Transit Co. v. Rourke*, 10 Ill. App. 474, Bailey, J., says: "It is a general rule of law that the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who come upon them, not by any invitation, either express or implied, but for their own convenience or pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be." In this case the deceased, while passing over defendant's premises, "without any invitation from the defendant, express or implied, and without any legal right," was injured. There was evidence that other persons were in the habit of passing over the premises for

their own convenience without any objection on the part of defendant. It was held that defendant was not liable. In *Cooper v. Overton*, 102 Tenn. 211, 45 L.R.A. 591, 73 Am. St. Rep. 864, 52 S. W. 183, the court said: "There can be no liability unless it was the defendant's duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises for the protection of persons going upon his land who have no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold."

In *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 659, Sherwood, J., after discussing the allegations of the complaint, says: "The petition, we think, fails to state a cause of action against the defendants, and that the demurrers were rightfully sustained. The single question presented by the record is whether the owner of a vacant lot upon which is situated a pond of water or a dangerous excavation is required to fence it, or otherwise insure the safety of strangers,

danger; and having thus knowingly allured them into a place of danger without their fault (for it could not blame them for not resisting the temptation it had set before them), it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves. The court added: "We agree with the defendant's counsel that a railroad company is not required to make its land a safe playground for children. It has the same right to maintain and use its turntable that any landowner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care in any case must, in general, be a question for the jury, upon all the circumstances of the case."

Actual knowledge that children resort to a railroad trestle to play is immaterial in an action brought to recover for the death of a child killed by the fall of an iron placed thereon by the company, since it is bound to take notice of the habits of children, the character of the place, and the natural consequence of so placing the iron. *Dwyer v. Missouri P. R. Co.* 12 Mo. App. 597.

In *Barrett v. Southern P. Co.* 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 660, the court said that, if the defendant ought reasonably to have anticipated that, by leaving a turntable unguarded and exposed, an injury to a child was likely to occur, it must be held to have anticipated such injury, and to have been guilty of negligence in thus maintaining the table in an exposed position. 19 L.R.A. (N.S.)

IV. Extent of application.

a. Attraction on private premises.

1. Dangerous things in general.

It will be seen by a reference to the cases in the following subdivisions of this note, that there has been, as before stated, but a very limited extension of the attractive nuisance doctrine beyond the turntable cases.

In *Coleman v. Robert Graves Co.* 39 Misc. 85, 78 N. Y. Supp. 893, it was held that one who kindles a pile of shavings on his own premises, in the proper conduct of his business, owes no duty of active vigilance to prevent children from playing with the fire, and so is not liable for injuries received by a nine-year-old girl who, while poking in the ashes, allows her dress to catch fire, since setting the fire is not in the nature of setting a trap for the unwary, a child of that age knowing that the fire will burn.

The turntable doctrine will not be extended so as to render a railroad company which sets fire to stumps and rubbish on its unfenced right of way, and leaves the fire unguarded, liable for the death of a four-year-old child who goes to play with the fire, and is burned so that it dies. *Erickson v. Great Northern R. Co.* 82 Minn. 60, 51 L.R.A. 645, 83 Am. St. Rep. 410, 84 N. W. 402. The court said that it was not practicable to lay down any absolute rule as to the limitations of the doctrine. The manifest trend, however, of all the decisions of the court, was to limit its application to attractive and dangerous machinery and to other similar cases where the danger was latent. The court was not prepared to say that cases might not arise outside of this classification

old or young, who may go upon said premises, not by his invitation, express or implied, but for the purpose of amusement or from motives of curiosity,"—citing *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, and many others, sustaining a demurrer. In that case it appeared that boys had been in the habit of bathing in the pond. There was "a sudden depression, making the water some 15 feet deep." A boy of nine years was drowned by going into the depression. In *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751, Boynton, J., after reviewing the authorities, thus sums up his conclusion: "The principle underlying the cases above cited recognizes the right of the owner of real property to the exclusive use and enjoyment of the same without liability to others for injuries occasioned by its unsafe condition, where the person receiving the injury was not in or near the place of danger by lawful right, and where such owner assumed no responsibility for his safety by inviting him there without giving him notice of the existence or imminence of the peril to be avoided."

In such cases the maxim, *Sic utere tuo ut alienum non laedas*, is in no sense infringed. In its just sense it means: "So use your own property as not to injure the rights of another." When no right has been invaded, although one may have injured another, no liability has been incurred. "Actionable negligence exists only where the one whose act causes or occasions the injury owes to the injured party a duty, created either by contract or by operation of law, which he has failed to discharge." The inducement to enter must be equivalent to an invitation. Mere permission is neither inducement, allurements, nor enticement. *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216. The principle, with its limitations, is clearly stated by Pollock, C. B., in *Hardcastle v. South Yorkshire R. & R. D. Co.* 4 Hurlst & N. 67: "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, . . . be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the conse-

to which the doctrine ought to be extended, but held that, as a general rule, the doctrine of the turntable cases must be limited to cases of attractive and dangerous machinery and to other similar cases where the danger was latent. This rule might not be strictly logical, but it was a necessary one, unless landowners were to be made insurers of the safety of children when trespassing upon their premises.

One who, for the purpose of burning up waste material, starts a fire on vacant land, need not so guard it as to prevent injury to one who is attracted there by childish instincts. *Paolino v. McKendall*, 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 730, 52 Atl. 268.

Hot water in a ditch cannot be said to be an allurements sufficient to attract a child from a path, to his injury. *Etheredge v. Central R. Co.* 122 Ga. 853, 50 S. E. 1003.

The owner of a vacant lot is not liable for injury to a nine-year-old trespassing boy who gets into a pile of hot ashes or embers while at play, and is burned, where there is nothing attractive to children on the lot, and the plaintiff himself testifies that he was not attracted to the lot by anything in it, but merely went there to play. *American Advertising & Bill Posting Co. v. Flannigan*, 100 Ill. App. 452.

One who dumps ashes and cinders upon private grounds cannot be said to be thereby setting a trap to catch boys or other intruders, where there is no such intention. *Smith v. Jacob Dold Packing Co.* 82 Mo. App. 9.

The doctrine of the turntable cases will not be extended so as to render a railroad company liable for injury to a five-year-old boy who goes off of a path on the company's 19 L.R.A. (N.S.)

premises, and falls into a ditch of hot water. *Etheredge v. Central R. Co.* supra.

No cause of action arises for injury to a twelve-year-old trespassing boy by the sudden discharge of steam and hot water upon him on premises upon which he has gone for the purpose of stealing type metal and lead junk. *Mergenthaler v. Kirby*, 79 Md. 182, 47 Am. St. Rep. 371, 28 Atl. 1065.

A recovery cannot be based on evidence that a three-year-old child lost its life by having fallen into a pool of hot water discharged on defendant's premises through an escape pipe, 60 feet from a public road, in the neighborhood and vicinity of several inhabited dwelling houses, since the plaintiff must show that the place was attractive to children, or that, to the knowledge of the defendant, children were in the habit of resorting to it for amusement or otherwise. *Schmidt v. Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417.

In *Putney v. Keith*, 98 Ill. App. 285, it was held that the daughter of the owner of a house was not liable for the death of a guest's two-year-old child, who, while at play, fell into a dish of hot water placed on the floor of the kitchen by the former while in the discharge of her household duties. *Waterman, Justice*, in delivering the majority opinion, said that it was not necessarily negligent to have about the house things that attracted the attention of children, and by which they might be injured. If such things were the ordinary utensils and appliances made use of by prudent people, and they were kept and used in such manner as they ordinarily were by prudent people, such keeping and use was not negligence in respect to adults or infants. *Dibell, J.*, in a dissenting opinion, however, said that a dish

a well-considered opinion, reviews the cases and examines the doctrine upon the reason of the thing. After stating the doctrine and the basis upon which it is placed, he says: "It is obvious that the principle on which the rule rests, if sound, must be applicable more widely than merely to railroad companies and the turntables maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them thereon, which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water to his buildings, . . . he who maintains a pond in which boys may swim in summer, or on which they may skate in winter; would seem to be amenable to this rule of duty. . . . In all of them the doctrine of the turntable cases, if correct, would charge the landowner or occupier with the duty of taking ordinary care to preserve young children thus tempt-

ed on his land from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, raises a strong suspicion of the correctness of the doctrine, and leads us to question it." The illustration given by the learned chief justice shows that he has had experience with towers constructed to support windmills, with ladders leading to the tank, and with boys. He further says that the only rational ground upon which the doctrine can be founded is that having a thing attractive to children on his land is an implied invitation to children to come upon his premises and play upon them, in, around, and upon such thing. After showing conclusively that the liability cannot rest upon an implied invitation, he says: "A turntable, however attractive, could not be deemed to have been erected for the use which the child makes of it. This objection is not obviated by an appeal to the doctrine that children of tender years are not held to the same degree of prudence and care as adults; . . .

tender years, who take a stick of it and explode it, causing the death of one of the children and permanent injury to the other, the company is liable under the doctrine of the turntable cases. *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 A. & E. Ann. Cas. 498. The court said that there was nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that might be produced therefrom the greater the attraction. As compared with an ordinary turntable, dynamite was vastly more attractive and for more dangerous. Young children were incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urged them into experiments with it whenever it came within their reach. In view of these considerations, the rule of law imposed upon him who possessed such dangerous articles should be more exacting than in the case of him who maintained a turntable.

One who stores dynamite in a factory in such a manner that it can be easily discovered by children who are accustomed to play there is guilty of negligence which will render him liable for injuries to a boy by one of the sticks of the explosive which is taken from the box and set off by a companion under the supposition that it is a firecracker. *Nelson v. McLellan*, 31 Wash. 208, 60 L.R.A. 793, 96 Am. St. Rep. 902, 71 Pac. 747.

In *Travell v. Bannerman*, 71 App. Div. 439, 75 N. Y. Supp. 866, the court said that a lump of caked gunpowder in which pieces of brass were embedded fell within the description of a dangerous and enticing machine. In the case at bar, some companions of the plaintiff found the gunpowder in a rubbish heap on a vacant lot be-

longing to the defendant, an ammunition manufacturer, who brought it to the highway where plaintiff was. They proceeded to extract pieces of brass which it contained, and, in doing so, one of the boys pounded the lump with a rock, and an explosion resulted in which the plaintiff was hurt. It was held to be a question for the jury whether proper care had been exercised in dumping the material on the premises. *Goodrich, P. J.*, dissenting. This case was reversed in 174 N. Y. 47, 66 N. E. 583, but on the ground that the evidence was not sufficient to show that it was the defendant who had put the material there.

But in *Ball v. Middlesborough Town & Lands Co.* 24 Ky. L. Rep. 114, 68 S. W. 6, it was held that the owner of a house formerly used as a storage place for dynamite, who did not know that explosive caps had been left in the building, was not liable for injury to a six-year-old boy who climbed into the house through a broken window covering 6 feet above the ground, and exploded a cap which he found on the floor, where it had been thrown by workmen.

And a railroad company was held not liable for injury to an eight-year-old boy who took a signal torpedo from a railroad track, where it had been rightfully placed for the purpose of being exploded by an approaching train, carried it to his home, and set it off, since no greater safeguards could have been adopted. *Louisville & N. R. Co. v. Hart*, 24 Ky. L. Rep. 1123, 70 S. W. 830.

And a railroad company was held not liable for injury to a twelve-year-old boy trespasser who took an explosive fog signal from a hand car, and then proceeded to pound it with a rock, since the taking was not innocent, and there was an absence of invitation or inducement. *McShane v. Toronto, H. & B. R. Co.* 31 Ont. Rep. 185.

for it is not a question of the child's negligence, but a question of the duty of the railroad company towards the child. If that duty is conceived to arise from the relation created by implied invitation, it must appear that the child is justified in believing that the turntable was designed for the use he makes of it, which is, of course, absurd." The supreme court of New Hampshire in *Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790, expressly rejects the doctrine, saying: "We are not prepared to adopt the doctrine of Stout's Case, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers." In *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283, the same conclusion is reached after a careful examination of the authorities by Lathrop, J. In *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A.

724, 45 Am. St. Rep. 615, 39 N. E. 1068, Peckham, J., reviews the cases, and for a unanimous court holds that defendant is not liable. *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484. In *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, the court adheres to the doctrine of the Stout Case. In *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393, the complaint alleged that "the defendant knew also that many children were in the habit of going upon the turntable to play." The latest discussion of the subject is to be found in *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 226, 4 L.R.A.(N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862, by Buchanan, J. After a careful examination of the decided cases, the learned justice rejects the doctrine of the "turntable cases," conceding that "there is a remarkable conflict of authority upon the subject." We have noticed this line of cases, not for the purpose of closing the question, as applied

In *Hughes v. Boston & M. R. Co.* 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070, it was conceded that, under the New Hampshire authorities, a railroad company could not be held to be in fault for not keeping its right of way free from unexploded signal torpedoes which might render the place dangerous to children. An unsuccessful attempt was made in that case to impose liability on the defendant for injury to a child by exploding a torpedo found on the track, on the theory that the injury was intentionally or wantonly inflicted.

In *Afflick v. Bates*, 21 R. I. 281, 79 Am. St. Rep. 801, 43 Atl. 539, it was said not to be negligence on the part of a city to leave a tool chest open and unguarded, so that access to it could be had by mischievous boys, and the explosive caps kept in it removed, but the point was really not decided, for it was held that, assuming such conduct to have been negligent, the city was not liable, because it was not the proximate cause of injury to the plaintiff, who was struck by falling particles of a cap exploded by another boy.

3. *Lumber, building material, etc.*

A railroad company is not liable for injury to a child while playing on a pile of railroad ties in the company's yards, open on the side of the railway track, and out of which children were always ordered when found, since it is under no obligation so to pile the ties as to prevent injury to a child climbing upon them. *Missouri, K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L.R.A. 825, 36 S. W. 430.

In *Kramer v. Southern R. Co.* 127 N. C. 330, 52 L.R.A. 359, 37 S. E. 408, an action brought to recover damages for the death of a nine-year-old boy while at play on a pile of cross-ties in a public street, on the 19 L.R.A.(N.S.)

theory that the defendant's negligence grew out of the obstruction of a public street, the court said that if the cross-ties had been piled upon the defendant's own premises instead of in the street, and the defendant had had no actual knowledge that children were in the habit of playing on the ties, the law should have imposed no duty upon the defendant to look out for their safety by having the ties piled with a view to that end. The principle announced in the turntable cases would not apply if the ties had been carelessly piled on the defendant's premises. Those cases were exceptions to the general doctrine, and went to the very limit of the law. The mere attractiveness of premises to children would not bring a case within that exceptional doctrine.

An owner of lumber piled on private property is not liable for injury to a six-year-old boy, caused by a portion of the timber falling on him while at play on or about it. *Powers v. Owego Bridge Co.* 97 App. Div. 477, 89 N. Y. Supp. 1030.

But the owner of an unsafe pile of lumber from which a heavy piece of timber fell and killed a child of tender years was held liable for its death, where the lumber was piled within 40 feet of a public street, across a passageway which the public had been accustomed to use, and upon an open, unfenced lot that children had for years been in the habit of resorting to by license of the owner, and without objection or warning by him, and to which they could, before the timber was placed there, go with safety. *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193.

And a railroad company was held liable for maintaining within 2 feet of its track a wood pile attractive to children to its knowledge, so that a five-year-old boy, while at play thereon, was shaken off by the jar-

to turntables, in this court, but to ascertain the basic principle upon which it was originally founded, and the basis of the criticism made of it by other courts. If liability arises in this particular class of cases, it must be because of some principle of the common law applicable to other cases governed by the same reason. Courts, guided by the principles of the common law, will not arbitrarily select one special object, like a turntable, and fix liability for injuries to children upon it, and refuse to carry the principle to its logical result in other cases. The court in Stout's Case failed to state the principle upon which it held the defendant liable, but was content to rely largely upon "the well-known case of *Lynch v. Nurdin*." As has been pointed out by several courts, in that case the horse and cart were left in the street unhitched. This was negligence *per se*. Lord Denman rested his opinion upon the ground that the defendant should have foreseen that children would be attracted to the horse and cart, etc. There was no suggestion that leaving it unhitched

was an implied invitation to drive it away. On the contrary, it was conceded that the children were trespassers. It is manifest that, if the liability rests upon the theory that a turntable or other dangerous machinery, or ponds, excavations, structures, etc., on one's own premises, attractive to children, constitutes an implied invitation to them to enter and play with or upon them, the children are not trespassers or mere licensees, but come upon the premises with all of the rights on their part and duties on the part of the owner of the premises attaching to that relation. Again, if this be the principle, it is impossible to put any limit upon it, other than to include such things as either the child, the court, or the jury may regard as attractive or alluring. "The viciousness of the reasoning which fixes liability upon the landowner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted." *Gummere, J., in Delaware, L. & W. R. Co. v.*

ring of the ground by a passing train, causing him to fall under the wheels and be injured. Kansas City, Ft. S. & M. R. Co. v. Matson, 68 Kan. 815, 75 Pac. 503.

The owner of a building is not guilty of negligence in leaving a large stone leaning against the side thereof, over an opening on the sidewalk, on the theory that the place is attractive to children, although a thirteen-year-old boy of not sufficient capacity to understand his danger pulls the stone over, so that it falls and crushes his ankle, where the special findings show that the stone did not interfere with the use of the sidewalk, and that an ordinarily prudent person would not have anticipated that the stone would injure anyone in the exercise of due care, and not only that such children were not in the habit of playing or congregating at the place of the accident, but that there was nothing attractive to children there, and that an ordinarily prudent person would not have considered the stone to be dangerous or unsafe in the position which it occupied. *Falkenberg v. Stout, 75 Kan. 172, 88 Pac. 874.*

No liability arises for injury to a seven-year-old boy, caused by the fall of curb stones upon which he is playing tag, piled partly in a highway and partly on private premises. *Kane v. Erie R. Co. 110 App. Div. 7, 96 N. Y. Supp. 810.*

But in *Schmidt v. Cook, 12 Misc. 449, 33 N. Y. Supp. 624*, the owner of premises was held bound to know that a flat stone, 33 inches long, 25 inches broad, and 3 inches thick, leaning almost perpendicularly against a wooden fence and stone wall in a yard where tenants' children are supposed to play, will naturally tempt children to play upon and about it, and, by reason thereof, become dangerous to life and limb; and hence owes to children playing in the yard

a duty of protection against harm. For former appeal of same case, see 4 Misc. 85, 23 N. Y. Supp. 799, reversing 1 Misc. 227, 20 N. Y. Supp. 889.

And the owner of an open lot, close to a highway, in a thickly populated part of a city, was held liable for the killing of a child by the toppling over upon him of a narrow section of cement pipe of large diameter, which was an attractive thing for children to roll about, to the knowledge of the owner, who was aware that children resorted to that place for that purpose. *Kopplekom v. Colorado Cement Pipe Co. 16 Colo. App. 274, 54 L.R.A. 284, 64 Pac. 1047.* The court said that "if an owner sees fit to keep on his premises something that is an attraction and allurements to the natural instincts of childhood, the law, it is well settled, imposes upon him the corresponding duty to take reasonable precautions to prevent the intrusion of children, or to protect from personal injury such as may be attracted thereby."

4. Dangerous machinery and appliances.

(a) In general.

The owners of grounds may be liable for injuries to trespassing children where, on account of the peculiar nature and exposed position of the dangerous defect or object, the owner should reasonably have anticipated such injury; and so, where the declaration alleged that a river drawbridge, located in a populous district of a city, was very attractive and enticing to children, and dangerous for them to be about while being opened and closed, and that it therefore became the duty of the defendant, while moving and turning the bridge, to keep a

Reich, 61 N. J. L. 635, 41 L.R.A. 831. 68 Am. St. Rep. 727, 40 Atl. 682. The difference between a temptation to commit a trespass and an invitation to come upon one's premises is pointed out by Mr. Justice Holmes in *Holbrook v. Aldrich*, 168 Mass. 16, 36 L.R.A. 493, 60 Am. St. Rep. 364, 46 N. E. 115. These cases are cited with approval by Buchanan, J., in *Walker's Case*, supra. The present case illustrates the fallacy of the theory of implied invitation. Would it ever occur to any reasonable mind that constructing the building with large windows and doors, placing in it the engines, dynamos, and other machinery, and keeping them constantly in motion, for the purpose of discharging its corporate functions and duties, however attractive to small boys, was an invitation to them to make the premises a playground? To adopt the suggestion carries us too far afield for the practical affairs of life, and violates manifest truth. Judge Buchanan thus clearly and forcibly illustrates the fallacy of it: "No landowner supposes for a moment that, by growing

fruit trees near the highway, or where boys are accustomed to play, however much they may be tempted to climb the trees and take his fruit, he is extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believes that a landowner, as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful, but which are attractive to children, and may expose them to danger if they should yield to the attraction, is by that act alone inviting them upon his premises. This doctrine of constructive invitation is not sustained . . . by the English cases . . . and has been utterly rejected by the highest courts" of a number of states.

It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we

reasonable lookout and watch over its approaches, and to use reasonable precautions to prevent children from approaching, and from being thereby injured, it was held that the question should be left to the jury whether the swinging bridge was a dangerous structure, in which the defendant should reasonably have anticipated that a child would catch its foot while attempting to jump upon it, and whether the servants of the defendant in charge of the bridge used ordinary and reasonable care and precautions to prevent the happening of the injury. *Coppner v. Pennsylvania Co.* 12 Ill. App. 600.

The owner of unprotected revolving cogwheels, located in an open space, 20 feet from a street, is liable for injury to a three-year-old child by the machinery, and the fact that the child was a trespasser does not matter. *Whirley v. Whiteman*, 1 Head, 610. The court said that, in playing about the cogwheels, the child was but indulging the natural instincts of a child.

One whose servant starts dangerous machinery operated by horse power, and then leaves the building in which it is located without anyone in charge except boys of tender years, who go there to ride, is liable for the death of one of them, who, while trying to get off of the driver's box upon which he is mounted, is caught in the machinery and crushed. *Gunderson v. Northwestern Elevator Co.* 47 Minn. 161, 49 N. W. 694.

But in *Smith v. Hayes*, 29 Ont. Rep. 283, it was held that one who left a horse-power machine in a lot alongside of his warehouse, the lot being uninclosed on one side, and the machine being 30 feet distant from the highway, was not liable, even under the turntable doctrine, for injury to a five-year-old child who, in the absence of the driver,

was hurt by it, where there was nothing to show that the machine was so situated as to attract or allure children to it, and there was no evidence that young children were in the habit of resorting for amusement to the lot.

In *McAllister v. Seattle Brewing & Malt- ing Co.* 44 Wash. 179, 87 Pac. 68, it was held that, under the rule adopted in Washington,—that where dangerous machinery and dangerous substances of a character likely to excite the curiosity of children, and allure them into danger, had been left unguarded in exposed places close to the highways or playgrounds of children, even though on premises of the owner, and children had been attracted to them, and had met with injury, the owner or person leaving the dangerous machinery or substance was liable for an injury,—the questions whether a sheave or pulley wheel placed in the center of a car track, and used in connection with a wire cable for moving cars for the use of a brewery, belonged to that class of dangerous machinery, whether it was of such an attractive or alluring character as to draw children to it, and whether it was placed and operated without guards, so close to a public highway that it must have been foreseen that it would attract and injure children of tender years, were held to be for the jury.

In *Hydraulic Works v. Orr*, 83 Pa. 332, a heavy platform so built that it could be raised or lowered across a private cartway in the heart of a city, close to a public highway, access to the premises being frequently left open, was held to be a dangerous trap when it was raised and unfastened and made to lean against a building at such an angle that a slight jar or pull would cause it to fall, and the owner of the premises was therefore held liable for the death of a six-

think sound in principle and humane in policy. We have no disposition to deny it, or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation, or license, or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity, excited by the character of the structure or other conditions, he goes thereon, and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or provision; that is, whether, under all of the circumstances, he should have contemplated that children would be attracted or allured to go upon his premises, and sustain injury. The principle is well stated in 21 Am. &

Eng. Enc. Law, p. 473, and was cited with approval in *McGhee's Case*, 147 N. C. 142, 60 S. E. 912. "A party's liability to trespassers depends on the former's contemplation of the likelihood of their presence on the premises, and the probability of injuries from contact with conditions existing thereon." Immediately following this language, the editor says: "The doctrine that the owner of premises may be liable in negligence to trespassers whose presence on the premises was either known, or might reasonably have been anticipated, is well applied in the rule of numerous cases that one who maintains dangerous implements or appliances on uninclosed premises, of a nature likely to attract children in play, or permits dangerous conditions [to exist] thereon, is liable to a child who is so injured, though a trespasser at the time when the injuries are received; and, with stronger reason, where the presence of a child trespasser is actually known to a party, or where such presence would

year-old boy who, with others, strayed into the passageway through a gate that had been left open, and was playing there when the platform fell upon him. The decision rests on the ground that the owner of the premises might reasonably have apprehended such an accident. In this case the trial court, in response to the request to charge, stated that a child could not be treated as a trespasser or wrongdoer.

In *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, it was said that the last-mentioned case was authority only for its own facts; that what the court meant to decide in that case was that a person who maintained such a dangerous trap, close to a public highway, in the heart of a large city, might be liable to a person injured thereby although such person were a child of six years of age, trespassing upon the premises; and that the case was not authority for the proposition that a child could not be treated as a trespasser or wrongdoer, or for the proposition that the owner of premises in the neighborhood of a populous city, which were bounded by a public highway, must so use them as to protect those who strayed upon them and were accidentally injured. The court said that, in the *Orr Case*, there was a recklessness that might be said to partake of the nature of wantonness, and that it was only upon this principle that the judgment could be logically sustained.

In *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 353, 28 N. E. 283, *Hydraulic Works v. Orr*, supra, was said to rest upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance.

The Pennsylvania courts have been considerably bothered by the decision in *Hydraulic Works v. Orr*, supra, and they have attempted to explain and distinguish it; 19 L.R.A. (N.S.)

but in *Duffy v. Sable Iron Works*, 210 Pa. 326, 59 Atl. 1100, Mitchell, Ch. J., in a dissenting opinion, said that the reason why the case had become like a shuttlecock in battledore was not far to seek. The case was a departure from settled principles, was wrongly decided, and had never commanded the general approval of professional opinion either at the bar or on the bench.

A good cause of action for injury to a child was held stated in a declaration which alleged that the defendant operated an unguarded planing mill, situated in an open lot where children were allowed, with the knowledge and consent of the defendant, to congregate and play, the place being adjacent to certain streets and highways in the midst of a thickly settled and populous district of a city, and supplied with dangerous machinery, including revolving interlocking cogwheels of such a character as to be attractive to children, and to appeal to their childish curiosity, to the defendant's knowledge, and which alleged that a nine-year-old boy, drawn to such dangerous machinery by childish curiosity, was injured thereby while exercising due care and caution for his own safety. *Jensen v. Wetherell*, 79 Ill. App. 33.

In *Dublin Cotton Oil Co. v. Jarrard* (Tex. Civ. App.) 40 S. W. 531, a girl caught her foot in open conveying machinery in a cotton-seed mill and was hurt. It was urged that if she was there merely with the consent and knowledge of the defendant, the only duty owed to her was to refrain from doing acts knowingly the consequences of which would be injurious to her; and that if she was there not upon express or implied invitation, nor by permission or consent, then she was an intruder, and could recover nothing for injuries not wilfully and knowingly inflicted. But the court said that while this proposition might be urged against an adult with experience and judgment, it was

have been known, had reasonable care been exercised. . . . But where, under the circumstances, the presence of children on the premises was not reasonably to have been anticipated there is, of course, no duty as to such persons to have the premises safe. And, likewise, where, though children might have been expected to come upon the property, no injuries to them should reasonably have been contemplated under the circumstances, there is no negligence, and consequently no liability." Cases are cited which sustain these propositions. We think this the correct principle upon which the liability should rest. As said in *Kramer's Case*, 127 N. C. 330, 52 L.R.A. 359, 37 S. E. 468: "Mere attractiveness of premises will not bring a case within the exceptional doctrine." To allege simply that the machinery, including dynamos, engines, etc., in an attractive building, in the populous portion of a city, "is calculated to attract and allure boys and others to see the machinery," does

not bring the case within the exception to the general principle. There is no suggestion that any boys had been "attracted or allured," nor is it even averred that the plaintiff was on the premises to see the machinery. On the contrary, the map shows that the location of the well into which he fell was on the side of the alleyway opposite the machinery. It is not easy to see how, at that place, the plaintiff could have seen the machinery. Again, there could be no possible danger in looking at the machinery. The "attractive building" had large windows and doors through which "those machines may be seen from the street" and other points. The case is in some respects similar to *Schmidt v. Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 868, 2 S. W. 417, in which a child was scalded by falling into a pit or well into which pipes carrying hot water emptied. The court, after stating the general principle, says: "The evidence in this

not the law governing our duties to little children, who, like the bees and the butterflies, wandered everywhere and into every place left open, as their childish instincts and impulses led them. They were not trespassers or intruders within the meaning of the law until they were old enough and intelligent enough to know and appreciate the right of the proprietor to exclude them from his premises by a simple command. They understood that they were required to keep out only when they could not get in. They paused not to read the signs of warning, or to inquire if they were welcome. Their little hearts told them they were welcome everywhere, and they must be protected from danger they know not of.

But in *Brown v. Rockwell City Canning Co.* 132 Iowa, 631, 110 N. W. 12, it was held that the owner of conveying machinery could not be held liable, under the doctrine of the turntable cases, for injury to an eleven-year-old boy, caused by the catching of his arm in one of the wheels of the machine, where the machinery was in an inclosed building into which it might reasonably be supposed that no one would come without proper caution.

A corporation maintaining over a body of water a revolving shaft with a coupling containing a projecting set screw, the shaft being supported by a timber framework which, together with the machinery and surroundings, is attractive to children, who are in the habit of resorting thereto for the purpose of amusement, men and boys being accustomed to climb about on the timbers for the purpose of fishing, to the knowledge of the company, was held liable for the death of a fourteen-year-old boy who, in climbing upon the structure, was caught by the set screw and wound around the shaft. *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 223, 44 L.R.A. 655, 56 Pac. 4. To the same effect 10 L.R.A. (N.S.)

fact is *Biggs v. Consolidated Barb-Wire Co.* 62 Kan. 492, 63 Pac. 740.

Whether, in any given case, there has been negligence on the part of the owner of property in maintaining dangerous machinery upon it, is a question of fact, dependent upon the situation of the property, and the attendant circumstances; because upon such facts will depend the degree of care necessary to guard others against injury therefrom. *Barrett v. Southern P. Co.* 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 866.

In the following cases under this subdivision of the note, the attempt to extend the turntable doctrine was unsuccessful.

A landowner is not liable, even under the doctrine of the turntable cases, for injuries to a trespassing child, caused by catching his leg in cable car machinery on its premises. *Uthermohlen v. Bogg's Run Min. & Mfg. Co.* 50 W. Va. 457, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410.

No obligation rests upon the owner to guard gin house machinery against the approach of infant trespassers, so as to render him liable for injury to an eight-year-old child who catches his hand in it. *North Texas Constr. Co. v. Bostick*, 98 Tex. 239, 83 S. W. 12.

No liability arises for the death of a six-year-old boy, who for the express purpose of riding, and in disregard of the warning of an older companion, gets upon a large ball attached to the end of a chain on a hoisting apparatus while the ball is in motion, and is carried up to the third story of a building, from which point he falls to the ground, and is killed, since the danger was obvious. *Rodgers v. Lees*, 140 Pa. 475, 12 L.R.A. 216, 23 Am. St. Rep. 250, 21 Atl. 399.

Failure of the owner of a factory forcibly to eject an eight-year-old boy whom he cannot make understand a command to leave the premises, and who is too young to appreciate his danger, is not negligence upon

are open. Fences have been removed. Probably in a large majority of them at times conditions exist—woodpiles, coal bins, flower pits, barrels for receiving sewage, and many others—which are dangerous to persons passing over them at night. To impose upon the owners the burden of prevision, in the absence of any suggestion that, by acquiescence or otherwise, they had given a license to trespassers, would imperil the property of innocent persons. We have discussed the case at more than usual length because of its importance to the public, and because the questions presented have not heretofore been decided by this court.

This decision will be certified to the Superior Court of Vance, to the end that further proceedings may be had in accordance with the course and practice of the court.

Error.

Co. 28 Tex. Civ. App. 374, 67 S. W. 530. The court said that it believed it would be unwise to extend the turntable doctrine to cases of this character. It would seriously retard the material progress and cripple the business interests of the country if persons owning and operating public utilities which, from their very nature, required the use of structures placed in proximity to public highways, should be forbidden to use or maintain any structure or appliance of a kind calculated to attract and allure children to attempt their use as playthings, and which, when so used, became dangerous.

Electric light wires 18 feet above the ground, on poles which are stayed by guy wires stretched to the ground, by means of which an eleven-year-old boy is easily enabled to climb until his head come in contact with the wire, and he receives a shock which kills him, are not so attractive and inviting to children, within the doctrine of the turntable cases, as to render the company liable for the death of the child. Mayfield Water & Light Co. v. Webb, 33 Ky. L. Rep. 909, 18 L.R.A. (N.S.) 179, 111 S. W. 712.

In Chicago, K. & W. R. Co. v. Boeloven, 53 Kan. 279, 36 Pac. 322, it was held that a railroad company maintaining, near a small settlement, a stock yard sufficiently fenced and protected by an outside gate, would not be liable for the death of a five-year-old boy who was killed by the falling of a defective inside gate upon which he was swinging, if, without the knowledge of the company, he reached the place by climbing over the outside gate. But the court said that if, with the consent or knowledge of the company, children frequently climbed over the outside gate or inclosure of the stock yards, and played or swung on the inside gate, which was in a defective and dangerous condition, under certain circumstances, such negligence might be established as would create a liability for any injury resulting therefrom. 19 L.R.A. (N.S.)

OHIO SUPREME COURT.

WHEELING & LAKE ERIE RAILROAD COMPANY, Plff. in Err.,

v.

CARL HARVEY, by Next Friend.

HIRAM S. SWARTS, Exr., etc., of Calibel Georgia Bush, Deceased, Plf. in Err.,

v.

AKRON WATERWORKS COMPANY.

(77 Ohio St. 235, 83 N. E. 66.)

Dangerous premises — children — care.

1. It is not the duty of an occupier of land to exercise care to make it safe for infant children who come upon it without invitation, but merely by sufferance.

Turntable — injury to children — liability.

2. A railroad company is not liable to an

Headnotes by the Court.

sulting to such children from a gate knowingly left in a dangerous condition.

A city is not liable for injury to a ten-year-old boy who climbs upon a gate on open land purchased for park purposes, and whose added weight breaks its lower bars, causing it to fall and hurt him. Guilmarin v. Philadelphia, 201 Pa. 518, 51 Atl. 312. The court said, however, that if an object was in itself dangerous, or might become dangerous if a child chanced to set it in motion while playing with it, or by running against it, there was a duty on the city to take such precaution as was reasonable, under the circumstances, to prevent injury by it.

In Ann Arbor R. Co. v. Kinz, 68 Ohio St. 210, 67 N. E. 479, the court said, *obiter*: "We think the better and more reasonable proposition is, that the owner of property owes no general duty to keep it in condition which will insure the safety of persons who go upon it without invitation or license; yet, if he keeps upon his premises dangerous machinery or other things likely to attract children, and does not guard them to prevent injuries to them, he is liable for injuries resulting from his neglect to provide such guards."

(b) Standing railroad cars.

Railroad cars and similar machines are not dangerous within the rule in the turntable cases. Barney v. Hannibal & St. J. R. Co. 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069.

A railroad company need not guard cars standing by themselves on the track so as to keep children from getting upon them or from being run over while playing about them. Chicago & A. R. Co. v. McLaughlin, 47 Ill. 265.

The fact that a child is of such tender years as to be incapable of exercising care for its safety does not affect the question of the degree of care imposed on the serv-

infant who comes upon its premises without invitation, and who is injured there while playing, without its knowledge, with a turntable. The doctrine of the turntable cases is disapproved.

Reservoir — drowning of child.

3. A waterworks company is not liable for the death of drowning of an infant who comes upon its land without invitation, and there falls into a reservoir or basin of water while playing about it, without the knowledge of the company.

(December 3, 1907.)

ERROR to the Circuit Court for Portage County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

ERROR to the Circuit Court for Summit County to review a judgment reversing

ants of a railroad company to avoid injury to it in starting a train in the absence of knowledge that the child is in danger of being run over; and, aside from the duty to give warning before starting by sounding a bell or whistle, no other duty is required to avoid injury to a three-year-old child, although it is attracted to the train by curiosity. *East St. Louis Connecting R. Co. v. Jenks*, 54 Ill. App. 91.

A railroad company is not liable for the death of a boy less than five years of age, who climbs upon a flat car on a side track near a station in a small village, and loosens the brakes, and who, when the car starts on a down grade, jumps off in front of it and is run over. *Central Branch Union P. R. Co. v. Henigh*, 23 Kan. 347, 33 Am. Rep. 167. The court said the cars were not dangerous machines left exposed near a populous city, nor were they of so alluring a character as to entice boys to play upon them; for, when unfastened, they would move only a few feet and then stop; nor were they dangerous, even when moved, to ordinary boys. No one would have anticipated that a boy less than five years old would have gone to the cars unaccompanied by any older person, and have climbed upon one of them, and unloosened the brake, so as to set the car in motion.

That a railroad corporation left a car standing on one of several side tracks adjoining a public street, and knew that one of the doors of the car was insecurely fastened, and was liable, upon a slight touch, to fall to the ground, and that the company knew that the car was an enticing, attractive, and inviting object to children, and that children had been accustomed to play about such cars as might happen to be placed upon any of such side tracks, was held not to render it liable for injury to a boy upwards of eleven years of age, who was traveling upon the street in the vicinity of the track upon which the car was

a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for the alleged negligent drowning of plaintiff's intestate. Affirmed.

Statement by Summers, J.:

In the village of Kent, the Wheeling & Lake Erie Railroad Company has a railroad yard in the outskirts of the village. The right of way at that point is uninclosed and is 140 feet in width, the tracks are located in a cut 10 or 12 feet in depth, and the land on both sides is that much higher than the right of way. There are four tracks, and between the center track is a 60-foot turntable. About 800 feet east and the same distance west from the turntable the right of way is crossed by public streets. The turntable was not locked, but was fastened by an iron brake shoe, weighing not less than 10 pounds, that was laid in a slot, and that could be lifted out, and the turntable

standing, and saw the car with its open door, and was "thereby enticed and invited to look into said car, and thereupon did undertake to look into said car, exercising therein as much care as could reasonably be expected of a child of his years and capacity," and who, in attempting to look into the car, "carefully" touched the door which fell upon and injured him. *McEachern v. Boston & M. R. Co.* 150 Mass. 515, 23 N. E. 231. The decision rests upon the ground that the boy was a trespasser, not invited or enticed to the place by the company, which owed him no duty to have the car safe.

The fact that an open box car standing on a levee is an attractive place for a ten-year-old boy who wants to see a boat race on the river imposes no duty upon the company to prevent injury to him, beyond that which rests upon it in the case of an ordinary trespasser. *Curley v. Missouri P. R. Co.* 98 Mo. 13, 10 S. W. 593.

The turntable doctrine is inapplicable to long trains of cars standing on a railroad track for the purpose of being loaded, since they are not inherently dangerous. *Rushen-berg v. St. Louis, I. M. & S. R. Co.* 109 Mo. 112, 19 S. W. 216. The court said that the operation of railroad trains would certainly be rendered impracticable if it should be declared to be the law that, before a freight train could be moved or its cars backed up against one another, an inspection must first be made of every car so see if, by any possibility, any trespasser was in a situation to be injured.

A brakeless, unblocked flat car, not of itself an object dangerous to children when left standing on the company's tracks in a highway, does not, by being so light that children can move it, become, under the doctrine of the turntable cases, a dangerous object in being moved along the track, so as to render the company liable for injury to a seven-year-old child who is run over

then could be revolved. Just before the 4th of July, in the year 1904, two boys, one aged thirteen and the other ten, while on their way to a car repairer's shanty, located on the railroad's right of way, to get a piece of iron to make "something" for the Fourth of July, met the plaintiff's infant, a boy between five and six years of age, who wished to go with them; and although not invited to do so, he yielded to his childish instincts and followed them down one of the streets to the right of way and along the tracks, past the turntable, to the repair man's shanty. The repair man was not at the shanty; but the boys found what they thought would answer their purpose, and started to return to the village, over the same course they had covered in going to the shanty. When they reached the place where the turntable was, they stopped to play with it. One of the older boys removed the fastening and revolved the turntable, and the little boy, who was sitting upon the turntable with his left leg hanging down over one end, was caught between the end of the table and the head block, and lost his leg. It appears from the testimony

of quite a number of boys that they had at different times played with the turntable, and also that they were driven away from the turntable whenever they were seen by any of the employees of the railroad company while so engaged. And it seems to have been generally known by the boys that they were not at liberty to play with the turntable. The only evidence tending to prove knowledge on the part of the railroad company, if it does so tend, that boys were playing with the turntable, is the testimony of the boys that they did play with it; that they had been driven away by employees of the company; and the testimony of the yard clerk, at one time in the employ of the company, that he had on several occasions stopped boys from playing with the turntable, and that on one occasion he had reported the fact to the station agent. In the petition it is averred that the turntable was located in the village, and at a place that was uninclosed and easily accessible to children, and that it was peculiarly attractive to children, and calculated to entice them to play with it; and that, when set in motion, which could easily

while at play upon it. *Kaumeier v. City Electric R. Co.* 116 Mich. 306, 40 L.R.A. 385, 72 Am. St. Rep. 525, 74 N. W. 481.

In *Iamurri v. Saginaw City Gas Co.* 148 Mich. 27, 111 N. W. 884, *Ostrander, J.*, said of the last-mentioned case, that the court could not have reached the conclusion it did except upon the theory that, under the circumstances of the case, no duty to take care for the playing, trespassing children existed. The rule to be deduced from the decisions seemed to be that if personal property, mischievous only when set in operation, was left at rest in the highway, and became mischievous and did damage because set in motion by a meddler, to whom the owner owed no duty of care, the owner was not liable to such meddler for any resulting injury, although he was an infant, and although the owner knew that infants had, and were again likely to, set the object in motion. It seemed clear that if the wind or some force other than that of the injured meddler had set the car in motion, and if an infant too young to be negligent, or an adult without negligence, had been hurt, the question of defendant's negligence would have been sent to the jury. *McAlvay, Ch. J.*, said that plaintiff was denied the right to recover in the *Kaumeier* Case, not because she was a trespasser, but because there was no evidence of defendant's negligence.

Leaving an unlocked and unguarded hand car at the side of one of the tracks of a railroad, a mile from a thickly-settled part of a city, a quarter of a mile from the nearest house, and letting it remain there over Sunday, is not negligence which will render the company liable for the death of 19 L.R.A. (N.S.)

an eleven-year-old boy who is attracted to the car, and who, with other boys who have put it back on the tracks, gets on the same, and, after putting it in motion, falls off and is killed, since the car is not so dangerous a thing of itself that the company is required to guard or lock it. *Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 493, 13 L.R.A. 765, 27 Pac. 689.

But in *Louisville & N. R. Co. v. Popp*, 96 Ky. 103, 27 S. W. 992, a railroad company was held liable for injury to a five-year-old boy whose leg was caught between a passenger car platform and a bumper at the end of the track at a station while the car was being coupled to another, where the tracks upon which the car was standing when the child went upon the platform were close to the station platform, on uninclosed premises, so that children might go there when tempted by curiosity, or go upon the cars for ice water. It was held that it was the duty of the company in such a case to know of the danger to children, and to be in a position at the proper time to protect them from injury when moving its trains and cars, especially where it was improper to couple cars at the place where the child was injured.

And where tramway cars, known to employees of the railroad company to be attractive to children, are released and sent without brakes on a down grade, and a seven-year-old boy is injured thereby, it was held to be a question for the jury whether the company's servants exercised due care in releasing the cars after the boy, who had purposely gone upon the premises, had been ordered away, without ascertaining how near he was to the track, or wheth-

be done even by children, was a source of latent danger to them, and that it was left unguarded, unfastened, and unlocked, although, at slight expense and trouble, it could have been made fast while not in use; that the railroad company knew that the children were wont to play with the turntable, and that it knew, or ought to have known, of the danger to them. At the close of plaintiff's evidence, and again at the close of all of the evidence, the defendant requested the court to direct a verdict in its favor. The plaintiff recovered a judgment for \$6,000, which, on error, was affirmed by the circuit court.

In the second case, briefly stated, the facts are: On Sherbondy hill, in the city of Akron, the defendant company maintained a reservoir about 15 feet in depth. The banks on the inside were precipitous, and the water about 8 feet in depth. When constructed, about twenty-five years ago, it was located on a tract of about 10 acres, outside of the corporate limits of the city; but, by the extension of the corporate limits in the year 1900, about one half of it was comprised within the limits of the city.

er the enticing cars would again draw him into danger. *Ott v. Johnson*, 38 Tex. Civ. App. 491, 86 S. W. 649.

(c) *Moving cars and vehicles.*

Moving railroad cars are not dangerous machines in the sense that the term is used in the turntable cases. *Steele v. Pittsburgh, C. C. & St. L. R. Co.* 4 Ohio S. & C. P. Dec. 350.

The doctrine of the turntable cases is inapplicable to the mere act of allowing children to get upon cars fitted up and used for the conveyance of all classes of persons, old and young, experienced and inexperienced. *Denison & S. R. Co. v. Carter*, 98 Tex. 196, 107 Am. St. Rep. 626, 82 S. W. 782.

In *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 465, 38 Am. St. Rep. 254, 21 S. W. 1062, the court refused to extend the turntable doctrine so as to make a railroad company liable for an injury to a thirteen-year-old boy who slipped under the wheels of a slowly-moving train while stealing a ride. The contention was that the train was unguarded, dangerous machinery.

The attractive nuisance doctrine will not be extended so as to cover a moving car on the track of a railroad company, and to render the company liable for an injury to a ten-year-old boy who, while attempting to get upon the ladder of a freight car, catches his foot under the wheels. *Underwood v. Western & A. R. Co.* 105 Ga. 50, 31 S. E. 123. The court said that nothing was more alluring to a child than a passing vehicle, whether it were a buggy, carriage, dump cart, wagon, or railway train; and that, if railroads were to be liable because boys attempted to swing upon passing

This 10-acre tract was not converted into a park, but it was covered with trees and bushes, and, excepting the reservoir, was left very much in its natural state. The basin was about 250 feet from the nearest public road. From this public road the company had constructed a rough road or driveway to and around the reservoir for its own use. It also had inclosed the basin with a picket fence about 3 feet high. The evidence tends to prove that people, including children, resorted to these premises for the view from the hill, or for their own pleasure, as is not unusual on unimproved tracts of land so near a city. Late in May, in the year 1903, plaintiff's decedent, Calibel Georgia Bush, a child nine years of age, together with her sister, aged eleven, and another girl, aged about twelve, were permitted by their parents to take their luncheon and go to the woods in the vicinity of these premises to picnic. After arriving at the woods, and having spent several hours there in strolling about, they discovered the reservoir. Two pickets were off of the fence, leaving an opening $8\frac{1}{2}$ inches in width. Through this opening they crawled, and

trains without the knowledge of the employees in charge thereof, then the owners of the other vehicles named would be equally liable if a boy, without the knowledge of the person in charge, were injured while attempting to swing upon the rear axle or other part of such vehicle.

In *Wilson v. Atchison, T. & S. F. R. Co.* 66 Kan. 183, 71 Pac. 282, the court refused to extend the turntable doctrine to the case of a slowly-moving freight train, by which a twelve-year-old boy was injured while catching a ride. The court said that while the doctrine was recognized in Kansas, it had no disposition so to extend it as to include railway trains. They passed and repassed through every community with such frequency, and the peril of jumping upon and from moving trains was so well understood, and the task of keeping boys from stealing rides and hopping upon cars and trains slowly moving through towns or railway yards was so impracticable and burdensome, as to make the rule invoked inapplicable.

A contractor who is grading a street, and who, in the course of the work, uses cars for transporting dirt, is not bound to provide a watchman whose special business it is to prevent children from boarding the moving cars under the temptation to ride. *Emerson v. Peteler*, 35 Minn. 481, 59 Am. Rep. 337, 29 N. W. 311.

Even if the turntable doctrine were applicable to railroad cars when at a standstill, it could not apply to cars in motion, fully equipped with the requisite number of hands, so as to render the company liable for injury to a boy, received while catching a ride. *Barney v. Hannibal & St. J. R.*

stood and sat upon the bank for a few minutes, when the youngest fell into the reservoir and was drowned. It appears that a few weeks before this, the gate in the picket fence was down, and a little boy, a son of one of the defendant's employees fell into the reservoir, and that this accident had been brought to the notice of the company, and that, prior to the accident in the present case, the gate had been nailed up. Plaintiff recovered a judgment for \$1,100, on the ground of the defendant's negligence, and the circuit court reversed for error in overruling the motion of the defendant to direct a verdict at the close of the plaintiff's testimony, and entered a judgment dismissing the petition.

Messrs. Squire, Sanders, & Dempsey and R. F. Dentson for plaintiff in error Wheeling & Lake Erie R. Company.

Mr. W. J. Beckley, for defendant in error Harvey:

The turntable was negligently left unfastened, and the turntable doctrine applies.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; Alabama G. S. R. Co. v.

Crocker, 131 Ala. 584, 31 So. 561; Chicago, B. & Q. R. Co. v. Krayenbuhl, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880; Edgington v. Burlington. C. R. & N. R. Co. 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95; Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399, 98 Am. Dec. 175; Harriman v. Pittsburgh. C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; Pittsburgh, C. & St. L. R. Co. v. Shields, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; Ann Arbor R. Co. v. Kinz, 68 Ohio St. 226, 67 N. E. 479; Lake Shore & M. S. R. Co. v. Duer, 21 Ohio C. C. 512; Barrett v. Southern P. Co. 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; Callahan v. Eel River & E. R. Co. 92 Cal. 89, 28 Pac. 104; Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393; Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; East Tennessee & W. N. C. R. Co. v. Cargille, 105 Tenn. 628, 59 S. W. 141; Koons v. St. Louis & I. M. R. Co. 65 Mo. 592; Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep. 418; Ilwaco R. & Nav. Co. v. Hedrick, 1 Wash. 446, 22 Am. St. Rep. 169, 25 Pac. 335; Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Ferguson v. Columbus & R. R. Co. 75 Ga. 637, 77 Ga. 102; Dobbins v. Missouri. K. & T. R. Co. 91 Tex. 60, 38 L.R.A. 573, 66

Co. 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069.

A railway company which has provided a driver for two cars coupled together is not required to furnish a second man to prevent children from getting on the platforms. Bishop v. Union R. Co. 14 R. I. 319, 51 Am. Rep. 386.

A railroad company is not liable to a five-year-old trespasser hurt by a moving car in the company's switch yards, on the theory that the yard and the switching of cars are dangerous and attractive agencies or instruments which allure and attract young children to the yard and about the cars, and that, because of such allurements, children have frequently been attracted to the yard, and that therefore the employees of the company are required to anticipate their presence, and so to manage and operate the cars as not to injure them. Smalley v. Rio Grande Western R. Co. (Utah) 98 Pac. 311.

In O'Connor v. Illinois C. R. Co. 44 La. Ann. 339, 10 So. 678, it was held that a railroad company was not liable for injury to a child of tender years, received while riding on a coal-dump car on inclosed premises, the plaintiff having got in through a hole in a fence which the company had attempted to keep in repair, but which had been repeatedly broken by trespassers, who had been warned again and again against the danger and driven away.

In Hebard v. Mabie, 98 Ill. App. 543, it was held that the question whether the steps on the rear end of a bus were attractive to children was not material in an action

brought to recover for the death of a five-year-old child who was killed by jumping therefrom after being ordered off by the driver. The court said that it was not the duty of the driver of a bus or other vehicle, moving along a public street or highway, to keep a lookout behind so as to know whether children or adults were riding on the rear end of the bus or other vehicle. On the contrary, the duty of such driver was to look ahead, so as to avoid collisions with other vehicles or persons.

5. Dangerous places.

(a) In general.

In Kayser v. Lindell, 73 Minn. 123, 75 N. W. 1038, it was held that the turntable doctrine would not be extended so as to render the owner of premises liable for injury to a tenant's three-year-old child, received in falling from a retaining wall on the land. The court said that while the owner of premises might owe more duty to a child than to an adult coming upon his premises by implied invitation, yet he was not bound to guard every stairway, cellarway, retaining wall, shed, tree, and open window on his premises, so that a child could not climb to a precipitous place and fall off.

In Chambers v. Milner Coal & R. Co. 143 Ala. 255, 39 So. 170, a nine-year-old child was burned to death by powder stored in a magazine on private property. A charge that "the defendant had the right to store his powder in the magazine, and keep it there, and there was no absolute duty rest-

Am. St. Rep. 856, 41 S. W. 62; Ryan v. Towar, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70; Fitzmaurice v. Connecticut R. & Lighting Co. 78 Conn. 406, 3 L.R.A.(N.S.) 149, 112 Am. St. Rep. 159, 62 Atl. 620; Thomp. Neg. § 1030; San Antonio & A. P. R. Co. v. Morgan, 92 Tex. 98, 46 S. W. 28; Louisville R. Co. v. Esselman, 29 Ky. L. Rep. 333, 93 S. W. 50; Denver City Tramway Co. v. Nicholas, 35 Colo. 462, 84 Pac. 813; Walker v. Potomac, F. & P. R. Co. (Pannill v. Potomac, F. & P. R. Co.) 105 Va. 226, 4 L.R.A. (N. S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862.

Messrs. Musser, Kohler, & Mottinger and Grant & Steber for plaintiff in error Swarts.

Messrs. Allen, Waters, & Andress for defendant in error Akron Waterworks Company.

Summers, J., delivered the opinion of the court:

The railroad company is not answerable in damages for the loss of the little boy's leg, unless his injury was caused by the neglect by the railroad company of some

duty it owed to the boy; and the waterworks company is not answerable in damages for the death of the little girl, unless she lost her life because the employees of the company neglected to observe some duty that it owed to her. Whether any and what duty rested upon the defendant is a question of law; whether the defendant performed or observed that duty, or neglected to do so, and plaintiff in consequence was injured, is a question of fact. The duty of the owner or occupier of land to persons coming upon it depends somewhat upon whether they are there by his invitation or permission. To invited persons it is his duty to exercise reasonable care for their safety. To licensees it is his duty to give notice of hidden dangers or traps. While trespassers, that is, persons entering without permission, assume the risk of injury from the condition of the premises, and the duty of the occupier to them is only to be careful not to injure them by bringing force to bear upon them. The only exception to his nonliability to persons entering without his permission was where he made a change in the condition of his land, adjacent to a public highway, so as to endanger the safety of travelers who might, without fault on

ing on it to keep it locked or guarded from access by children or others, unless the situation and surroundings would reasonably indicate to an ordinarily prudent person in charge of such magazine that it might be tampered with and ignited, so as to cause injury to children or others. The duty of the defendant in this regard depends entirely on the surrounding circumstances which may be in evidence, and of this the jury are the judges,"—was held not to be too favorable to the defendant, where it appeared that the magazine was built of brick and stone, and was located in a woods, not in a populous community, and from 50 to 75 yards from the highway, and within 6 feet of a path seldom traveled, the powder being damaged, and it appearing that when set on fire it did not explode, but burned slowly, the child's clothing catching fire because he was standing in the door.

A bridge company is not liable for the death of a seven-year-old boy who, while walking upon an iron gas pipe, located at some distance above the floor of the carriage way of the bridge, loses his balance and falls through an opening in the structure, since the company is not bound to maintain the bridge in such a manner as to prevent the possibility of an accident to a child. Oil City & P. Bridge Co. v. Jackson, 114 Pa. 321, 6 Atl. 128.

No liability arises for the death of a seven-year-old boy who, while at play in a building in process of erection, gets upon a window sill, and, in attempting to pull himself up, takes hold of a loose stone over the

window, which falls and kills him, no inducement or invitation, implied or otherwise, being held out to him. Witte v. Stifel, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891. The court said that it was not shown in the case that the defendants knew of the dangerous condition of the stone, or that children were in the habit of resorting to the building for play; nor was there anything about the construction unusual or unique, which would be attractive to children.

No liability arises for injury to a child trespasser stepping through a hole in the floor of a power house on private property at a distance of 20 yards from the highway. Curtis v. Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955. The court said it was not unmindful of the humane rule of law that forbade a property owner to leave unguarded dangerous machinery and dangerous places which might be of such a character as to attract young children, or to allure them into dangers, but the rule was not of general application, and could not be extended to cases such as the one at bar. There was nothing alluring or attractive about these premises or machinery, nothing to invite children thither, and nothing dangerous about the place and machinery when not in use. To hold, as a general and universal rule of law, that the owners of mills and factories must so construct and maintain their premises as to be reasonably safe for trespassers, infants or adults, regardless of how they might gain admission, would be destructive of all industry and all property rights.

their part, accidentally stray from the highway.

So the law stood until the decision in *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, decided in 1874. In that case a little boy, about six years of age, lost his foot while playing with a turntable on the uninclosed lands of the railroad company, in company with two other boys, and a judgment for \$7,500 was sustained. This case was tried before Dillon, Circuit Judge, and Dundy, District Judge. The circuit judge charged the jury as follows: "This action rests, and rests alone, upon the alleged negligence of the defendant; and this negligence consists, as alleged, in not keeping the turntable guarded or locked. Negligence is the omission to do something which a reasonably prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent or reasonable man would not do, under all the circumstances surrounding the particular transaction under judicial investigation. If the turntable, in the manner it was constructed and left, was not dangerous in its

nature, then of course the defendants would not be guilty of any negligence in not locking or guarding it. But, even if it was dangerous in its nature in some situations, you are further to consider whether, situated as it was on the defendant's property, in a small town, and distant or somewhat remote from habitations, the defendants are guilty of negligence in not anticipating or foreseeing, if left unlocked or unguarded, that injuries to the children of the place would be likely to or would probably ensue. The machine in question is part of the defendant's road, and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that, if they resorted there, they would be likely to get injured thereby, then you cannot find a verdict against them. But, if the defendant did know, or had good reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play, and that, if they did, they would or might be injured, then, if they took no

Keeping a yard in which children are accustomed to play accessible to them, and piling a number of railroad ties in such a manner that they fall upon an eight-year-old trespasser playing upon them, will not render the company liable for resulting injury to the child, since the place is not peculiarly alluring, nor the ties obviously dangerous. *Missouri, K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L.R.A. 825, 36 S. W. 430, reversing (Tex. Civ. App.) 32 S. W. 815.

The owner of a lumber yard should not be held to the duty of reasonable care in the piling of the lumber, so as to prevent any danger that can likely come to children who may reasonably be expected to frequent such locality without any conscious purpose of mischief or any unlawful act. *Vanderbeck v. Hendry*, 34 N. J. L. 467.

One who maintains an open lumber yard adjacent to a street is not liable for the death of a trespassing boy, caused by the falling of the lumber upon him while at play, although the place is attractive to children, to the knowledge of the defendant. *Kelly v. Benas* (Mo.) 116 S. W. 557. The court said that "if the old channel of the law was to be quite changed by the application of the new doctrine automatically and without discrimination, if sentimental considerations (however elevated and tender) are to usurp the place of cold and calm reason as the foundation for rules of law, then the flood gate now damming back liability will be raised, letting in strange and deep waters for the landowner to struggle with. Not only will he be liable for boys drowned while swimming in his stock pond (the idea of swimming being alluring to a boy), for those who fall into uncovered wells, cisterns, and cellars (the notion of

playing on the brink of such being a boyish one), for children who are suffocated while playing in piles of sand accumulated for building purposes, or in sliding down stacks of straw unscientifically piled and exposed, but he may be mulcted in damages for injuries to his neighbors' children, who, romping in his haymow, without his invitation, break their bones by sliding down his hay chute, or those who, playing in his rock quarry, are hurt. Shall he fence against adventurous, trespassing boys? Almost as well suggest 'that he build a wall against birds.' If he is held to liability for injury to the children of Jones because of the way he piles his lumber, by the same token, as to Brown, liability would be fastened on him for the way he piles his stones, his bricks, his corn in pens, his hayricks, and his cord wood on his private grounds; in fact, as has been pointedly said, every landowner will be liable for injuries to his neighbor's children under the new doctrine except the neighbor himself. We cannot well write the law that way."

In *Siddall v. Jansen*, 168 Ill. 43, 39 L.R.A. 112, 48 N. E. 191, reversing 67 Ill. App. 102, where a five-year-old boy was playing around a store in which his father was employed, and where, in the temporary absence of the parent, the child was attracted to an elevator shaft, the door of which was unfastened, and was severely bruised and mangled by the descending cage, the court, in holding that the question whether the child was a trespasser was for the jury, approved the language of the court in *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484, *infra*: "Although a child of tender years who meets with an injury upon the premises of a private owner

means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence." [2 Dill. 294, Fed. Cas. No. 13,504.]

This charge, in the Supreme Court, was held to be a correct statement of the law. In many of the states the courts have followed the lead of the Supreme Court of the United States, and a multitude of cases has arisen, seeking to make the owners of property liable for injuries to children from accidents happening upon their premises, on the ground that the owner was negligent in not anticipating that children would be likely to be attracted to the place and to be injured. The multitude of circumstances under which the owner of property would be liable for injuries to children, and the very serious burden which was, in consequence, being placed on the owners of property, were very probably not foreseen in the Stout Case. But the cases became so numerous as to occasion very careful examination of the principles laid down in that case. In many jurisdictions the correctness of the

conclusion there reached is denied, and in some of the states where that decision was followed the courts have repudiated the doctrine, in others they have limited it, and in still others they have declined to follow the doctrine in any case excepting a turntable case. To even enumerate the cases in which the so-called turntable doctrine has been applied or denied would require so much space as to preclude its attempt.

The following are turntable cases in which the doctrine is applied: United States: *Sioux City & P. R. Co. v. Stout*, supra. Minnesota: *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289, 45 N. W. 440. Nebraska: *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50. Missouri: *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418. Kansas: *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Union P. R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501. Iowa: *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95. California: *Barrett v. Southern P. Co.* 91 Cal. 296, 25

may be a technical trespasser, yet the owner may be liable if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts."

And in *Mullaney v. Spence*, 15 Abb. Pr. N. S. 319, it was held that the fact that a four-year-old child who approached the open door of an elevator, close to the sidewalk of a street, and was crushed by the descending car, was technically a trespasser, would not stand in the way of recovery for the injury.

(b) Ponds, reservoirs, waterways, etc.,

In *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484, affirming 53 Ill. App. 189, a pond or pit was located in a populous city on a plot of ground bounded on two sides by public streets and on the third side by a public alley with an opening of some 40 feet in a fence at the street on one side, and an opening of equal dimensions in a fence at the alley, with a causeway running from one opening to the other diagonally across the premises, inviting approach, and actually being used for the passage of men and teams. Logs and timbers floated about in the pond, and boys had for some time been in the habit of playing upon them in the water. The city authorities had been notified of its attractiveness to children and of its dangerous character, but had suffered the pond to remain undrained and the fence around it to be broken down in some places, and to be actually removed in others. In an action brought to recover for the death of a boy who was drowned in this pond, the doc-

trine of the turntable cases was held applicable, the court saying that the love of motion which attracted a child to play upon a revolving turntable would also attract him to experiment with a floating plank or log which he found within his easy reach in a pond.

A water company is liable for the drowning of an eleven-year-old boy in a reservoir to which children are attracted for fishing and other sports, although the place is fenced so as to render access difficult, where the company, through its agent, has knowledge that the barrier is ineffective, and permits children to trespass on the ground unrebuked. *Price v. Atchison Water Co.* 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450. The court said that, knowing that the fence was insufficient as a barrier or a warning of danger, it was the duty of the company to have expelled the intruders, or to have adopted other measures to avoid the accident.

In *Kansas City v. Siese*, 71 Kan. 283, 80 Pac. 626, a city was held liable on the authority of the last-mentioned case for the drowning of a twelve-year-old boy in a pond in which he was bathing, although it was urged that the boy was of sufficient maturity to know the danger into which he ventured, and that he had been advised of that danger, and warned to shun it. *Cunningham, J.*, dissenting, said that if, in the future, the principles announced in the *Price Case*, supra, were followed, the owner of an apple tree from which a venturesome boy might fall and sustain injury in his effort to reach a big red apple attractively displayed on its branches would be adjudged guilty of maintaining an attractive nui-

Am. St. Rep. 186, 27 Pac. 666. Washington: *Ilwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, 22 Am. St. Rep. 169, 25 Pac. 335. Tennessee: *Bates v. Nashville, C. & St. L. R. Co.* 90 Tenn. 36, 25 Am. St. Rep. 665, 15 S. W. 1069. But a railway company is not required to fasten the turntable any more securely than necessary to keep it securely in place. Illinois: *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269. Reversed judgment on the sole ground that the company was not negligent, in view of the isolated position of the turntable. South Carolina: *Bridger v. Asheville & S. R. Co.* 25 S. C. 24. Georgia: *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637. Texas: *Evansich v. Gulf, C. & S. F. R. Co.* 57 Tex. 126, 44 Am. Rep. 586; *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356, 19 Am. St. Rep. 755, 14 S. W. 26; *Ft. Worth & D. C. R. Co. v. Measles*, 81 Tex. 474, 17 S. W. 124. To these should be added *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. St. Rep. 619. This was not a turntable case, but a case in which a boy was injured in a slack pit of the railroad company. However, the doctrine of the turntable cases was re-examined and approved.

In the following cases, in which the in-

sance, and answerable therefor in damages; or one who, for the purpose of affording water for his stock or to run his mill, should maintain a pond, would be guilty to the same extent. To claim cases like the one at bar were governed by principles of the turntable cases was, to his mind, against reason and the weight of authority.

The owner of an unprotected reservoir in an open field near residences and public highways where children resort to play is liable for the death of a boy less than ten years of age, who, while at play, falls into the water and is drowned. *Franks v. Southern Cotton Oil Co.* 78 S. C. 10, 12 L.R.A. (N.S.) 468, 58 S. E. 960.

The owner of premises is liable under the attractive nuisance doctrine for the drowning of a two-year-old child who, while its mother is visiting a tenant on the premises, is permitted to play in the yard, and, while so engaged, lifts the cover of an unguarded cistern to satisfy its childish curiosity, and falls into the water. *Donk Bros. Coal & Coke Co. v. Leavitt*, 109 Ill. App. 385.

In *Tucker v. Draper*, 62 Neb. 66, 54 L.R.A. 321, 86 N. W. 917, the court said: "If I know that there is an open well upon my premises, and know that children of such tender years as to have no notion of their danger are continually playing around it, and I can obviate the danger with very little trouble to myself, and without injuring the premises or interfering with my own free use thereof, I owe an active duty to those children, and if I neglect that duty, and they fall into the well and are killed, 19 L.R.A. (N.S.)

juries were received at a turntable, the doctrine of the turntable cases is denied: *New Hampshire: Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790. Massachusetts: *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283. New York: *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068. New Jersey: *Turess v. New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682. Virginia: *Walker v. Potomac, F. & P. R. Co.* (Pannill v. Potomac, F. & P. R. Co.) 105 Va. 226, 4 L.R.A. (N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862.

In the following cases, where the injuries were not sustained at a turntable, the doctrine of the turntable cases is denied: *New Jersey: Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 A. & E. Ann. Cas. 497. Michigan: *Ryan v. Towar*, 128 Mich. 463; 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644. Rhode Island: *Paolino v. McKendall*, 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 736, 53 Atl. 268. West Virginia: *Ritz v. Wheeling*, 45 W. Va. 262, 43 L.R.A. 148,

it is through my negligence; I cannot urge their negligence as a defense, even though I have never invited or encouraged them expressly or impliedly to go upon the premises." This duty rests upon the ground that the danger to be anticipated from an open well outweighs the slight expense and inconvenience that would be caused in making it safe.

The language in the last-mentioned case was said, in *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880, to amount to a reaffirmance of the turntable cases, and to suggest the true principal upon which cases of this character rest, that is, that where the owner of dangerous premises knows, or has good reason to believe, that children so young as to be ignorant of the danger will resort to such premises, he is bound to take such precautions to keep them off, or to protect them from injuries likely to result from the dangerous condition of the premises while there, as a man of ordinary care and prudence, under like circumstances, would take. At first sight it would seem that the principle thus stated is too broad, and that its application would impose unreasonable burdens on owners, and intolerable restrictions on the use and enjoyment of property. It must be kept in mind that it requires nothing of the owner that a man of ordinary care and prudence would not do, of his own volition, under like circumstances. Such a man would not willingly take up unreasonable burdens, nor vex himself with intolerable restrictions.

31 S. E. 993; *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 457, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410.

In the following cases, in which children were injured, but not while playing with a turntable, liability is denied in courts that have adopted the turntable doctrine in cases where the injuries were received at a turntable: Minnesota: *Emerson v. Peteler*, 35 Minn. 481, 59 Am. Rep. 337, 29 N. W. 311; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402; *Haesley v. Winona & St. P. R. Co.* 46 Minn. 233, 24 Am. St. Rep. 220, 48 N. W. 1023; *Dehanitz v. St. Paul*, 73 Minn. 385, 76 N. W. 48; *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965; *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899; *Stendal v. Boyd*, 73 Minn. 53, 42 L.R.A. 288, 72 Am. St. Rep. 597, 75 N. W. 735; *Erickson v. Great Northern R. Co.* 82 Minn. 60, 51 L.R.A. 645, 83 Am. St. Rep. 410, 84 N. W. 462. Georgia: *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 44 L.R.A. 314, 39 S. E. 82; *O'Connor v. Brucker*, 117 Ga. 451, 43 S. E. 731. Nebraska: *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Omaha v. Bowman*, 52 Neb. 393, 40 L.R.A. 531, 66 Am. St. Rep. 506, 72 N. W. 316. California: *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598. Mis-

souri: *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069; *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891; *Arnold v. St. Louis*, 152 Mo. 173, 48 L.R.A. 291, 75 Am. St. Rep. 447, 53 S. W. 900. Kansas: *Chicago, K. & W. R. Co. v. Bockoven*, 53 Kan. 279, 36 Pac. 322. Texas: *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L.R.A. 573, 66 Am. St. Rep. 856, 41 S. W. 62. Tennessee: *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 4 L.R.A. (N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199. Washington: *Clark v. Northern P. R. Co.* 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537.

The principles involved have been carefully considered in so many cases that it would be fruitless as well as presumptuous to undertake to add anything to the discussion.

In the recent case, *Friedman v. Snare & T. Co. supra*, where the court denied liability for injuries to a little girl between four and five years of age, who had been injured while playing upon some iron girders that

In the majority of cases, however, the attempt to extend the attractive nuisance doctrine to dangers of the class discussed under this subdivision of the note has been unsuccessful.

A pond is not to be treated as an attractive danger within the meaning of the turntable cases. *Smith v. Jacob Dold Packing Co.* 82 Mo. App. 9.

In *Peters v. Bowman*, 115 Cal. 349, 56 Am. St. Rep. 106, 47 Pac. 113, 598, the court refused to follow the doctrine of the turntable cases so as to hold a lot owner liable for the drowning of a boy in a pond formed upon the land by surface waters, due to the exercise by the city in which the property was located of a power and authority which the owner could not legally resist. The court said that a body of water either standing, as in ponds and lakes, or running, as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays, is a natural object, incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent, open danger, the knowledge of which is common to all; and there is no just view consistent with the recognized rights of property owners which would compel one owning land upon which such water or part of it stood or flowed to fill it up or surround it by an impenetrable wall.

The owner of a lot upon which a pond formed by surface waters is located is not liable, on the theory that it is an attractive 19 L.R.A. (N.S.)

nuisance, for the drowning of a ten-year-old boy who falls into the water from a plank upon which he is attempting to float, where the water was caused to stand on the lot by an act of the city in stopping up a drain, and the owner did nothing to render the pond attractive, and did not even know of its existence. *Cooper v. Overton*, 102 Tenn. 222, 45 L.R.A. 591, 73 Am. St. Rep. 871, 52 S. W. 183.

The owner of an artificial pond is not liable for the drowning of a ten-year-old boy in it while at play, although it is an attractive place to children. *Sullivan v. Huidekoper*, 27 App. D. C. 154, 5 L.R.A. (N.S.) 263, 7 A. & E. Ann. Cas. 196. The court refused to extend the turntable doctrine to such a case, saying that one might as well dam the Nile with bulrushes as to keep boys brought up with the freedom allowed American boys away from ponds, pools, and other bodies of water.

A pond is not so constructed with reference to its depth, location, and attractive character as to impose upon the owner the duty of so guarding it that children of tender years may not be attracted and allured to it, to their harm, where it is situate more than an eighth of a mile outside the limits of a city, remote from any street or highway on which a child has a right to travel, and its allurements and attractions, whatever they may be, are present only to those who deliberately and designedly seek them out, and where a child, to reach the pond, must go a mile and a half from its home, and walk more than a third of a mile over a network of railway

fell upon her while playing upon them in the street, where they had been placed by an abutting property owner, for use in the construction of a building, the English cases that are cited as supporting the decision in *Sioux City & P. R. Co. v. Stout*, supra, are reviewed. And in *Ryan v. Towar*, supra, many of the cases, both English and American, are examined, and the doctrine of the turntable cases is expressly disapproved. In that case the defendant owned a small pump house, located upon ground owned by a railroad company. In the house was a small, overshot water wheel. The plaintiff, a girl about twelve or thirteen years of age, was in the habit of passing this pump house on the way to school with her brothers and sisters; going across lots through the field, because it was nearer. For some time previous to the time of the accident a hole existed in the stone wall of the house inclosing the wheel, through which children went to play on the wheel. On the day in question, the brothers of plaintiff, on the way from school, crawled through this hole, and, mounting the wheel, were able by their weight to turn the wheel part way round and back. A younger sister, aged eight years, got caught between the wheel and the wheel pit. The plaintiff heard her

screams, and went through the hole to her succor, and aided in rescuing her, and was herself injured. In the opinion, Hooker, J., after reviewing a number of turntable cases, says: "Here we have the doctrine of the turntable cases carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow, or a lawn mower, or a spade upon his lawn; a rake, with its sharp teeth pointing upward, upon the ground or leaning against a fence; a bed of mortar prepared for use in his new house; a wagon in his barnyard, upon which children may climb, and from which they may fall; or who turns in his lot a kicking horse, or a cow with calf,—does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through which the accumulations of the stables are thrown, be kept locked and fastened, lest twelve-year-old boys get in and be hurt by the animals, or by climbing into the haymow and falling from beams? May a man keep a ladder, or a grindstone, or a scythe, or a plough, or a reaper, without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go

tracks. *Hanna v. Iowa C. R. Co.* 129 Ill. App. 134. The court said that a boy who deliberately braved such dangers for the sake of a swim in the pond would hardly be deterred from that pleasure by any ordinary fence or gate. In this case the pond was reasonably protected from intrusion by fences and by a high embankment on one side. It was provided with a heavy gate, but it appeared that the gate was not kept shut except when cattle were within the inclosure.

A city is not liable for the death of a seven-year-old boy who, in pursuit of a bird, wades beyond his depth, and is drowned in water which fills an excavated gravel pit, the pond thus formed being used for fishing and bathing purposes, since it is not the duty of the city to provide against such a contingency. *Schauf v. Paducah*, 106 Ky. 228, 90 Am. St. Rep. 220, 50 S. W. 42.

The owner of land on which there is an unfenced excavation filled with water, in a populous part of a city, is not liable for the drowning therein of a four-year-old trespassing child, since a landowner is not bound to fence or otherwise guard an open excavation or pond, natural or artificial, on his land, so as to prevent injury to children coming thereon without right or invitation, express or implied, although they are induced to do so by the alluring attractiveness of the place. *Stendal v. Boyd*, 73 Minn. 53, 42 L.R.A. 288, 72 Am. St. Rep. 597, 75 N. W. 735.

The owner of property is not required to fence an excavation filled with water so as 19 L.R.A. (N.S.)

to prevent an eight-year-old boy from falling into it and being drowned. *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74.

Having an unfenced and unguarded pond on land within a city, the pond being dangerous and attractive to children, who are accustomed to bathe in it, to the knowledge of the owner, will not render him liable for the drowning of a nine-year-old boy who goes there to bathe. *Moran v. Pullman Palace Car Co.* 134 Mo. 651, 33 L.R.A. 755, 56 Am. St. Rep. 548, 36 S. W. 659.

No liability arises against the owner of land upon which a pond covered with ice is located, by reason of the fact that children skating upon it break through and are drowned, where there is nothing to show that they were there by permission or invitation. *Arnold v. St. Louis*, 152 Mo. 173, 48 L.R.A. 291, 75 Am. St. Rep. 447, 53 S. W. 900.

In *Richards v. Connell*, supra, it appeared that the defendants, who were lot owners, negligently permitted surface water to accumulate on the land until it formed a dangerous pond; that they neglected to fence the lots, or to erect barriers of any kind to prevent children lawfully in the vicinity from falling into the pond; that the lots were situated in the vicinity of one of the public schools of the city; that the pond was in a public and much frequented place, and attractive to children of tender age, many of whom were accustomed to play about on the pond; and that a ten-year-old boy, yielding to his natural impulses, used a section of a

still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish pond? And must he guard ravines and precipices upon his land? Such is the evolution of the law, less than thirty years after the decision of *Sioux City & P. R. Co. v. Stout*, when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon." Of the case of *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257, in which the opinion is by Judge Cooley, and which is quoted from at some length in *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, as approving the turntable doctrine, he says: "Clearly this does not adopt the rule of *Sioux City & P. R. Co. v. Stout*." And in conclusion he says: "That a landowner is under no obligation to use care to protect a trespasser is a broad, and, until recently, undisputed rule, without exception; liability for injuries sustained by such being limited to cases of intentional or wanton injuries. The rule, with this limitation, is sustained

to-day by the great weight of authority. It is contended by some law writers, and has been held in some cases, that an exception exists in favor of children of tender years. The varying reasons given should lead us to doubt the solidity of the foundations upon which these cases rest, especially when none of the reasons are of recognized authority. The law has never before denied the liability of children for trespass because of tender years. On the contrary, it was intimated in *Mangan v. Atterton*, L. R. 1 Exch. 239, that a four-year-old boy was a trespasser, under the circumstances of that case; and there are numerous cases cited in this opinion where liability is denied upon that and no other ground. The assertion that the weight of authority supports the plaintiff's contention in this case seems to us incorrect. It may be true that, in cases involving turntables, a majority of the cases, which are necessarily few, have followed the case of *Sioux City & P. R. Co. v. Stout*, supra; but there should be a legal principle underlying the rule laid down in that case, and that principle has been assiduously sought for by some of the courts, without success, as we have seen. Others have asserted different reasons for following it. One gives us to understand that a child is

wooden sidewalk floating thereon as a raft, and fell into the pond, and was drowned. It was held that the owner was not required to fence the vacant lot, or otherwise secure the safety of strangers, old or young, who might go upon the premises, not by invitation, express or implied, but for the purpose of amusement, or from motives of curiosity.

A city is not liable for the death of a seven-year-old boy who is drowned within its limits in a pond on private property, not on or in dangerous proximity to a public highway, although the city permits the water to accumulate and remain there, and the boy is drawn to the pond by its attractiveness to children. *Omaha v. Bowman*, 52 Neb. 293, 40 L.R.A. 531, 66 Am. St. Rep. 506, 72 N. W. 316.

But, upon an amended petition, it being made to appear that the water of the pond extended to and over the sidewalk of a portion of the street, and that the deceased entered the pond from the street, it was held that a case was made against the city, on the authority of *Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528, rehearing in 50 Neb. 804, 70 N. W. 363, in which the city was held liable under similar circumstances, on the ground that it was the duty of a municipal corporation to keep its streets in a reasonably safe condition for the use of the public. *Bowman v. Omaha*, 59 Neb. 84, 80 N. W. 259.

The owner of a vacant, unfenced city lot upon which children are in the habit of playing is not liable for the death of a

six-year-old child who, while sailing a toy boat in a cesspool on the premises, not adjoining a highway, falls into the water and is drowned. *Greene v. Linton*, 7 Misc. 272, 27 N. Y. Supp. 891.

It is not the duty of the owner of a lot in a thickly-settled part of a city to fence or guard a dangerous hole or excavation, which he does not appear to have made or to have caused to be made on the premises, and which fills with water, even to prevent children from having access thereto; and he is therefore not liable for the death of a nine-year-old boy who, while playing about the pond, falls in and is drowned. *Klix v. Nieman*, 68 Wis. 276, 60 Am. Rep. 854, 32 N. W. 223.

In *Peninsular Trust Co. v. Grand Rapids*, 131 Mich. 571, 92 N. W. 38, it was held that a city was not liable under the attractive nuisance doctrine for the death of a child who crawled through a hole in a fence about a reservoir, and who, in attempting to wade in the water, was drowned.

The duty of a city to use reasonable care to guard an attractive reservoir near a public park, so as to prevent the drowning of an eleven-year-old boy, is discharged when it surrounds the place with a woven-wire fence 4 feet and a half high, that children cannot climb over without taking off their shoes, and when it provides watchmen who, before the accident, warn the boy to keep outside of the fence. *Carey v. Kansas City*, 187 Mo. 715, 70 L.R.A. 69, 36 S. W. 438.

licensed to go wherever he can find that which attracts him. A Texas court has held that children of tender years cannot be trespassers; while other authorities are content to rest their approbation of and adherence to the alleged rule upon the inhumanity of the doctrine that a landowner must not be held responsible for injuries suffered by trespassing children, when, by ordinary thoughtfulness and care, he could have anticipated and prevented it; and the generic term 'attractive nuisances' is applied to the great variety of things which may naturally be expected to allure young children upon private premises. The term 'attractive nuisance,' as applied, is a new one in the books, and the plausible application of the well-known principle that one must so occupy his own as not to do harm to the rights of others should not be construed to so restrict the use of private lands as to make it necessary to guard and protect trespassers. A man's home has always been considered his castle,—a domain where, secure from intrusion, he might lawfully do as he would, so long as he did not interfere with the legal rights of others. It has been his duty to guard those licensed to enter, but beyond that he has not been required to go. In our anxiety to prevent personal in-

juries, we should not go so far as to over turn private rights."

In *Gillespie v. McGowan*, 100 Pa. 144. 45 Am. Rep. 365. Paxson, J., says that the principle upon which it is sought to fasten liability on property owners would, if carried to its logical conclusion, "charge the duty of the protection of children upon every member of the community except their parents." In a very able article on the liability of landowners to children entering without permission, by Judge Jeremiah Smith, in 11 *Harvard Law Review*, 349-372. he says: "If those who brought the child into the world are unable, by reason of poverty, to provide him a playground, this may afford an argument for the passage of a statute imposing that duty upon the municipality; in which case each landowner would have to contribute his proportion of the expense. But this is quite another thing from assessing upon a single unfortunate landowner the entire damage arising from the want of such a playground."

In some of the cases it is said that *Lynch v. Nurdin*, 1 Q. B. 29, has been overruled or at least disapproved; but in *Union P. R. Co. v. McDonald*, supra, Mr. Justice Harlan doubts the correctness of this statement, and refers to an English case in which it

That a place where a city had formerly maintained a reservoir was, at the time a child fell into the water and was drowned, an unguarded excavation, pit and trap near a public street, and close to the residences of a large number of persons, including that of the plaintiff, and that the water therein and the work of filling in the excavation, which had been going on for some time, was calculated to, and did, allure to it young children, and that the city had knowledge of these facts, was held, in *Clark v. Manchester*, 62 N. H. 577, not to establish the city's liability for the death of the child, the court saying that the work of filling it was not carried on for the purpose of attracting boys there, and giving them sport and pleasure, but for the improvement and beneficial use of the city's land. The fact that children went to the reservoir pit from curiosity or for pleasure, without objection by the defendants, was held not to be an invitation or a license to go there. The child, said the court, was not upon the land by invitation, nor under circumstances which made it the duty of the city to protect him; but was there to gratify his curiosity or for mere pleasure. The city owed him no special duty. It was not a case of setting a trap for children, nor one of wantonly or knowingly leading them into danger, and this one to destruction. It was the ordinary case of a landowner managing, within the boundaries of his own land, his own property, in his own way, for his own use and benefit; and though, in so doing this, he might find occasion to dig

excavations, construct reservoirs, provide fish ponds, plant and cultivate fruit trees, erect and maintain useful structures, instruments, and machinery, all of which were alluring and attractive and dangerous to children, yet it could not be claimed that he must constantly guard these things against the approach of persons coming without license or invitation, and attracted by mere curiosity or pleasure, or suffer in damages for any injury they might receive.

A city is not liable for the drowning of a trespassing child in a reservoir, since a landowner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is a child raises no duty where none otherwise exists. *Ritz v. Wheeling*, 45 W. Va. 267. 43 L.R.A. 148. 31 S. E. 993.

In *Hargreaves v. Deacon*, 25 Mich. 1, it was held that the owner was not liable for the drowning of a trespassing child who fell into an unguarded cistern on property not immediately adjoining a highway. The court said that there is some danger, in dealing with such questions, of confounding legal obligations with those sentiments which are independent of law, and rest merely on grounds of feelings or moral considerations. We feel usually more indignation at wrongs done to children than at wrongs done to others. But the law has not usually given them civil remedies on any such basis. Nor does it usually if ever, impose any duties on strangers towards them resting entirely on the fact that they are children. Those who have any special dealings with them, as

has been approved, and we may add that since then it has been followed in *Harrold v. Watney* [1898] 2 Q. B. 320. and in *McDowall v. Great Western R. Co.* [1902] 1 K. B. 618. However, we do not consider the case of *Lynch v. Nurdin* as authority for the decision in *Sioux City & P. R. Co. v. Stout*. In *Lynch v. Nurdin* the defendant left his horse and cart unattended in a public street. The plaintiff, a child seven years of age, got upon the cart in play, and another child led the horse on, and the plaintiff was thereby thrown down and hurt. The plaintiff recovered. It is to be observed that the horse and cart were left in the street. It was the duty of defendant to use care. The child was rightfully in the street, and the fact that he meddled with the cart was not contributory negligence in one of his age, and it is not properly a case of trespass. In the turntable cases there is neither invitation nor permission, and to ground them on cases like *Townsend v. Wathen*, 9 East, 277, where dogs were lured to their death by tainted meat, or like *Bird v. Holbrook*, 4 Bing. 628, where a spring gun was set to shoot trespassers, is to lose sight of the difference between negligence and intentional wrongdoing. The distinction is pointed out in *Ponting v. Noakes* [1894] 2 Q. B. 281.

parents, teachers, and employers, incur obligations appropriate to their relations, and differing from those incurred towards others in proportion to the necessity of care and protection to the risk of injury. But those who have no such relation with them are not liable for negligence in carrying on their own business beyond what would be their liability to others as well as children who are equally free from blame. But the court also said that it would express no opinion concerning cases where the nature of the business is such as to present peculiar attractions to children beyond other kinds of occupation. This case was decided in the same year that the turntable doctrine was announced.

In *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, it was held that the owner of an abandoned brickyard was not liable for the death of a boy nearly eight years of age, who was fishing in an old, open well on the premises, and who fell into the water, and was drowned. The court said that to compel the owners of such property either to inclose it or to fill up their ponds and level the surface so that trespassers might not be injured would be oppressive. The law does not require any such principle to be enforced, even where the trespassers are children. The court added: "It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to

where the defendant was held not liable for the death of plaintiff's horse, due to the latter's eating from a yew tree that was wholly on defendant's land.

In *Buch v. Amory Mfg. Co.* 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809, where a boy, eight years of age, unable to speak or understand English, was injured by machinery, in a very able opinion *Carpenter, Ch. J.*, says: "Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owe to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A., standing close by a railroad, sees a two-year-old babe on the track, and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death. Pub. Stat. 1901, chap.

this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents."

The owner of land containing an open cistern is not required to guard or fence it so as to prevent the drowning of a seven-year-old trespasser therein, although the premises are used, to the knowledge of the owner, as a playground and common. *Breckenridge v. Bennett*, 7 Kulp, 95.

In *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 63, 38 L.R.A. 573, 66 Am. St. Rep. 859, 41 S. W. 63, affirming (Tex. Civ. App.) 40 S. W. 861, in holding a railroad company not liable for the death of a child less than three years old, who was drowned in a pit of water near a path designed for the use of persons going to and from a railroad station platform on business, it was said that the common law imposes no duty upon the owner to use care to keep his property in such condition that trespassers may not be injured, even if they are children of tender years.

No liability arises for the drowning of a five-year-old child in a permanent canal or mill trench in the neighborhood of inhabited dwellings, on the theory that the place was attractive to children, to the knowledge of the owner of the property, who failed to fence or guard it, where there is nothing to show that it is usual to guard banks of either natural or artificial streams under the circumstances, or that the defendant undertook to maintain a guard, and failed to keep it in proper order. *McCabe v.*

278, § 8. 'In dealing with cases which involve injuries to children, courts . . . have sometimes strangely confounded legal obligation with sentiments that are independent of law.' *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155. 'It is important to bear in mind, in actions for injuries to children, a very simple and fundamental fact, which, in this class of cases, is sometimes strangely lost sight of, viz., that no action arises without a breach of duty.' 2 Thomp. Neg. 1183, note 3. 'No action will lie against a spiteful man who, seeing another running into danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held answerable for not protecting them against any danger they might encounter whilst using the license.' *Gautret v. Egerton*, L. R. 2 C. P. 371, 375. 'What duties do the owners owe to a trespasser upon their premises? They may eject him, using such force, and such only, as is necessary for the purpose. They are bound to abstain from any other or further intentional or negligent acts of personal violence,—bound to inflict upon him by means

of their own active intervention no injury which, by due care, they can avoid. They are not bound to warn him against hidden or secret dangers arising from the condition of the premises (*Redigan v. Boston & M. R. Co.* 155 Mass. 44, 47, 48, 14 L.R.A. 276, 31 Am. St. Rep 520, 28 N. E. 1133), or to protect him against any injury that may arise from his own acts or those of other persons. In short, if they do nothing, let him entirely alone, in no manner interfere with him, he can have no cause of action against them for any injury that he may receive. On the contrary, he is liable to them for any damage that he, by his unlawful meddling, may cause them or their property. What greater or other legal obligation was cast on these defendants by the circumstance that the plaintiff was (as is assumed) an irresponsible infant? If landowners are not bound to warn an adult trespasser of hidden dangers,—dangers which he, by ordinary care, cannot discover, and therefore cannot avoid,—on what ground can it be claimed that they must warn an infant of open and visible dangers which he is unable to appreciate? No legal distinction is perceived between the duties of the owners in one case and the other. The situation of the adult in front of secret dangers which, by no de-

American Woolen Co. 124 Fed. 283, affirmed in 65 C. C. A. 59, 132 Fed. 1006. The court thought that the canal was an object of such a character that, both from the reason of the thing and the customs of the community, the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers connected with it, as they easily could and ought to have done.

The owner of a vacant lot upon which there is an unfenced stream of water is not liable for the drowning of a trespassing six-year-old girl who, in attempting to cross the stream on a log, falls into the water. *Marnock v. Simpson*, 10 Del. Co. Rep. 119.

One who places boards across a canal for the use of his workmen is not liable for the death of a four-and-one-half-year-old child who wanders from her home with a companion of her own age, and, in attempting to cross the canal on this temporary bridge, falls in and is drowned, there being nothing dangerous in the bridge itself, and nothing to suggest the possibility of such an accident. *Blum v. Weatherford & C. Bros.* 121 La. 298, 46 So. 317.

In *Indianapolis Water Co. v. Harold* (Ind.) 83 N. E. 993, it was held that a water company was not liable for the drowning of a nine-year-old boy who, while attempting to cross a canal by means of a log used as a footbridge, fell into the water, where it appeared that he was not lured to the place from the highway, and where there was no proof that the log was attractive to children, and where the log was

shown to have been in legitimate use as a movable bridge, and to have been a proper appliance for keeping the canal in repair.

The turntable doctrine will not be extended and applied to an open, unprotected flume, built upon high trestles, on private premises, so as to render the owner thereof liable for the death of a three-year-old child attracted thereto by a running stream of water which it carries, who falls into the open flume, and is carried through it, and hurled by the force of the water upon rocks below. *Salladay v. Old Dominion Copper Min. & Smelting Co.* (Ariz.) 100 Pac. 441.

(c) *Railroad tracks and structures.*

In *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 472, 4 Atl. 106, it was held that the tender age of children trespassing on a railroad track would not raise a duty toward them when none otherwise existed.

Where a four-year-old boy was run over by railroad cars while using the track as a playground, having reached the place of the accident by a footpath in which he had no rights, it was held that the company was not liable although it had been notified that the place was dangerous for children, and had been requested to put a fence across the track. It was held that there was no inducement or implied invitation held out to the child. *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686.

No duty rests upon a railroad company to fence its right of way, even against the intrusion of an infant trespasser. *Casista*

gree of care, he can discover, and that of the infant, incapable of comprehending danger, is, in a legal aspect, exactly the same. There is no apparent reason for holding that any greater or other duty rests upon the owners in one case than in the other. There is a wide difference,—a broad gulf,—both in reason and in law, between causing and preventing an injury; between doing, by negligence or otherwise, a wrong to one's neighbor, and preventing him from injuring himself; between protecting him against injury by another, and guarding him from injury that may accrue to him from the condition of the premises which he has unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law. Is a spectator liable if he sees an intelligent man or an unintelligent infant running into danger, and does not warn or forcibly restrain him? What difference does it make whether the danger is on another's land, or upon his own, in case the man or infant is not there by his express or implied invitation? If A. sees an eight-year-old boy beginning to climb into his garden over a wall stuck with spikes, and

does not warn him or drive him off, is he liable in damages if the boy meets with injury from the spikes? *Degg v. Midland R. Co.* 1 Hurlst. & N. 773, 777. I see my neighbor's two-year-old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by the common law or under the statute (*Pub. Stat.* 1901, chap. 278, § 8), because the child and I are strangers, and I am under no legal duty to protect him. Now, suppose I see the same child trespassing in my own yard, and meddling in like manner with the dangerous machinery of my own windmill. What additional obligation is cast upon me by reason of the child's trespass? The mere fact that the child is unable to take care of himself does not impose on me the legal duty of protecting him in the one case more than in the other. Upon what principle of law can an infant, by coming unlawfully upon my premises, impose upon me the legal duty of a guardian? None has been suggested, and we know of none."

The real reason for implying invitation, or declaring a turntable to be a lure, is to escape the imputation of making the law,

v. Boston & M. R. Co. 69 N. H. 649, 45 Atl. 712.

The doctrine of the turntable cases does not apply to a child trespasser on a railroad track, not allured or attracted to the right of way by unprotected machinery or other dangerous instrumentalities. *Ellington v. Great Northern R. Co.* 96 Minn. 176, 104 N. W. 827.

A railroad company is not required to fence its right of way so as to prevent a four-year-old child which crosses the track from getting upon the premises of a stranger, where it is hurt by falling into a trench. *Morrissey v. Providence & W. R. Co.* 15 R. I. 271, 3 Atl. 10.

No obligation rests upon a railroad company to guard a depot with active vigilance so as to prevent a child less than three years of age from going alone on the platform, without the knowledge of the company's servants, and so as to protect it from injury by moving a train against which it leans, the child having strayed from its home and gone upon the platform without invitation, out of childish curiosity, and for the purpose of amusement. *Ling v. Great Northern R. Co.* 165 Fed. 813.

A railroad company is not liable for injury to a boy between five and six years of age, who takes a position close to the edge of a station platform, and is struck by a slight projection from the side of a passing freight car, and knocked under the wheels, since the company owes him no duty to protect him from an accident from such a cause. *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706. 19 L.R.A. (N.S.)

Where an eight-year-old boy went under an elevated railroad structure in process of erection, and was hurt by a piece of iron falling upon him, and it appeared that he was not attracted to the place of danger by the structure, or by any work that was being carried on and that he was not invited there expressly or by implication, it was held that the company could not be held liable under the doctrine of the turntable cases. *Northwestern Elev. R. Co. v. O'Malley*, 107 Ill. App. 599.

A railroad company is not liable for injury to a ten-year-old boy who climbs upon an elevated railway structure in search of a ball, and who, while there, stumbles against a live wire, where there is no evidence tending to show that boys of tender years, or others, have been in the habit of climbing upon such a structure, and it appears that the wire is not exposed, unguarded, or easy of access from the street, and that there is nothing on the surface of the roadbed or top of the structure attractive or alluring to childish instincts, and where it appears that the company had no reason to anticipate that children or others would endeavor to resort to it at that place. *McAllister v. Jung*, 112 Ill. App. 138. The court said that the difference between the case at bar and the turntable cases, where the place of danger was open, easy of access, frequented by children, and in itself attractive, was so wide that it could discover no ground of comparison and no basis for the application of the doctrine of those cases.

The fact that a railroad bridge abutment is constructed with stone steps, which to the

rather than declaring it. Railroad companies do lock their switches, because, unlocked, they endanger the property of the company and the lives of its passengers; but, assuming that there is no reason why a switch should be kept locked for safety when not in use, and a turntable should be left unlocked when not in use, endangering the lives of little children, excepting that in the one case there is a pecuniary liability and in the other not, that does not vest the courts with the legislative function to impose the duty upon railroad companies. It is much better that the duty should be prescribed by the legislature rather than be declared by the courts, for then it may be known in advance of liability, and the courts will be saved the expense and difficulty of explaining to disappointed litigants, in cases based upon a different state of facts, but logically requiring the same result, why they are mistaken. Thus, in *Ryan v. Towar*, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644, the cases are cited in which it is held that a railroad company does not owe to children the duty to see that they do not jump upon its cars, or to keep its cars in good repair, or the doors shut, or to guard them so that children cannot be injured by loosening

the brakes, or not to leave a hand car near the track, or to keep a lookout for them when trespassing. To which may be added *Dicken v. Liverpool Salt & Coal Co.* 41 W. Va. 511, 23 S. E. 582, in which, a recovery was denied for the injury of a little child, crippled by a car while on a tramroad of a salt company; *Clark v. Manchester*, 62 N. H. 577, where a child of four years was drowned in a reservoir that had once been used by the city, but had been abandoned, the fence removed, though a portion of it yet had water in it, and there was a field nearby where ball playing and other games went on and children were accustomed to play, the child, while passing along a path at the reservoir, fell into it; *Grindley v. McKechnie*, 163 Mass. 494, 40 N. E. 764, where a child went through an opening in a fence, along a path, and fell into a sewer owned by the city; *Gay v. Essex Electric Street R. Co.* 159 Mass. 238, 21 L.R.A. 448, 38 Am. St. Rep. 415, 34 N. E. 186, where liability was denied to a boy ten years old, who went on a car unlawfully standing in a street, and was injured by a recoiling brake, not properly fastened; *Talty v. Atlantic*, 92 Iowa. 135, 60 N. W. 516, where a child was injured while digging sand, a bank caving in upon

knowledge of the company, are attractive to children, does not show an invitation, express or implied, for children to make use of them as a stairway, in the absence of evidence to show that this is not the usual and ordinary method of construction; and the company is therefore not liable for the death of a four-year-old boy who falls from the steps and is killed. *Williamson v. Gulf, C. & S. F. R. Co.* 40 Tex. Civ. App. 18, 88 S. W. 279.

A railroad company is not liable for injury to a seven-year-old girl who falls through an open culvert across a ditch forming part of a switch track, where the culvert is not put in a place frequented by children as a playground, or in their customary path across the ditch, and where there is nothing in the structure itself to tempt children to it or to entice them to use it. *Fredericks v. Illinois C. R. Co.* 46 La. Ann. 1180, 15 So. 413.

It is not negligence on the part of a railroad company to fail so to guard its stock pens as to prevent the entrance of a seven-year-old boy who is injured by a gang plank which is struck by a car, and driven against his foot while he is standing in a cattle chute. *Gulf, C. & S. F. R. Co. v. Cunningham*, 7 Tex. Civ. App. 65, 26 S. W. 474.

But in *Dwyer v. Missouri P. R. Co.* 12 Mo. App. 597, it was held that evidence that a railroad company erected, on unclosed ground near its track, a low trestle, to which children habitually resorted to play, and placed irons upon it in such a manner as to be upset by a child's weight, and that a

child threw off one of these irons, and was killed by its fall, tends to show culpable negligence on the part of the company.

And it was held that an invitation to children of tender years to visit railroad yards may be implied where it has created a situation that is alluring and attractive to them. *Texas & P. R. Co. v. Brown*, 11 Tex. Civ. App. 503, 33 S. W. 147.

d) Excavations.

That an excavation upon private land is attractive to children does not require the owner so to guard it as to prevent injury to children coming upon it without his invitation, express or implied. *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 54 L.R.A. 314, 39 S. E. 82.

The owner of land is under no duty to protect an infant trespasser who comes from the street across the land of another, from the possible danger of falling into a quarry on the land of a stranger. *Magner v. Frankford Baptist Church*, 174 Pa. 84, 34 Atl. 456.

In *Mackey v. Vicksburg*, 64 Miss. 777, 2 So. 178, in holding that the question whether a city digging dirt from a hill, and depositing it in the rear of a lot, by means of which a child of tender years was enabled to escape from the lot, and go upon a precipitous and dangerous path along the hill to a point from which it fell and was hurt, had done what was reasonably calculated to entice the child, following its instincts of curiosity or love of liberty, to escape from

him; *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965, where a child of three years, playing in a pit in an unguarded vacant lot, was killed by the caving of the bank; and in this case children were attracted by the bank, and were accustomed to play there; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069, where children went to play in an unfenced railroad yard, and one of them, six years of age, was injured in jumping on a train; *Vanderbeck v. Hendry*, 34 N. J. L. 467, where defendant owned a lumber yard in a populous part of the city, frequented by children, and a child was injured by the falling of a pile of lumber not in a safe condition; *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369, where a child six years of age walked on a wall along the street and fell into a pit; *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 457, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410, where a boy seven years of age trespassed upon the property of a coal company, and was injured by a pulley and cable used by the company to haul cars from its mines to the tippie; *Habina v. Twin City General Electric Co.* 150 Mich. 41, 13 L.R.A. (N.S.) 1226, 113 N. W. 586, where a little girl nine years of age, while crossing the uninclosed lands of the

defendant, fell into a ditch filled with hot water.

But it is said that the case of *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451, applies the doctrine of the turntable cases, and that ever since, for twenty years, the decision in that case has been considered by the profession as committing this court to that doctrine. If true, that would not make the doctrine a rule of property, but would entitle the case only to the same consideration that is given any other considered judgment of the court. The decision in that case did not require the application of the doctrine of the turntable cases, but rests upon long-settled principles of law. There, some boys, walking along the tracks of a railroad, found an unexploded torpedo, and, when trying to open it, in ignorance of its dangerous character, it exploded and seriously injured one of their number. The case was disposed of on a demurrer to the petition. The boys were held to be licensees, and, being licensees, it was the duty of the company to warn them of the hidden peril, or to use care that they were not injured thereby. In the opinion (31) Williams, J., says: "Hence, where a railroad company has, for a long time, permitted the public, including

the yard, and enter upon the dangerous path, was one of fact for the jury, the court said that if the defendant, by the exercise of reasonable foresight, could have anticipated the probability of the child's action, it should have guarded against the danger by removing the earth or obstructing the pathway. If it failed so to do, it failed in a duty which rested upon it, and was not relieved from responsibility even though the child was a trespasser in going upon the premises.

The owner of an unoccupied residence lot upon which excavations have been made to obtain building sand is not liable for the death of a three-year-old child who is taken into the lot for recreation by an older sister, and is knocked down by falling earth from an overhanging embankment, although the premises are open and unfenced, and the excavations are unprotected; since the owner owes them no duty to fence or guard his premises, and there is nothing in the nature of the excavations which can be said to be especially inviting or attractive to children, or calculated to entrap them into danger, within the rule established in the turntable cases. *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965.

In *Talty v. Atlantic*, 92 Iowa, 135, 60 N. W. 516, several boys, ranging from seven to ten years of age, went to dig in a shallow sandpit with a sloping approach from the line of a street which was not a public thoroughfare, there being no sidewalks upon it, and the traveled way being upon a wagon track upon the side opposite the pit, and 19 L.R.A. (N.S.)

some distance from it. They undermined the bank until it fell and killed all but one of them. The court said that the rule applicable to the city in determining whether its officers were negligent is: "Was the situation of the sandpit, in such close proximity to the street, the condition of the pit as to its extent, and all the surroundings, such as to require the authorities of the city, in the exercise of reasonable judgment, to anticipate that children might be allured to the pit from the street, and, with shovels and spades, excavate holes in the bank to such an extent as to endanger their lives? If there is warrant in the evidence to authorize such a finding, the city is liable." In this case, after a verdict of \$100 was rendered in favor of the plaintiff, he moved for a new trial on the ground that the verdict was too small, the motion being granted. The court held that the motion should have been overruled and judgment entered on the verdict.

Hawley v. Atlantic, 92 Iowa, 174, 60 N. W. 519, was a case arising out of the same facts. There was a verdict for the plaintiff, and the defendant moved for judgment on the special findings. The court, in *Talty v. Atlantic*, supra, reiterated the rule of liability above stated; but, as there was no evidence in the record, the court assumed that the necessary facts were established to warrant the verdict, and affirmed the judgment.

No duty rests upon the owner to keep a sandpit in a safe condition for a trespassing child under seven years of age.

children, to travel and pass habitually over its road, at a given point, without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and is bound to exercise care accordingly, having due regard to such probable use, and proportioned to the probable danger to persons so using its road; and it is negligence for the servants of such company to knowingly interpose any new danger without reasonable precaution against injury therefrom." In the present case, unlike *Harriman v. Pittsburgh, C. & St. L. R. Co.*, the facts do not make a case, if not of implied invitation, at least one in which the defendant may be said to be estopped to deny permission. Assuming, then, but not deciding, that the plaintiff was a licensee, the turntable was not a hidden peril or trap, as those terms are understood in law. The turntable was not visible from the streets, and the boys were not by it attracted or lured onto the railroad company's property, and the company legally is no more responsible for the injuries received by the boy in meddling with the turntable than it would have been had they been sustained by him in meddling with any other of its appliances.

Newdoll v. Young, 80 Hun, 364, 30 N. Y. Supp. 84.

One who digs a sandpit in his own land is bound to prosecute the work in such a manner as not to endanger children who may be attracted to it, or else he must maintain a fence or other safeguard to keep them out of the lot. *Fink v. Missouri Fur-nace Co.* 10 Mo. App. 61.

The owner of land upon which a trench is dug which fills with water, and upon which pieces of board, shavings, and other material float so as to conceal the danger, is not liable for the drowning of a five-year-old trespassing child who falls into the trench, although the excavation is only 25 feet from a much-traveled thoroughfare in a large city, and access to it is not cut off by any sufficient fence or other obstacle, and warning of its danger is not given in any way. *Grindley v. McKechnie*, 163 Mass. 494, 40 N. E. 764.

In *Loftus v. Dehail*, 133 Cal. 217, 65 Pac. 379, liability for injury to a seven-year-old girl who falls into an open cellar on a vacant lot does not arise merely because of the attractiveness of the place to the child and the failure of the owner to guard it; nor does the turntable doctrine apply, where it appears that the child was aware of the danger, and was pushed into the excavation.

But in *Brown v. Salt Lake City*, 33 Utah. 222, 14 L.R.A. (N.S.) 619, 93 Pac. 570, the doctrine of the turntable cases was held to apply to an unguarded conduit, attractive and dangerous to a schoolboy eight years of age, where the danger is such as easily

In the case of *Harriman v. Pittsburgh, C. & St. L. R. Co.* it was not necessary to a determination of the questions presented to determine whether the boy was on the railroad company's property by implied invitation, or by license. It may be, as intimated in the opinion, that the conduct of the company estopped it to deny liability, or to assert that the boy was a trespasser; but it was not necessary to go further, for, in either case, it was the duty of the company not to interpose a trap or pitfall, or a new danger, without notice or the exercise of due care. Upon this ground the judgment in that case may be vindicated; but we are not satisfied that what is there said upon the subject of invitation and license can be.

In *Sturgis v. Detroit, G. H. & M. R. Co.* 72 Mich. 619, 40 N. W. 914, Campbell, J., says: "It is impracticable to keep off trespassers from an open track, and all who go upon it do so at their own risk of such dangers as are incident directly to such use." And in *Hargreaves v. Deacon*, 25 Mich. 1, a case in which a boy was drowned in an uncovered cistern on private premises, he says: "Cases are quite numerous in which the same questions have arisen which arise in this case; and we have found none which hold that an accident from negligence on

to be foreseen and prevented. It was held in this case that the court could not say, as a matter of law, that city officials should not foresee that boys might go into an unguarded conduit for a distance of over 600 feet, nearly 400 feet of which was totally dark, in order to play, and that they might fall into the water coming into the conduit at that point, and be drowned, so as to render it error to refuse to direct a verdict in favor of the city in an action to hold it liable for the death of a boy so drowned.

b. Attractions in highway.

Following the lead of *Lynch v. Nurdin*, 1 Q. B. 29, the courts have been much more inclined to impose liability for dangerous machinery, etc., left unprotected in the highway, than they have where the dangerous attractions are on private premises, where the child has no right to go. Technically, however, the child, where he goes upon a dangerous machine in the street, is as much a trespasser as when he goes upon a turntable on private grounds. The temptation, however, is more open to him, and the owner of the dangerous agency cannot help knowing that children will be attracted thereby, and that they are liable to injury if it is left unprotected.

In *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068, Peckham, J., said there was a great difference in the facts between the case of *Lynch v. Nurdin*, *supra*, and a

private premises can be made the ground of damages unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant." And in *Ryan v. Towar*, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644, it is expressly ruled that "an invitation or a license to cross the premises of another cannot be predicated on the mere fact that no steps have been taken to interfere with such practice;" and that "there is no difference between children and adults as to the circumstances that will warrant the inference of an invitation or a license to enter upon another's premises."

In *Turess v. New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614, Magie, Ch. J., says: "Invitation which creates such a relation may be express, as when the owner

or occupier of land, by words, invites another to come on it or make use of it or something thereon; or it may be implied, as when such owner or occupier, by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used. This definition, originally given in *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, was approved and adopted by our court of errors. *Phillips v. Burlington Library Co.* 55 N. J. L. 307, 27 Atl. 478. It will be observed that, in the case of an implied invitation, the relation is imposed upon the owner or occupier of land only when he has done something which justifies one who enters upon the land and makes use of it or something upon it in believing that he intended such use to be made; and he who makes such use can claim the relation only when he is justified by the acts or conduct of the owner or occupier in believing that such use was intended. And entry and use by such invitation are thus distinguished from entry and use by mere permission."

turntable case. Whether leaving a horse and cart in a public street, unattended and loose, subject to natural observation and interference from children passing along the street, was or was not negligence, might be held a proper question for the jury; while, in the case of a defendant engaged upon his own land in doing simply that which it was necessary to do in order that he might carry on his business properly, and who failed to exercise the highest vigilance in order to protect from possible harm children who might stray upon his land for no other purpose than recreation, there was an absence of any fact upon which a jury ought to be permitted to find negligence. The defendant in the one case was not upon his own land, nor was he engaged in the proper transaction of his business thereon; but, on the contrary, he was in a public street, and had improperly left his horse and cart therein unattended, where others, and among them children, had the same right to be that he had. In the case at bar, the turntable was on the defendant's own land; it was a proper and appropriate machine for the carrying on of its business; it was properly made and was properly used by the defendant.

In *Conrad v. Baltimore & O. R. Co.* (W. Va.) 16 L.R.A. (N.S.) 1129, 61 S. E. 44, the court said it did not perceive the supposed analogy between such a case as *Lynch v. Nurdin*, supra, and one in which a man erected or left a structure, machine, or other thing on his own land, upon which strangers could not rightfully come. That liability

was predicated on the doing of a negligent act in a public highway, not on the premises of the defendant, was clearly shown by Lord Denman's opinion. Neither *Lynch v. Nurdin* nor any other English cases the court had found applied this principle to lawful and unmalicious acts done by a man on his own premises. Nor in most states in which the turntable cases were regarded as law was the principle applied to persons other than railroad companies; nor to them in respect to structures or machines other than turntables. What possible ground was there for such distinction and discrimination?

In *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95, the court, referring to cases like the two last mentioned, said that some critics had sought to weaken the force of *Lynch v. Nurdin*, 1 Q. B. 29, and to distinguish it from a line of cases repudiating the attractive nuisance doctrine by saying that, in the former, the child was in the public street, and therefore the rule as to trespassers did not apply to it. The suggestion was fallacious and misleading. The cart was also on the public street. It was rightfully there; and the child, when he climbed into it without leave, was as much a trespasser in the eye of the law as it was possible that a child of his years could be,—as much, indeed, as if he had wandered across the boundary line of the defendant's land. The defendant was held liable not because the plaintiff was not a trespasser, nor because the horse and cart were not rightfully upon

And in *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682, in the court of errors and appeals, Gummere, J., says: "The viciousness of the reasoning which fixes liability upon the landowner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As was said by Mr. Justice Holmes, in *Holbrook v. Aldrich*, 168 Mass. 16, 36 L.R.A. 493, 60 Am. St. Rep. 364, 46 N. E. 115, 'temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe there may might have been foreseen.'"

Swarts v. Akron Waterworks Co.: This case owes its existence to the doctrine of the turntable cases, and might be disposed of without further consideration, upon the ruling in the preceding case; but, since it is illustrative of the consequences of adopting the turntable doctrine, it may excuse an extension of this already too lengthy opinion. Counsel for plaintiff say: "A great deal

the street, but because he knew, or, as a reasonable man, ought to have known, that, in thus leaving his property exposed, he was offering a dangerous temptation to the thoughtlessness of childhood, and used no care to prevent injury therefrom.

In *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155, it was said that there is a distinction between a case in which an excavation is made or something calculated to amuse and attract children is done or left at a place where a child has a right to be, and one in which the same thing is done or left at a place where, in order to reach the point of danger, the child becomes an intruder upon the premises of another. Consequently, where a five-year-old child was drowned in an excavation preparatory to building a bridge across a shallow stream, the excavation being at a place where the child had a right to be, it was held that the city was liable.

In *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484, it was pointed out that what the court said in the last-mentioned case about excavations upon private property was *obiter*.

In *Iamurri v. Saginaw City Gas Co.* 148 Mich. 27, 111 N. W. 884, a gas company's drip-tank wagon, having an uncovered vent-hole, was left in a public street, and the plaintiff, a boy five and one-half years old and a companion between six and seven years of age, climbed upon it. They were driven off once by an employee of the defendant, but climbed back again as soon as

was said in the argument below, and doubtless will be said here, in regard to the so-called 'turntable cases.' The insistence that the doctrine of that so-called class of cases shall not be extended has at last reached the point of demanding that a real turntable shall be shown in any case as the best and only evidence that the principle is to be applied. We are contending, not for a name, but for a principle. We cannot produce at the bar a turntable; but, if the evidence in this record tends to show that the defendant maintained an 'attractive danger,' a corresponding obligation arose to reasonably safeguard it against the consequences to be apprehended from it to children who might be attracted by and to it. The doctrine thus allowed and recognized by this court as applicable in a proper case we expect will be adhered to in any case falling within the principle, whether the instrument of danger be a turntable or a reservoir of water." And again: "It must be confessed here that the case from which the above quotation is made is a 'turntable' case, and that we are unable to make profit of a turntable in open court; nor can we produce a torpedo to make our position square with *Harriman v. Pittsburgh, C. & St. L. R. Co.*; but our controversy is careless of names,

he went away. While the boys were on the wagon, it exploded; the explosion being alleged to have been caused by the dropping of a lighted match into the venthole by plaintiff's companion. A judgment for the plaintiff was affirmed by a divided court. *McAlvay, Ch. J.*, in his opinion in favor of affirmance, distinguished between a trespasser on land and one upon a drip tank left in a public highway, and quoted with approval the following language from *Wharton on Negligence*, 2d ed. § 112: "It is negligence to leave such an instrument on a place of public access, where persons are expected to be constantly passing and repassing, and where such persons are not required to be on their guard, . . . but it is not negligence to leave such an instrument in a private inclosure, which, from its very privacy, excludes the public, and puts on their guard all who enter."

Hooker, J., however, said the consequences to the child would have been the same had this wagon stood across the walk upon private ground. It would have been just as attractive, and he would have been just as much, and no more, a trespasser upon the wagon. An attempt to discriminate between rights of a trespasser when the wagon was in the highway and when it was on private ground resulted in nothing more than a distinction without a difference. Continuing, he said: "We are of the opinion that it cannot be denied that these boys were trespassers when they climbed on this wagon as an adult would have been; and that the one who applied the match, at least, is lia-

and deals with principles alone. The particular principle for which we are quarrelling—and we venture to restate it at the risk of being thought tedious, rather than leave any room for doubt as to where we stand—is this: 'Where the owner of dangerous premises knows or should know that children so young as to be ignorant of the danger will resort to such premises, he is bound to take all reasonable precautions to keep them from the premises, or to protect them from the dangerous condition of the premises;' and this equally whether the danger lurks in a machine or invites approach to a body of water; and that the question of whether the duty thus cast upon the owner has been discharged is one of fact in this case."

In the very able article in 11 *Harvard Law Review*, 349, 434, Judge Jeremiah Smith reviews all of the cases, and reaches the conclusion that the doctrine of the turntable cases is not sound. He regards the opinion in *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393, as the ablest in support of that doctrine, and it may be, therefore, interesting to note, that in the subsequent case, *Stendal v. Boyd*, 72 Minn. 53, 42 L.R.A. 288, 72 Am. St. Rep. 597, 75 N. W. 735, that court, by its chief

justice, in a case where liability is denied for the drowning of a little boy in a dangerous excavation filled with water on a city lot, says: "The doctrine of the turntable cases is an exception to the rule of nonliability of a landowner for accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises child-proof. If the owner must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must, on the same principle, guard a natural pond; and, if the latter, why not a brook or creek, for all water is equally alluring to children? If he must fence in his stone quarry after it fills with water, so that children cannot reach it,—a well-nigh impossible task,—why should he not be required to do it before, for a stone quarry, with its steep and irregular sides, might well be an attractive and dangerous place to children? It would seem that there is no middle ground, and that the doctrine of the turntable cases ought to be limited to cases of attractive and dangerous machinery." And in conclusion he says: "Upon the undisputed facts

ble for any damage he may have done to the gas company. It seems incongruous that he should, at the same time, have a cause of action for damages against the gas company for not preventing his trespass."

A manufacturing company piling blocks of granite and slate close to the sidewalk on ground between its factory and the street, in a thickly-populated community, is required to make the place reasonably safe, not only for adults using the highway, but for children, recognizing their childish instincts and the probability that they may be attracted to enter upon the premises, so as to prevent a stone from falling on a child who touches it in play; the question whether the company has exercised such care being for the jury. *Rachmel v. Clark*, 205 Pa. 314, 82 L.R.A. 959, 54 Atl. 1027.

One who piles beer barrels in a street in such a manner that he should anticipate that children will climb upon them, and in such a manner as to be dangerous to them while so climbing, is liable for injury to a five-year-old boy, caused by the falling of the barrels while he is at play upon them. *Kreiner v. Straubmiller*, 30 Pa. Super. Ct. 609. The court said that it is a well-established rule that those controlling property on or immediately adjacent to a public highway must have regard to the reckless and thoughtless taste and traits of childhood. The owners of the premises are required in such cases to anticipate that children may use the highway, and, in so doing, be exposed to any unsafe object placed thereon. They are bound to know that young children

are likely to be at play on the streets, and to make use of the objects attractive for their exploits and games; and thus responsibility has been held to attach in some cases where the offensive object was wholly upon the property of the defendant, and where the children were trespassers.

In *O'Leary v. Michigan State Teleph. Co.* 146 Mich. 243, 109 N. W. 434, the question whether a telegraph company, the servants of which were engaged in stringing a cable, was negligent in not leaving a pulley block guarded, so as to prevent a seven-year-old child from catching his hand in it, was held properly submitted to the jury. The court pointed out the fact that the child, when hurt, was in the highway, where he had a right to be, and said that there was reasonable ground for distinction between a case in which something was left in the highway which could only injure a child by his meddling with it, and putting it into operation in the absence of the owner or person having it in charge, and a case like the one at bar, in which the owner was present, operating the apparatus, and having actual notice that the children were attracted by the tackle, and would play with it unless prevented. *Hooker, J.*, dissented.

A person who leaves exposed in a public street an unsecured and unguarded iron roller is liable for the death of a five-year-old boy who escapes from the residence of his parents, gets upon the roller, starts the mules, and is thrown under the machine, and mortally injured. *Westerfield v. Levis Bros.* 43 La. Ann. 63, 9 So. 52.

in this case, we hold that the plaintiff cannot recover, for the reason and upon the ground that a landowner is not bound to fence or otherwise guard an open excavation or pond, natural or artificial, on his land, so as to prevent injury to children coming thereon without right or invitation, express or implied, although they are induced so to do by the alluring attractiveness of such excavation or pond." In *Erickson v. Great Northern R. Co.* 82 Minn. 60, 51 L.R.A. 645, 83 Am. St. Rep. 410, 84 N. W. 462, liability was denied in a case where a child four years of age was attracted by a fire on the unfenced right of way of the railway company near the public streets, and, while playing about the fire, was burned so that she died. *Start. Ch. J.*, in that case, says: "The manifest trend, however, of all the decisions of this court, is to limit its application to attractive and dangerous machinery, and to other similar cases where the danger is latent. We are not prepared to say that cases may not arise outside of this classification to which the doctrine ought to be extended; but we do hold that, as a general rule, the doctrine of the turntable cases must be limited to cases of attractive and dangerous machinery, and to other similar cases where the danger is latent.

A contractor grading a street, who leaves in the highway an unguarded scraper, attractive and dangerous to children, is guilty of negligence rendering him liable for injury to a five-year-old girl, received while playing upon the machine. *Kelley v. Parker-Washington Co.* 107 Mo. App. 490, 81 S. W. 631.

One who piles lumber in a public street without proper consent, so as to constitute a public nuisance, is liable for injury to a nine-year-old trespassing child upon whom a portion of it falls, although the evidence fails to make apparent the cause of its falling, where the evidence also fails to show that the injured child was instrumental in causing the lumber to fall. *Smith v. Davis*, 22 App. D. C. 315. The court said that the lumber was piled on public ground, where the public had a right to be, and that it was tempting to children to play on it, or, it might be, to sit on it; and that if, by indulging their natural impulses, they were on the timber, and it fell from some jar or disturbance received, it would be difficult to show that there was any such negligence on their part as would defeat a recovery for an injury received by one of them.

In *Spengler v. Williams*, 67 Miss. 1, 6 So. 613, the plaintiff recovered a verdict for the death of her child, who was killed while at play by the falling of an unsafe pile of lumber in a public street, the recovery being allowed on the theory that the lumber so maintained was an attractive nuisance. There was an averment in the declaration that the defendant knew that the piling of

This rule may not be strictly logical, but it is a necessary one, unless landowners are to be made insurers of the safety of children when trespassing upon their premises." In *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 A. & E. Ann. Cas. 498, the doctrine was extended to a case in which the defendant had left exposed and unguarded on its premises a large quantity of dynamite, which was found by the plaintiff's children, and in an explosion of which one of them was killed and the other permanently injured. In *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 659, liability is denied for the death by drowning of a boy nine years of age in a pond which was created by excavations in quarrying rock. Liability is also denied in *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74, where a boy eight years of age was drowned in a pond on a lot in the city of St. Louis. In *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598, liability is denied for the drowning of a boy eleven years of age, in a pond on a city lot. In *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, liability is denied in the case of the drowning of an infant

the lumber in the street was well calculated to attract and entice children of tender age to play around it. It was urged that the verdict should be set aside, on the ground that there was no evidence to show that the defendant knew that the piling of lumber in the street would attract children, or that it was calculated to entice them to play around it; but the court held that such fact did not belong to that class of things to be alleged in pleading, or, if alleged, to be proved specifically.

One who piles lumber in a street in an inhabited part of a city by placing one piece over another, in tiers, instead of piling it so that the tiers will rest against and support one another there being a strong probability that children will be playing about it at all hours of the day, is guilty of reckless, culpable negligence which will render him liable for the death of a six-year-old child who, while trying to climb upon the lumber, is killed by the falling of a portion of the pile. *Earl v. Crouch*, 40 N. Y. S. R. 847, 16 N. Y. Supp. 770, affirmed in 131 N. Y. 613, 30 N. E. 864.

The fact that a girl of tender years, while traveling in the street, turns aside for a moment to play upon lumber so piled in the highway as to constitute a nuisance, thereby becomes a trespasser, does not relieve the owner of the lumber from liability for injury to her, caused by the falling of a portion of it. *Busse v. Rogers*, 120 Wis. 443, 64 L.R.A. 183, 98 N. W. 219. The court said that "the child who lags unwilling on the way to school, and chases a bright-

child in a pond on land in the vicinity of a public school. In *Hargreaves v. Deacon*, 25 Mich. 1, where a child fell into an uncovered cistern, and was drowned, liability was denied. In *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223, liability is denied in a case where a child nine years of age was drowned in an unfenced pond on a lot in the city of Milwaukee. In *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, liability was denied in a case where a child eight years of age fell into an abandoned and unguarded cistern or well. And in *Ritz v. Wheeling*, 45 W. Va. 262, 43 L.R.A. 148, 31 S. E. 993, liability was denied in a case where a child less than five years of age was drowned in a reservoir maintained by the city to furnish water for public use. In the opinion, Brannon, Ch. J., says: "There can be no negligence charged upon a person unless he rests under a duty to the person complaining of damage at his hands; for, if there is no duty violated, though there may be grave damage befalling the complaining party, he has no ground of action. It is a case denominated in law as *damnum absque injuria*,—damage done, but without violation of a right in the injured party,—a misfortune unaccompanied by a breach of duty by the party inflicting the

injury. Shearm. & Redf. Neg. § 8. The reservoir and the land containing it were the private property of the city, used not as a park or place of public resort or common, but only for reservoir purposes. The child was a trespasser, if you can say a child can be a trespasser. It was a trespasser in legal sense; that is, it was on this property without right. The city was not bound to watch it. It could not be liable to it only for wilful or wanton injury."

In this court, in *Ann Arbor R. Co. v. Kinz*, 68 Ohio St. 210, 67 N. E. 479, the company owned an unfenced common in the city of Toledo. The plaintiff, a boy eleven years of age, was attracted to the common by a game of ball, and, while there, engaged with some other boys in playing about a bank, 10 feet in height, he was injured by the falling of the bank, and it was held that the railroad company was not liable. In *Lake Shore & M. S. R. Co. v. Liidtkke*, 69 Ohio St. 384, 69 N. E. 653, liability was denied where a boy, six years of age, strayed onto the right of way of the railroad company in the city of Sandusky, and was injured by a passing train, by which he was attracted, and when trying to touch a passing car. It was held that the company was not liable. In *Cincinnati, H. & D. R. Co. v. Aller*, 64

winged butterfly, or plays a game of marbles, or climbs a tempting pile of timber in the highway to play seesaw for a moment, does not thereby become an outlaw, and, when injured by another's negligence, he cannot be turned aside with the curt remark that he has ceased to travel, and become a trespasser, and hence can complain of no one's conduct. His natural habits and instincts must be in some way and degree recognized."

One who stacks lumber in a public street is liable for injury to a six-year-old boy who falls therefrom, although it may not have been negligently piled, since its unguarded situation makes it an attractive and accessible object of danger to very young children. *Harper v. Kopp*, 24 Ky. L. Rep. 2342, 73 S. W. 1127.

In *Lynch v. Knoop*, 118 La. 611, 8 L.R.A. (N.S.) 480, 118 Am. St. Rep. 391, 43 So. 252, 10 A. & E. Ann. Cas. 807, it was held that the owner of a lumber pile in a public landing place was not liable for the death of an eight-year-old girl, caused by the fall of lumber upon her, due to the fact that other children had gone upon the lumber and displaced pieces of it, since the owner had no reason to suspect that children would do that, and for the reason that the lumber pile was not such an object as to attract children or excite their curiosity.

In *Ricketts v. Markdale*, 31 Ont. Rep. 610, a municipal corporation was held liable for the death of a child less than seven years of age, who was killed while at play on a pile of lumber at the side of a street, near to

and partly on the sidewalk, the accident being caused by one of the pieces swaying around and crushing him. *Ferguson, J.*, said that the timbers offered an invitation and were an allurements to children for the purposes of play. The recovery was based upon the corporation's negligence in failing to keep the street safe, it being held that the child had the right to play in the highway; but no point is made as to his being a trespasser on the lumber.

A railroad company which stacks building material in a street in so negligent a manner that a beam falls upon an eleven-year-old boy while attempting to get down from the top of the pile, upon which he had climbed, is liable for the resulting injury. *Louisville R. Co. v. Esselman*, 29 Ky. L. Rep. 333, 93 S. W. 50.

Judgment should not be granted on answers to interrogatories, notwithstanding a general verdict in favor of plaintiff in an action against a city and an independent contractor, brought to recover damages for injuries to a six-year-old boy who went to play in a sand pile in a street in which a sewer was being constructed, and fell into an open manhole, although the answers show that the construction company had exclusive possession of the street at the manhole, for the purpose of building the sewer, and that it frequently warned boys away from playing in the sand pile near the open manhole, and that the injured boy knew that the manhole was uncovered, where other answers show that the boy, at the time of the accident, did not have intelligence enough to

Ohio St. 183, 60 N. E. 205, footmen, with the knowledge of the company, used its station platform and tracks as a route to the village, and the plaintiff, intending so to use the platform and tracks, set out for the village about a half mile distant, but he did not, as was the custom, leave the platform before reaching the end of it, and walk along the track, but continued along the platform, and, in the dark, stepped off the end of it and was injured. It was held that he was not invited by the company to use its premises, but that its use was merely permissive, and that he assumed the risk. In *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751, it is held: "A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station house, where, at the time of receiving the injury, such person was at such station

house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road."

We may very appropriately conclude in the words of Allen, J., in *Clark v. Manchester*, 62 N. H. 577: "The excavation for a reservoir was not made and filled with water for a trap, but for a lawful use by the defendants on their own land. . . . The averment of license and invitation to the child to go there is one of argument by inference from the facts stated, and the facts positively averred do not warrant and support the inference. The fact that children went to the reservoir pit from curiosity or for pleasure, without objection of the defendants, was not an invitation nor a license to go there. The child was not upon the land by invitation, nor under circumstances which made

know the danger of the manhole, and it is not shown that he was ever warned of the danger by anyone, and it further appears that the manhole had been completed for four weeks, and was within 4 feet of the sand pile, which was 7 feet high, and that the manhole had been left continuously for two weeks uncovered, to the knowledge of both the city and the company, and to their knowledge that the sand pile was attractive to children of the neighborhood, and that they were attracted to it for the purpose of play, and that there were no guards or barricades about the manhole, or on the street or sidewalk. *South Bend v. Turner*, 156 Ind. 418, 54 L.R.A. 396, 83 Am. St. Rep. 200, 60 N. E. 271.

One who is moving attractive machinery in a public highway discharges his duty to children of tender age who are at play about it by repeatedly driving them away; and is not liable under such circumstances for injury to a seven-year-old boy, received while he is suddenly attempting to pass between part of the machinery. *J. I. Case Threshing Mach. Co. v. Burns*, 38 Tex. Civ. App. 412, 86 S. W. 65.

A stone wagon with bed below the axles is not so attractive and dangerous to children as to require the owner to take special precaution to avoid injury to those who attempt to ride upon it. *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 4 L.R.A. (N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199.

It is the duty of a street car company to use reasonable care to prevent children from going upon its cars, to which they are attracted when the cars are left exposed in a public street. *Denver City Tramway Co. v. Nicholas*, 35 Colo. 462, 84 Pac. 813.

In *Jonasch v. Standard Gaslight Co.* 24 Jones & S. 447, 4 N. Y. Supp. 542, affirmed in 117 N. Y. 641, 22 N. E. 1131, the questions whether a derrick in a street was left unguarded and unfastened, and was a dan-

gerous machine, likely to cause injury to children when unguarded and unfastened, and, if it was both unguarded and dangerous, whether that, as a matter of fact, constituted negligence, were held rightfully left to the jury.

The turntable doctrine does not apply to a case in which a nine-year-old boy is run over by a street railway trailer car, left in the street, and set in motion on a down grade by the loosening of the brakes by the plaintiff and his companions, where the danger is open to observation, and can be comprehended by a boy of plaintiff's age with average intelligence, and where the car is equipped with brakes of the ordinary kind, properly set. *George v. Los Angeles R. Co.* 126 Cal. 357, 46 L.R.A. 829, 77 Am. St. Rep. 184, 58 Pac. 819.

In *Jewson v. Gatti*, 2 Times L. R. 441, while a young girl was leaning against a guard rail in a cellar way, watching men at work painting in the cellar, the rail gave way, and she fell into the cellar, and was hurt. This was held to be a case for the jury. Lord Esher said that, in addition to the fact that the area was left unprotected, without due regard to the safety of the public while painting was going on in the cellar, that the defendant must have known that this would attract children, and that children would naturally lean against the bar while looking into the cellar. That was almost an invitation, certainly an inducement, to the children to lean against the bar while looking down into the cellar.

In *Cincinnati & H. Spring Co. v. Brown*, 32 Ind. App. 58, 69 N. E. 197, in holding that the question of defendant's negligence was for the jury where the owner of premises adjoining a highway maintained a broken-down barbed-wire fence against which a twelve-year-old girl ran while at play, and was hurt, the court said that, in determining what the duty of the owner was, the fact that he knew of the use of the locality

it the duty of the defendants to protect him. He was there to gratify his curiosity, or for mere pleasure, and the defendants owed him no special duty. It was not a case of setting a trap for the children, nor one of wantonly and knowingly leading them into danger and this one to destruction. It was the ordinary case of a landowner managing, within the boundaries of his own land, his own property, in his own way, for his own use and benefit; and though, in doing this, he might find occasion to . . . construct reservoirs, provide fish ponds, plant and cultivate fruit trees, erect and maintain useful structures, instruments, and machinery, all of which are alluring, attractive, and dangerous to children, yet it could not be claimed that he must constantly guard these things against the approach of persons coming without license or invitation, . . . or suffer in damages for any injury they might receive. The rule

that the owner of land may manage it in his own way for his own benefit, and owes no duty to those who come upon it for no business purpose, but without license, express or implied, is too well established to need further comment, or to warrant a departure from it."

In the case of *Wheeling & L. E. R. Co. v. Harvey* the judgments of the Circuit Court and of the Court of Common Pleas are reversed, and the petition is dismissed; and in the case of *Swarts v. Akron Water-Works Co.* the judgment of the Circuit Court is affirmed.

Shauck, Ch. J., and Crew and Davis, JJ., concur in the first.

Shauck, Ch. J., and Price, Crew, Spear, and Davis, JJ., concur in the latter.

Petition for rehearing denied.

as a playground by the children of the neighborhood, and the fact that the remnants of the wire fence served no purpose of use or ornament, but, by reason of the sharp bars upon the wire, were dangerous to anyone coming forcibly in contact therewith without knowing of their presence, were to be considered by the triors for the purpose of arriving at a conclusion as to the reasonableness or prudence of making such a use of the premises, it being a well-recognized doctrine that persons are required to use greater care in dealing with children of tender years than with older persons, who have reached the age of discretion, and that greater care is required to avoid injury to them even when they are trespassers.

In the following cases recovery has been denied, where the dangerous attraction was in the highway. No liability arises for injury caused by the falling of a cake of ice upon a four-year-old child trespassing on an ice wagon step, although the child would not have been hurt if the boards at the end of the wagon had been higher. *Conlon v. Bailey*, 58 Ill. App. 261.

In *Malmberg v. Bartos*, 83 Ill. App. 481, the proprietor of a store, while unloading ice, left his chopping ax on the sidewalk while he carried in the ice. The plaintiff, a child seven years old, and another girl, the proprietor's son, four years old, and another boy, several years older, were standing near by. The plaintiff attempted to pick up a piece of ice, and was ordered not to by the four-year-old boy, who told her to go away or he would "fix her." Upon her refusal to leave, the elder of the two boys seized and held her finger while the proprietor's son picked up the ax and chopped it off. It was held that the father could not be held liable on the theory that it was negligent to leave the ax on the sidewalk where children were playing near by. The court said it was scarcely necessary to say that while an ax might be a dangerous instrument in the

hands of a child, it did not necessarily follow that the defendant was guilty of negligence, or, if he was, that his negligence was the proximate cause of the injury.

That insecurely-piled iron girders are attractive to children, who use them as a place for play, or as a resting place after play, imposes no duty upon the owner of the premises, or the contractor who piles them there, so to arrange them as to render them safe for the use of the children. *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 A. & E. Ann. Cas. 497. Fort, J., dissented.

A winch used in raising fragments of stone from a trench during the construction of a sewer does not, when left unprotected in the street, become a nuisance to children playing with it, so as to render the contractor liable for a resulting injury, since the machine is not in itself dangerous, and does not, in itself, constitute an unlawful obstruction to the highway, and is not of such a character that a jury may find that, merely because it is so left in the highway, it is dangerous and a temptation or enticement to children of tender years, and that the natural and probable result of their playing with it will be an injury to them. *Fitzgerald v. Rodgers*, 58 App. Div. 298, 68 N. Y. Supp. 946.

No liability arises for injury to an eight-year-old boy, caused by the falling of an ornamental urn on top of an iron street post which he climbs in order to get a better view of a parade. *Keegan v. Luzerne County*, 8 Kulp. 160.

A city is not liable for injury to a six-year-old boy who goes upon a wall at the side of a street, and, while walking or standing thereon, falls into an area on the other side. *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369. It was urged in this case that it was negligence in the corporation thus to leave exposed, without barriers, a place so enticing and alluring to

PENNSYLVANIA SUPREME COURT.

HENRY E. THOMPSON, by Next Friend,
v.BALTIMORE & OHIO RAILROAD COM-
PANY, Appt.

(218 Pa. 444, 67 Atl. 768.)

**Negligence — turntables — trespassing
children — liability.**

A railroad company owes no duty to a trespassing child to lock or guard its turntables, although such machines are calculated to allure children to them for amusement.

(Mestrezat, J., dissents.)

(June 4, 1907.)

children, but the court said that the obligation of municipal corporations to erect barriers around areas adjoining or extending into its sidewalks or highways grew out of the duty which rested upon them to maintain their streets and sidewalks in safe condition for those who might rightfully use them, whether they were grown persons or children; but this duty could not be held to extend to the protection of children against every sudden freak that might possess them.

Nor is a properly-constructed surface-water drain so inviting to a nine-year-old child as to render the city liable for his drowning while playing in the drain during or just after a very heavy rain. *Rome v. Cheney*, 114 Ga. 194, 55 L.R.A. 221, 39 S. E. 933.

In *Jefferson v. Birmingham R. & Electric Co.* 116 Ala. 300, 38 L.R.A. 459, 67 Am. St. Rep. 116, 22 So. 546, it was said that a railroad company operating cars in a public street could not be held liable for an injury to a five-year-old boy trespasser on the cars, on the theory that the movement of the cars in the street was attractive to children, and would naturally cause them to desire to get upon them, and that the cars were highly dangerous to children old enough to get upon them, but too young to appreciate the danger, and that the company failed properly to tend or guard such cars while they were being so operated.

No such extraordinary duty is imposed on a city to protect travelers from a peculiarly dangerous precipice or embankment at the side of a street as that of maintaining a barrier so high and so close that children cannot find ways or means to surmount it. *Lineburg v. St. Paul*, 71 Minn. 245, 73 N. W. 723.

The liability of a city is coextensive with its duty respecting the ordinary use of the highway, but it cannot be extended beyond that limit to a case in which a child has been attracted by machinery employed in the construction of a public sewer, and thereby induced to climb upon or over the barriers or guards into the excavation, so as to render it liable for a resulting injury, that part of the street being closed against travel, and guarded against accident to persons in the

A PPEAL by defendant from a judgment of the Court of Common Pleas No. 4 for Philadelphia County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. W. B. Linn, for appellant:

An owner of a turntable owes no duty to children save the duty owing to all trespassers.

Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 317; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; *Overholdt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74; *Hargreaves*

ordinary use of the street. *Hamilton v. Detroit*, 105 Mich. 514, 63 N. W. 511.

In *Tighe v. Lowell*, 119 Mass. 472, it was held that a six-year-old girl using the highway as a playground could not recover for injuries received by falling into an open ditch excavated for a sewer.

c. Unattractive thing in attractive place.

A distinction may be made between a case in which the dangerous thing is in itself attractive, and one in which it is not of itself attractive, but is located in an attractive place. If the attractive nuisance doctrine is based upon sound reasons, it would seem that it ought to apply as well to the second class of cases as to the first, but the courts have not always so held. In several of the cases where this point might have been raised, no mention was made of it.

In *Seymour v. Union Stock Yards & Transit Co.* 224 Ill. 579, 79 N. E. 950, the court said that the attractive nuisance cases were divided in two classes: First, where the injury resulted from some dangerous element, a part of or inseparably connected with the alluring thing or device,—as in the turntable cases. Second, where the attractive device or thing was so located or situated that, in yielding to its allurements, the child, without such intervention of another element as broke the relation of cause and effect, was brought directly in contact with a danger from some independent source, which occasioned the injury.

The fact that cross steps on a bridge pier could be used as ladders, and the fact that pigeons were in the habit of rearing their young on the beams and around the top of the bridge, rendering the bridge a place attractive to small boys, will not render an electric power company liable for injury to a boy who, in climbing the bridge, comes in contact with a live wire, 30 feet above the ground, and is thereby hurt, since the things that constitute the attraction were features connected with the river, the bridge, and the pigeons, which were matters for the existence of which the company is not responsible, and the accident is not one which the

v. Deacon, 25 Mich. 1; Clark v. Manchester, 62 N. H. 577; Dobbins v. Missouri, K. & T. R. Co. 91 Tex. 60, 38 L.R.A. 573, 66 Am. St. Rep. 856, 41 S. W. 62; Savannah, F. & W. R. Co. v. Beavers, 113 Ga. 398, 54 L.R.A. 314, 39 S. E. 82; Richards v. Connell, 45 Neb. 467, 63 N. W. 915; Peters v. Bowman, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598; Grindley v. McKeechie, 163 Mass. 494, 40 N. E. 764; Walsh v. Fitchburg R. Co. 145 N. Y. 310, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; Walker v. Potomac, F. & P. R. Co. (Pannill v. Potomac, F. & P. R. Co.) 105 Va. 226, 4 L.R.A.(N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862; Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L.R.A. 831, 68

Am. St. Rep. 727, 40 Atl. 682; Turess v. New York, S. & W. R. Co. 61 N. J. L. 314, 40 Atl. 614; Daniels v. New York & N. E. R. Co. 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 26 N. E. 283; Frost v. Eastern R. Co. 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; Paolino v. McKendall, 24 R. I. 432, 60 L.R.A. 133, 90 Am. St. Rep. 736, 53 Atl. 208; Ryan v. Towar, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; Bates v. Nashville, C. & St. L. R. Co. 90 Tenn. 36, 25 Am. St. Rep. 665, 15 S. W. 1069; Cauley v. Pittsburgh, C. & St. L. R. Co. 95 Pa. 398, 40 Am. Rep. 664; Loomis v. Terry, 17 Wend. 500, 31 Am. Dec. 306; Erickson v. Great Northern R. Co. 82 Minn. 60, 51 L.R.A. 645, 83 Am. St. Rep. 410, 84 N. W. 462;

company should have anticipated. Graves v. Washington Water Power Co. 44 Wash. 675, 11 L.R.A.(N.S.) 452, 87 Pac. 956.

An electric light company is liable, under the attractive nuisance doctrine, for maintaining defectively-insulated wires outside the course of the traveled way, on a viaduct in a city street, and separated therefrom by a balustrade over which small boys are in the habit of climbing and going close to the wires, where a ten-year-old boy climbs over the railing, and comes in contact with a wire, and is killed. Consolidated Electric-light & P. Co. v. Healy, 65 Kan. 798, 70 Pac. 884. The court said that while the company did not maintain the bridge and the railing constituting the attractive climbing place for boys, and it might be that its wires were not attractive appliances, still it maintained the wires in such immediate proximity to that which was attractive as to constitute them an integral part of the whole. It put its wires within the attractive environment. It identified itself in that way with the attractive place.

It is not negligence for a lessee to maintain an unguarded pile of hot ashes and cinders on land near a pond which is attractive to and is frequently visited by children of the neighborhood, so as to render him liable for injury to a four-year-old boy who is burned while running through the ashes to reach boys fishing in the pond, where the lessee neither creates nor maintains the pond. Smith v. Jacob Dold Packing Co. 82 Mo. App. 9.

A railroad company which leases part of its grounds for a circus is not liable under the turntable doctrine for the death of a boy about twelve years of age, who makes a short cut over the company's switch yards to reach the show grounds, and is run over by one of the company's trains, since there is nothing dangerous in the show itself, and the boy's injuries are not occasioned by anything in or about it. Clark v. Northern P. R. Co. 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636.

But it was held that an electric light company is liable for any injury received by a ten-year-old boy who climbs a small tree

with low-hanging branches in a highway, and comes in contact with an uninsulated live wire, since the company is bound to take notice of the habit of small boys of climbing such trees, and to anticipate such an accident. Temple v. McComb City Electric Light & P. Co. 89 Miss. 1, 11 L.R.A.(N.S.) 449, 119 Am. St. Rep. 698, 42 So. 874, 10 A. & E. Ann. Cas. 924.

d. Degree of care.

In jurisdictions in which the attractive nuisance doctrine is adopted, the duty imposed upon the landowner is that of using reasonable care to avoid injury to children. Whether he has done so depends, of course, upon the circumstances of each case.

Nothing more than ordinary or reasonable care is required of persons who have placed upon their own premises such dangerous machinery as turntables,—attractive, alluring, and open to children strictly *non sui juris*. Haesley v. Winona & St. P. R. Co. 46 Minn. 233, 24 Am. St. Rep. 224, 48 N. W. 1023.

A railroad company owes no duty of leaving cars that are dangerous, alluring, and attractive to children at the foot of an incline instead of on it, so that, when the brakes are unfastened, propulsion by gravitation will be impossible; and, if it leaves them on the descending grade, it sufficiently performs its duty when it causes the brakes to be set so securely that it requires the united efforts of two boys, aged eleven and fifteen years, to loosen them. *Ibid*.

So, if the negligence charged is failure to fence dangerous premises, evidence as to the impracticability of fencing them is admissible. Overholt v. Vieths, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74.

Whether a railroad company exercised ordinary care in keeping a temporary turntable fastening fixture fastened while the permanent one was being repaired, so as to prevent children from playing with the turntable, and being injured thereby, was held to be for the jury, in Berg v. Minneapolis & St. L. R. Co. 95 Minn. 404, 104 N. W. 293, 5 A. & E. Ann. Cas. 375.

yard at night through an open gateway, and while standing near the turntable, with which some children were at the time playing, was struck by a projecting bar which they used in turning it, and was thrown into the pit and caught between the wall and the turntable.

The principles that fix the relation between a landowner and a person entering on the land without permission were fully considered in *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317, a case in which the plaintiff was injured by the breaking down of a station platform on which he was standing, from mere curiosity, to witness the approach of a train. It was there held that the permissive use of the platform by persons not having business with the company imposed on it no liability for defects in construction, and that a person using the private property of another by permission or sufferance, takes upon himself the risks incident to it. It was said in the opinion by Sharswood, J.: "It will appear on an examination of the interesting and elaborate discussion in the English courts of the question whether an action could be supported by such a trespasser for personal harm occasioned by a spring gun, mantrap, or dogs-pike, set on the grounds of the defendant, in which it was determined that, where there was no proper warning given, such an action well lies; that it rested mainly on the ground that a man cannot lawfully do indirectly that which it is unlawful for him to do directly. He cannot shoot or maim or set a ferocious dog upon a mere trespasser. He shall not there place a concealed machine where it will be likely to do the same thing, or let such a dog loose in his grounds without warning. *Deane v. Clayton*, 7 Taunt. 489; *Ilott v. Wilkes*, 3 Barn. & Ald. 304; *Bird v. Holbrook*, 4 Bing. 628. It is, however, equally well settled that the owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a [public] nuisance if it were in a public street or common where all persons had a legal right to be without question as to their purpose or business." In *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, a contractor, who was in exclusive possession of land for the purpose of carrying out his contract, had caused an excavation to be made, and had left it unguarded at night. A person crossing the land fell into the excavation and was killed. In the opinion denying the right to recover, it was said: "The law fully recognizes the right of him who, having the dominion of the soil, without malice does a lawful act on his own premises, and leaves the consequences of an act thereby happening where they belong,—up- 19 L.R.A. (N.S.)

on him who has wandered out of his way, though he may have been guilty of no negligence in the ordinary acceptance of the term." In *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, a child under eight years of age was drowned in an abandoned well, 80 feet from a city highway, in an uninclosed lot which was a place of resort in hot weather. The instruction to the jury that "the true principle which must be applied to a case of this kind is this: The owner of premises in the neighborhood of a populous city, and opening on a public highway, must so use them as to protect those who stray upon them,"—was expressly disapproved, and the judgment for the plaintiff was reversed. In *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706, a boy under six years of age went, for his own amusement, on the platform of a railroad station to observe an approaching train, and was struck by an iron step which was bent and projected a few inches from the car. A judgment for the plaintiff was reversed on the ground that the company owed him no duty of protection under the circumstances. This principle has been applied in a variety of cases of trespass by children. In *Rodgers v. Lees*, 140 Pa. 475, 12 L.R.A. 216, 23 Am. St. Rep. 250, 21 Atl. 399, it was applied in a case where a child took hold of a chain which was a part of a hoisting apparatus and was over a sidewalk outside of the building line; in *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106, where a boy was walking along the tracks of a railroad on the outer ends of the sleepers, and was injured by a passing train; in *Oil City & P. Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128, where a boy, in crossing a bridge, walked on a gas pipe, 5 inches in diameter, and fell through an opening in the floor. Of *Hydraulic Works Co. v. Orr*, 83 Pa. 332, relied on by the plaintiffs, it has often been said that it is authority for its own facts; and, as far as it appears to sanction the doctrine that a child cannot be treated as a trespasser, it has been expressly overruled. See *Gillespie v. McGowan* and *Rodgers v. Lees*, supra. In the first of these cases it was said: "In *Hydraulic Works Co. v. Orr*, there was a recklessness that may be said to partake of the nature of wantonness; and it is only upon this principle that judgment can be logically sustained." In *Duffy v. Sable Iron Works*, 210 Pa. 326, 59 Atl. 1100, an open vat, into which hot tar and grease were run, had been placed in an open space so near the line of the street that a child might unconsciously walk into it. In *Rachmel v. Clark*, 205 Pa. 314, 62 L.R.A. 959, 54 Atl. 1027, the defendants had used for storage the sidewalk of a street in connec-

tion with an open paved space in front of their building, separated from the street only by an imaginary line. The negligence was in placing on a public way, where all persons had a right to be, a slab of slate in such a position that the touch of a child's hand would cause it to fall.

The fact that the person injured was a child makes no difference, unless there was negligence. The plaintiff's youth relieves him of the charge of contributory negligence, but it does not give rise to an imputation of negligence on the part of the defendant. He was where he had no right to be, on the property of the defendant, which it was using in a lawful manner for a lawful purpose in the conduct of its business. It owed him the duty not to injure him intentionally, but it was under no duty actively to take care of him, either by keeping him out of the yard, or by protecting him, after he had entered it, from his own acts or the acts of others who, like him, had entered without permission. There was no negligence unless there was breach of duty. There was no breach of a duty owing an adult. An owner of land is not liable for its condition to an adult who enters without permission. Unless a different standard of duty is to be established as to a child, there was no liability in this case.

Whether an owner of land who makes changes on it in the course of its beneficial use, which tend to attract children, and to expose them to danger, is under a duty to take special precautions for their safety, is a question on which there is a conflict of authority. That such a duty exists has been asserted in some jurisdictions and denied in others. The earlier cases on the subject followed *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, but the tendency of the later decision is decidedly against the imposition of such a duty. Some of the courts that adopted the ruling in *Sioux City & P. R. Co. v. Stout* have since repudiated it, and others have followed it with hesitation, or have limited its application to a particular class of improvements. The establishment of such a duty would create a restraint which, in some cases, would amount to a prohibition, upon a mode of beneficial use of land, for the protection of intruders and intermeddlers. It is difficult to see any ground upon which such a duty can be placed. An owner is not liable for leaving his land in its natural shape. Why should he be held liable for placing structures upon it which are harmless in themselves and are necessary for the lawful use he wishes to make of it? It cannot be said that he invites or allures children, because no such intention in fact exists; nor that he sets a trap for the innocent and unwary. 19 L.R.A. (N.S.)

The law does not impose a duty upon the landowner to take special precautions for a class of persons,—a doctrine which, if carried to its logical conclusion, would, as was said in *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, "charge the duty of the protection of children upon every member of the community except their parents." In *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682, it was said by Gummere, J.: "The viciousness of the reasoning which fixes liability upon the landowner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted." If the standard of duty contended for is set up, it will be an exception to the general rule, and a wide and dangerous extension of the liability governing the ownership of property. Where it would logically end it is difficult to determine. As was suggested in *Gillespie v. McGowan*, supra, it might make it "the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches." In the opinion in *Turess v. New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614, it was said by Magie, Ch. J.: "It is obvious that the principle on which the rule rests, if sound, must be applicable more widely than merely to railroad companies and the turntables maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them thereon, which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water to his buildings; he who leaves his mowing machine or dangerous agricultural implements in his field after his day's work; he who maintains a pond in which boys may swim in summer or on which they may skate in winter—would seem to be amenable to this rule of duty." The doctrine of the so-called turntable cases has been disapproved in *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 226, 4 L.R.A. (N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862; *Delaware, L. & W. R. Co. v. Reich*, supra; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; *Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Paolino v. McKendall*, 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 736, 53 Atl. 268; *Ryan v. Towar*, 128 Mich. 463,

55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; *Dobbins v. Missouri*, K. & T. R. Co. 91 Tex. 60, 38 L.R.A. 573, 66 Am. St. Rep. 856, 41 S. W. 62; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L.R.A. 148, 31 S. E. 993; and in many other cases. The doctrine is a sweeping innovation on the settled common-law rule that a landowner is not liable for the condition of his premises to one who enters them without permission. We are of opinion that it is not sound in principle, and that it cannot be sustained.

The judgment is reversed, and judgment is now entered for the defendant.

Mestrezat, J., dissenting:

Few, if any, more important cases have been considered and determined than the one now presented for the decision of this court. Especially is the doctrine announced far-reaching and important to the multitude of people who live in the congested districts of the cities of the commonwealth. It takes from them a protection which has heretofore been accorded in all jurisdiction where the life of a child is of greater importance than any commercial interest. It completely destroys the maxim, *Sic utere tuo ut alienum non laedas*, which for centuries has protected the weak against the strong, the homes of the humblest against the encroachments of the highest. It gives to an individual or a corporation the right to erect upon his premises in the most densely populated part of the city of Philadelphia any machine or structure whatever which he deems necessary for carrying on his business, although such machine or structure may be so placed as to menace the life of every child in the neighborhood. It establishes a principle, as I conceive, unsupported by reason, unsustained by the best judicial thought of this country, and one so appalling that sooner or later, if enforced by this court, must result in legislative action. It cannot be that the people of this commonwealth will submit to a doctrine that declares that a child whose tender years deprive him of protection becomes a trespasser and without the pale of the law when he is attracted to the premises of another by an object, erected thereon by the owner, which appeals to the childish instinct, and by which he is injured or killed. The question involved in this case is not a new one either here or in many other jurisdictions. It is attempted in the opinion to show that the principle announced by the majority of the court is the law in many jurisdictions, including our own, and that the contrary doctrine is a sweeping innovation on the settled common-law rule that a landowner is not liable for the condition of his premises to one who enters without permission. I do not agree with either of these conclusions. On the contrary, while the 19 L.R.A. (N.S.)

right of the child to be protected under the circumstances of this case has been attacked, yet with deference I submit that the weight of judicial decisions and of text-book authority is overwhelmingly against the doctrine announced in the majority opinion.

A half century ago, this court, in the case of *Rauch v. Lloyd*, 31 Pa. 358, 72 Am. Dec. 747, approved the principle announced in the leading English case of *Lynch v. Nurdin*, 1 Q. B. 29, and refused to follow the contrary doctrine adopted in New York and one or two other states. Mr. Justice Woodward, speaking for the court, said (page 370 of 31 Pa.): "But that the same rule should not be applied to a child of tender years was so successfully demonstrated by Lord Denman in *Lynch v. Nurdin*, 1 Q. B. 30, and by Chief Justice Redfield in *Robinson v. Cone*, 22 Vt. 224, 54 Am. Dec. 67, that I shall content myself with referring to their reasonings. Nor am I unmindful of the counter current of authorities in New York

but the preponderance of both reason and authority will be found favorable to the two adjudications first named. That every case is to be determined by its own circumstances, and that children are to be held responsible only for the discretion of children seem self-evident propositions. A blind man is not bound to see, a deaf man to hear, nor a lunatic to reason; and yet they have a right to redress for injuries inflicted by the negligence of others. Children of tender age are not responsible to the law, either criminally or civilly, and that for want of discretion." It was there held that, where a child of tender years attempted to pass under a train of railroad cars, negligently left standing on the crossing of a public street, and by which he was injured, the owners of the cars were liable; but, under similar circumstances, they would not have been liable if an adult had been injured. In *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317, relied on to sustain the position of the majority of the court in the present case, Mr. Justice Sharswood, delivering the opinion, declared the doctrine of *Lynch v. Nurdin* still to be the law, saying (page 142 of 59 Pa.): "No reference is made in the opinion [he referred to] to *Lynch v. Nurdin*, 1 Q. B. 29, a decision much controverted, but one which has stood its ground."

In *Hydraulic Works Co. v. Orr*, 83 Pa. 332, a child six years old, while at play, strayed from the street, through an open gate, into an alley, and was killed by a falling platform 24 feet from the street, which was raised and lowered in receiving and shipping goods. At the entrance to the alley, where it abutted on the street, was a gate which was posted "Private" and

"No admittance." The gate was frequently open, although the employees of the factory which adjoined the alley were instructed to keep it shut. The father and mother of the child brought an action to recover damages for his death, on the ground that the defendant was guilty of negligence in respect to the condition or character of the platform, and in not keeping the gate fronting on the street closed. There was a verdict and judgment for the plaintiffs, which were sustained by this court. It was there held, in the language of the syllabus, that while it is true, in general, that where no duty is owed no liability arises, this rule varies with circumstances; and where, therefore, an owner has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the question of duty then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence. Chief Justice Agnew delivered the opinion, and in part said (page 336): "Now, can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entries of persons on business, by accident, or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind, as well as the maxim, *Sic utere tuo ut alienum non lædas*, must say this cannot be true,—that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other someone, probably a thoughtless boy in the buoyancy of play, would be led there, and injury would follow,—especially, too, when prompted by knowledge that a fastening was needed. Perhaps the best monitor in such a case is the conscience of one who feels, in his dreadful recollection, the crushing sense that he had left such an engine of ill to take the life of an innocent child." Mr. Justice Paxson disagreed with the views expressed in the opinion of the chief justice, and noted his dissent on the record.

Hydraulic Works Co. v. Orr has been followed and approved by this court in all the cases on the subject, if we except some *dicta* used in the opinions, in one or two cases. In Gramlich v. Wurst, 86 Pa. 74, 27 Am. Rep. 684, Mr. Justice Woodward, delivering the opinion, and speaking of Hydraulic Works Co. v. Orr, says (page 80 of 86 Pa.): "No cause was ever more justly decided. It was the case suggested by Baron Martin in 10 L.R.A. (N.S.)

Hardcastle v. South Yorkshire R. & R. D. Co. 4 Hurlst & N. 67, of a dangerous appliance adjoining a public way. The children were trespassers, certainly, but then they were children; and the defendants were bound to have regard for the reckless and thoughtless traits of childhood. . . . Even a trespasser may have redress for negligent injuries inflicted upon him. . . . Hydraulic Works Co. v. Orr rested on principles and precedents that sustained it amply, but which have no application here." Schilling v. Abernethy, 112 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792, quotes from and follows Hydraulic Works Co. v. Orr. Mr. Justice Gordon, delivering the opinion, said (page 442 of 112 Pa.): "We there held [Hydraulic Works Co. v. Orr] that circumstances may beget duties which, under ordinary circumstances, cannot be implied, and that, when such circumstances are shown to exist, the question arising therefrom is not for the court, but for the jury. . . . Whether, then, the owner of these premises [in the case being decided], under the circumstances made apparent by the evidence, was or was not justified in maintaining such a deadfall as this bowing wall along the side of this passageway, was surely a question for the jury, and one that could not lawfully have been withdrawn from the consideration of that body." In Biddle v. Hestonville, M. & F. Pass. R. Co. 112 Pa. 551, 4 Atl. 485, Hydraulic Works Co. v. Orr is quoted with approval in the opinion, which concludes as follows (page 554 of 112 Pa.): "It is very true . . . extra precautions are not required in anticipation of the intrusions of trespassers, even though they be children; but, when they do so intrude, and are known to be in an improper place, they must not be so wholly neglected as to endanger their lives or limbs. Any other doctrine would so illy accord with Christian civilization as to render its maintenance impossible."

In Arnold v. Pennsylvania R. Co. 115 Pa. 135, 2 Am. St. Rep. 542, 8 Atl. 213, Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745, the first of the turntable cases, is cited with approval, and the principle there decided is stated in the following quotation (page 140 of 115 Pa.): "Whilst a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to a passenger, it is nevertheless not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts." The opinion of this court then continues: "This same doctrine has been approved by our own authorities, *inter alia*, in the cases of Pennsylvania Co.

v. Toomey, 91 Pa. 256; Pennsylvania R. Co. v. Lewis, 79 Pa. 33; Hydraulic Works Co. v. Orr, 83 Pa. 332; Philadelphia & R. R. Co. v. Hummell, 44 Pa. 375, 84 Am. Dec. 457; and Biddle v. Hestonville, M. & F. Pass. R. Co. supra." In Corbin v. Philadelphia, 195 Pa. 461, 49 L.R.A. 715, 78 Am. St. Rep. 825, 45 Atl. 1070, decided in 1900, Hydraulic Works Co. v. Orr is cited with approval, and Mr. Justice Brown, speaking for the court, quotes two thirds of the opinion in that case, including the strong and emphatic language used by Mr. Justice Agnew. In Rachmel v. Clark, 205 Pa. 314, 62 L.R.A. 959, 54 Atl. 1027, decided in 1903, Hydraulic Works Co. v. Orr was cited with approval, and Chief Justice Agnew's opinion was quoted in part as follows (page 319 of 205 Pa.): "Duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts, of the probability of danger and the grossness of the act of imputed negligence."

Duffy v. Sable Iron Works, 210 Pa. 326, 59 Atl. 1100, was decided by this court about two and one-half years ago, and is the last expression of opinion by this court on the subject. The opinion was written by Mr. Justice Thompson, who cites with approval and quotes from Hydraulic Works Co. v. Orr. In his opinion, alluding to some of the attacks made upon Hydraulic Works Co. v. Orr, he says (page 331 of 210 Pa.): "It is difficult to understand why this case has become like a shuttlecock in battle-dore, to be pitched up and down. The boy in that case was six years old, and while playing in the street strolled into the alley, when the gates were open, and while there the platform fell upon him. The facts were submitted to the jury, and the verdict was in favor of the plaintiff below." Justice Thompson then quotes that part of the opinion in Schilling v. Abernathy, supra, which approves Hydraulic Works Co. v. Orr.

It will therefore be observed that from 1877, the year in which Hydraulic Works Co. v. Orr was decided, until 1904, the principle announced in that case has been recognized and approved time and again by this court. It is claimed, however, in the majority opinion in the case at bar, that certain decisions of this court have practically overruled Hydraulic Works Co. v. Orr. We will briefly refer to these cases. The first case is Gramlich v. Wurst, from which we have already made a quotation which shows that it sustains Hydraulic Works Co. v. Orr. Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365, is

cited in the majority opinion as sustaining its position. There the nearest paved highway ran 300 feet from the place of the accident, and the nearest road was about 80 feet. There were houses about 300 feet off, but the built-up part of the city was nearly one-half mile distant. The facts, therefore, are not similar to those in Hydraulic Works Co. v. Orr. or to those in the case at bar. It is important, in considering the Gillespie Case, to note the fact that the opinion was written by Mr. Justice Paxson, who had dissented in Hydraulic Works Co. v. Orr. It will be observed throughout his opinion that he reflects upon this latter case by the use of certain *dicta* which should have had no place in the decision. This was the first opportunity the learned justice had after dissenting in Hydraulic Works Co. v. Orr to get his views in a majority opinion. In Duffy v. Sable Iron Works, supra, referring to a *dictum* of Justice Paxson in the Gillespie Case, Justice Thompson, speaking for this court, says (page 331 of 210 Pa.): "A *dictum* occurs in Gillespie v. McGowan, supra, that Hydraulic Works Co. v. Orr, supra, was in direct conflict with Gramlich v. Wurst, 86 Pa. 74, 27 Am. Rep. 684; but an examination of that case will show that the deductions leading to such *dictum* are not warranted, and that the case rested upon well-defined and settled principles."

In Rodgers v. Lees, 140 Pa. 475, 12 L.R.A. 216, 23 Am. St. Rep. 250, 21 Atl. 399, Mr. Justice Green wrote the opinion, and Mr. Justice Clark dissented. The majority opinion in that case distinguishes Hydraulic Works Co. v. Orr. It is true that, in his opinion, Mr. Justice Green quotes some *dicta* from the opinion in Gillespie v. McGowan, which reflects upon Hydraulic Works Co. v. Orr; but it should be noted that the *dicta* are the words of Mr. Justice Paxson, who had dissented in the Hydraulic Works Case, and also that they were *obiter* and not necessary to the decision of the Rodgers Case. It will therefore be observed that the cases upon which the majority opinion relies to overthrow the doctrine announced in Hydraulic Works Co. v. Orr cannot be regarded as sustaining the position, in view of the numerous cases which distinctly recognize and sustain the principle of that decision.

This is a turntable case, and the principles announced in those cases have been recognized and followed not only by the Supreme Court of the United States, in which they originated, but by the courts of the great majority of the states of the Union, as well as by those of England. It is true that New York, New Hampshire, and possibly one or two other states reject

the doctrine of the turntable cases. But this does not justify the majority of this court in overruling our own cases, which specifically repudiate the New York doctrine and are in harmony with the adjudications of the Supreme Court of the United States and of the courts of the great majority of the several states of the Union. The earliest turntable case was *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, decided in 1874. That was the unanimous judgment of the Supreme Court of the United States, and it was there held: "While it is the general rule, in regard to an adult, that, to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." It was also held: "While a railway company is not bound to the same degree of care in regard to mere strangers who are even unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts." In that case a judgment was sustained in favor of a child six years of age who was injured while playing with other children on a turntable located in an open space, about 80 rods from the company's depot in a village of about 150 persons. The *Stout* Case was followed in the Supreme Court of the United States by *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, decided in 1894, announcing and approving the same doctrine, although not a turntable case. Mr. Justice Harlan delivered an exhaustive opinion, in which he reviews all the cases upon the subject, and concludes with an affirmation of the doctrine announced in the *Stout* Case. He notes the fact that *Lynch v. Nurdin*, 1 Q. B. 29, is cited with approval in nearly all of the cases. He says that it has been claimed that *Lynch v. Nurdin* was overruled in England; but he quotes from the opinion of Lord Chief Justice Cockburn in *Clark v. Chambers* (1878) L. R. 3 Q. B. Div. 327, showing the contrary. He also quotes from the Lord Chief Justice's opinion as follows (page 279 of 152 U. S.): "It appears to us that a man who leaves in a public place along which persons, and, amongst them, children, have to pass, a dangerous machine which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the

less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion." The learned justice then says (page 279 of 152 U. S.): "We adhere to the principles announced in *Sioux City & P. R. Co. v. Stout*, supra. Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pile made by it in the vicinity of its depot building. . . . It knew that children were in the habit of frequenting that locality and playing around the shaft house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near the pit, beneath the surface of which was concealed [except when snow, wind, or rain prevailed] a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision. . . . What difference in reason, we may observe in this case, is there between an express license to the children of this village to visit the defendant's coal mine, in the vicinity of its slack pile, and an implied license, resulting from the habit of the defendant to permit them, without objection or warning, to do so at will, for purposes of curiosity or pleasure?"

The majority opinion in the present case says that the turntable cases have been disapproved in New York and in a few of the other states. This is true, but this court, on the other hand, affirmed *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, the original turntable case, by a unanimous judgment in *Arnold v. Pennsylvania R. Co.* 115 Pa. 135, 2 Am. St. Rep. 542, 8 Atl. 213, and in that case it is said that the doctrine of the turntable cases was approved in *Pennsylvania Co. v. Toomey*, 91 Pa. 256; *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Philadelphia & R. Co. v. Hummel*, 44 Pa. 375. 84 Am. Dec. 457; and *Biddle v. Hestonville. M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485. Shall we now eliminate the principle from our own jurisprudence, overrule all our own cases, and follow the cases of three or four other states which we have expressly repudiated, and which, as seen in 1 *Shearman & Redfield on Negligence*, § 73, have been condemned in England and are directly opposed to the current of American cases?

Neither space nor time will permit me to refer to the numerous cases decided in the courts of last resort in the various states of the Union, which sustain the doctrine enunciated in *Hydraulic Works Co. v. Orr* and in the turntable cases. We will, however, refer to and quote from some text-books, which, without exception, support the principles of the turntable cases. The principle underlying these cases is well stated in Ray's *Negligence of Imposed Duties, Personal*, p. 33: "If an act you are contemplating, right in itself, will likely cause someone to expose himself to danger which he does not anticipate, it is your duty to take care that such exposure does not prove injurious to him. In determining the question whether the act will induce such exposure, it is your duty to consider the motives and impulses that induce action by others who are likely to be influenced by your act. If men may be misled in their judgment by your act, you must take measures to warn them or to avoid injuring them by proper care. If children, from their known childish instincts and curiosity, may be led into danger, such care is due them also." The same learned author also says (page 28): "The owner of any machine which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their natural instinct to amuse themselves with anything that may attract them as a plaything, and which he knows or ought to know may attract them, and who knows it is so placed that it does attract them to play with it,—is under a duty, as to such children, to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them. Whoever, therefore, does anything in or immediately adjacent to a public street, park, or locality where children may rightfully congregate, and are accustomed so to do, calculated to attract children into danger which they cannot appreciate, or are too untrained and inexperienced to resist, owes the imposed duty of protecting them against the temptation he places before them, by suitably guarding the source of danger; or, in case this cannot be done, by giving timely warning to their parents or guardians of the existence of the danger." In 1 *Shearman & Redfield on Negligence*, 5th ed. § 73, it is said: "It was held in some English cases that, if a child's own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of injury, the latter cannot recover damages. But these decisions have been condemned in England, and are directly opposed to the current of American cases. 19 L.R.A. (N.S.)

The law has been settled to the contrary. In America, by the famous series of turntable cases, in which railroad companies were held liable by the Federal Supreme Court, as well as by several state courts of last resort, for injuries suffered by little children, in consequence of their own acts in meddling with railroad turntables, which were left open to public access, unfastened and unguarded, although, of course, perfectly harmless if let alone." In a note to the section will be found a reference to the states whose courts have sustained the doctrine of the text. In volume 2 of the same work (§ 705) it is said: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition, for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees." In the recent second edition of his exhaustive work on the Law of Negligence, Judge Thompson says (vol. 1, § 1024): "A well-grounded exception to the foregoing principles is that one who artificially brings or creates upon his own premises any dangerous thing which, from its nature, has a tendency to attract the childish instincts of children to play with it, is bound, as a mere matter of social duty, to take such reasonable precautions as the circumstances admit of, to the end that they be protected from injury while so playing with it, or coming in its vicinity. Things of this kind frequently pass under the designation of attractive nuisances." In § 1031, the learned author says: "In respect of the first of cases, that of attractive nuisances, it is to be observed that it would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed; and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed, or maimed for life." This extract is quoted and indorsed by the Supreme Court of the United States in *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619. The same principle is announced in other text-books: *Wharton*, Neg. 2d ed. §§ 112, 343, 824a; *Beach*, Contrib. Neg. 3d ed. § 204; *Barrows*, Neg. p. 69; *Bishop*, Non-Contract Law, § 854.

It is unnecessary to discuss the doctrine of the turntable cases. It has been thoroughly discussed by both the English and the American courts, and for the purposes of this case nothing need be added to the reasoning of those cases. It does not deprive the landowner of the use of his premises, nor make him liable for their condition to one who enters without permission. All that it requires, and which humanity demands, is that he will not erect upon his premises a dangerous machine or structure, unguarded or unprotected, so near a public highway that children accustomed to frequent the highway will be allured or enticed into a danger which may result in their death. The doctrine now announced by the majority of this court will require the people in the densely populated parts of the city of Philadelphia to keep their children of tender age at all times in the house or in the charge of a nurse. The playground of such children must be in the house, and not upon the public places, even the parks of the cities of the commonwealth. They cannot be permitted to go to the parks for recreation or play without being subjected to the dangers of the traps and pitfalls which a reckless and heartless owner of property may erect or construct. With a small expenditure of money, turntables and other attractive playthings for children may be guarded, and children at play may be protected and get the recreation which they require. Under the evidence in this case, a few dollars would have restored the fence surrounding the turntable, and the children of that populous neighborhood would have been protected from the dangers of the place. I cannot agree that the thousands of people who live in the city shall be required to keep their children in their houses or employ nurses, most of them illy able to bear the expense, to protect their children, when such protection could be given by the owner of the premises with a small expenditure of money. It seems to me a sacrifice of humanity to the greed of commercialism.

The doctrine announced in the majority opinion is unquestionably a departure from the settled law of this commonwealth. It is substantially the doctrine of the dissenting opinion in *Duffy v. Sable Iron Works*, 210 Pa. 326, 59 Atl. 1100, filed less than three years ago. It is not in accord with our own cases or with those of the overwhelming majority of the other states. It is in conflict with the decisions of all the Federal courts of this country, and it is condemned by the courts of England.

For the reasons stated, I would affirm the judgment of the court below.
19 L.R.A. (N.S.)

ALABAMA SUPREME COURT.

ALABAMA WESTERN RAILROAD COMPANY, Appt.,

v.

STATE OF ALABAMA EX REL. ALEXANDER M. GARBER, Attorney General.

(— Ala. —, 46 So. 468.)

Nuisance — action by state.

The state may maintain a bill to abate a nuisance in a city street.

(April 16, 1908.)

Case Note. — State as proper party to maintain a bill to abate or enjoin a public nuisance in a city street.

It will be observed that the question in the foregoing case, and the question indicated in the above title, is not whether the remedy by a bill in equity to enjoin or abate a nuisance has been supplanted by other remedies, but whether the right to maintain such a bill is vested in the municipality to the exclusion of the state. It is expressly declared in *State v. Franklin*, 133 Mo. App. 486, 113 S. W. 652, that, where the municipality fails to act, the state may, in the exercise of its visitatorial powers, through the arm of the attorney general or of the prosecuting attorney of the county wherein the nuisance is maintained, bring a suit in equity, or a proceeding under the statute, for its abatement. There are many cases, of which *Augusta v. Reynolds*, 122 Ga. 754, 69 L.R.A. 564, 106 Am. St. Rep. 147, 50 S. E. 998, *Hunt v. Chicago Horse & Dummy R. Co.* 121 Ill. 628, 13 N. E. 176, and *State ex rel. Detienne v. Vandalia*, 119 Mo. App. 406, 94 S. W. 1009, are types, which hold or assume that the attorney general or other law officer of the state may maintain a suit in equity to enjoin or abate a public nuisance in a city street; and there are also numerous cases cited in the note to *Coast Co. v. Spring Lake*, 51 L.R.A. 657, which discuss the right of a municipality to maintain a suit to enjoin or abate a public nuisance in a street; but seem to assume that the attorney general or other proper law officer of the state is at least a proper party to represent and vindicate the rights of the public by such a bill, assuming that the conditions are such that it may be maintained at all, although, as shown in the note just referred to, the courts have frequently upheld the right of a municipality to maintain such a bill, without, however, intimating that its right in this respect is exclusive.

In *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264, the court said: "The jurisdiction of a court of equity to abate an existing or prevent a threatened nuisance, upon information filed by the attorney general, is limited to those public

APPEAL by defendant from a decree of the City Court of Birmingham overruling a motion to dismiss for want of equity a bill filed to abate a nuisance in a city street. Affirmed.

The facts are stated in the opinion.

Messrs. Percy & Benners, for appellant:

The state is not the proper party to file a bill for the abatement of a public nuisance

where such nuisance is in a public street in a city.

People v. Equity Gaslight Co. 141 N. Y. 232, 36 N. E. 194; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Atty. Gen. v. Sheffield Gas Consumers' Co.* 3 De G. M. & G. 304; *Atty. Gen. v. Hane*, 50 Mich. 447, 15 N. W. 549; *McCain v. State*, 62 Ala. 138.

Messrs. Alexander M. Garber, Attor-

neys upon an information, and not upon the ground that the attorney general was not the proper party to maintain such a suit, assuming that the facts were sufficient to justify it.

It was held in *People v. Law*, 34 Barb. 494, 22 How. Pr. 109, however, that the people, in their character as the aggregate body of the public, could not maintain a suit to enjoin the construction of a railroad in a city street until compensation should be made; and further, that the people, in such character, were not the proper representatives of the property rights of the municipality, but that the municipal corporation must protect such interests.

In *Morris & E. R. Co. v. Atty. Gen.* 20 N. J. Eq. 530, it was held that the remedy by indictment for maintenance of a public nuisance in a street being so efficacious, courts of equity would entertain jurisdiction very reluctantly when their intervention was invoked at the instance of the attorney general or a private individual; and this doctrine was followed in *Atty. Gen. ex rel. Gloucester City v. Brown*, 24 N. J. Eq. 89. It will be observed, however, that these cases relate rather to the question whether a resort to a court of equity is the proper remedy, and not to the question who is the proper party to invoke that remedy.

While, as already stated, this note is not concerned with the question whether the remedy by a suit in equity by the law officer of the state, to enjoin or abate a nuisance, has been supplanted by legal remedies, it may be noted incidentally in this connection that the remedy given by statute to county commissioners for the obstruction of a state or county road has been held not exclusive of the right of the attorney general to maintain a suit for an injunction in the name of the state. *State ex rel. Crosby v. Dayton & S. E. R. Co.* 36 Ohio St. 434.

So, the penalty prescribed by statute for infringing the building line in an urban district is not exclusive of a suit for an injunction by the attorney general in behalf of the public. *Atty. Gen. v. Wimbledon House Estate Co.* [1904] 2 Ch. 34.

Of course, the many cases in which the state has been defeated upon the merits, or upon the ground that a suit in equity to abate or enjoin the nuisance was not the proper remedy, are not within the scope of this note.

nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition. . . . And the court will not interfere when the obstruction to the rights of the public is of such a character that it may with equal facility be removed by other constituted authorities and public officers. *Atty. Gen. v. Bay State Brick Co.* 115 Mass. 431, 438. There must be a want of adequate sufficient remedy, and the injury to public rights must be of a substantial character, and not a mere theoretical wrong." It was accordingly held in this case that the court would not entertain an information filed by the attorney general to restrain a railroad company from proceeding under an order of the board of aldermen of the city of Boston, authorizing it to lay tracks in a certain street, upon the ground that the construction of the tracks and the running of cars thereon would create a public nuisance. This, however, seems to be upon the ground that the municipality could apply the proper remedy through its control of the streets and its power to locate the tracks and regulate the running of cars thereon; and the case is therefore hardly authority for the proposition that the maintenance of a suit in equity to abate a nuisance in a city street, when that is the proper remedy, is the exclusive province of the municipality, and not of the state.

The same observation applies to *People v. Equity Gaslight Co.* 141 N. Y. 232, 36 N. E. 194, which quotes with approval the foregoing language from the Massachusetts case. In the New York case the court refused to entertain a suit in equity by the attorney general to restrain a gas company from opening the streets of the city of Brooklyn and laying gas pipes therein; remarking that the people had abundant remedy without coming into a court of equity, the state having delegated to various officials acting under the charter of Brooklyn ample power to protect and maintain the streets. The true character of the decisions in the Massachusetts and New York cases is further indicated by the fact that both cite, in support of their decisions, the case of *Atty. Gen. v. Sheffield Gas Consumers' Co.* 3 De G. M. & G. 304, in which the decision against the attorney general in a suit by information and bill for an injunction was clearly upon the ground that the disturbance of the pavement in a town by an unincorporated gas company was not such a nuisance as to justify an injunction either upon a bill or 19 L.R.A. (N.S.)

ney General, and Richard H. Fries, for appellee:

The bill was properly filed by the state. State v. Bell, 5 Port. (Ala.) 377.

The above case has been repeatedly followed and never departed from in Alabama.

McNeill v. McNeill, 36 Ala. 115, 76 Am. Dec. 320; Johnson v. Longmire, 39 Ala. 146; Owens v. Grimsley, 44 Ala. 360; Hill v. Armistead, 56 Ala. 120; Thomason v. Cooper, 57 Ala. 560; Weakley v. Curley, 60 Ala. 409; Griffin v. Spence, 69 Ala. 397; Bromberg v. Bates, 98 Ala. 626, 13 So. 557; Hoole v. Atty. Gen. 22 Ala. 195; 14 Enc. Pl. & Pr. p. 1136; State ex rel. Waring v. Mobile, 24 Ala. 701; Atty. Gen. v. Forbes, 2 Myl. & C. 129; State v. Bell, 5 Port. (Ala.) 371; Elliott, Roads & Streets, § 664; Dan. Ch. Pl. & Pr. 5, 10; Story, Eq. Pl. §§ 8, 49; Pom. Eq. Jur. 3d ed. § 479.

Messrs. Brown & Murphree also for appellee.

Dowdell, J., delivered the opinion of the court:

The bill in this case is filed in the name of the state, on the relation of the attorney general. The purpose of the bill is to abate a public nuisance, namely, an obstruction of a certain public street in the city of Birmingham. The case was heard below on a motion to dismiss the bill for want of equity, upon the theory that the state is not the proper party to file a bill for the abatement of a public nuisance, where such nuisance is in a public street in a city, but that such duty devolves upon the municipal authorities. The court below overruled the motion to dismiss the bill, and from the decree overruling the motion this appeal is prosecuted.

The jurisdiction of a court of chancery to abate a nuisance is not denied by the respondent, appellant here; but it is conceded. It is contended, however, that the city alone has the right to maintain a bill to abate a public nuisance in its streets, and cases from other jurisdictions are cited in support of this contention. Whatever may be the decisions of courts of other jurisdictions, this court, we think, is committed to a different doctrine. A public street in a city is a public highway, and its uses belong to the public generally, and it cannot be said that such uses are limited to the municipality or to its citizenship alone. Nor is the authority and power of the municipality over its streets as to the abatement of nuisances exclusive. This was expressly held in the case of Hoole v. Atty. Gen. 22 Ala. 190. It may be that such authority might be by legislative grant conferred exclusively upon the municipality; but such is not the case here.

It is contended, however, that, in the case 19 L.R.A. (N.S.)

of Hoole v. Atty. Gen. supra, the question as to who was the proper party to maintain the bill was not decided. The question, nevertheless, was argued in brief of counsel, and the court held that the bill had equity, though the case was decided on its merits on the facts. The question here is on the equity of the bill, its averments being confessed. In this respect, we think the case of Hoole v. Atty. Gen. supra, is undoubtedly in point as an authority. There might be a case in which the municipality authorized the nuisance complained of, and in such a case it is hardly to be supposed that the municipal authorities would take action to abate the nuisance; and, if the doctrine contended for by appellant be upheld, the wrong to the general public would be without redress. There are a number of our cases that might be cited, persuasive of the view we have expressed, but we are contented to rely upon the case of Hoole & Paulin, supra, and the general doctrine of equity jurisdiction in cases of public nuisance, and the right of the state to take action for the suppression of the same.

The decree appealed from will be affirmed.

Tyson, Ch. J., and Anderson and McClellan, JJ., concur.

ALABAMA SUPREME COURT.

F. W. BROMBERG, Appt.,

v.

EUGENOTTO CONSTRUCTION COMPANY et al., Respts.

(—Ala. —, 48 So. 60.)

Specific performance — personal contract.

1. Equity will not enforce performance of a contract to let a certain amount of floor space in a building to be constructed, which would require supervision of the method of construction to produce the requisite space.

Note. — As to specific performance of contracts requiring constant supervision, see case note to Lone Star Salt Co. v. Texas Short Line R. Co. 3 L.R.A. (N.S.) 828.

For a discussion of the principle invoked in the case reported, that where a court of equity has no jurisdiction to decree the equitable relief sought, and no other special equity intervenes, the bill cannot be retained for the purpose of awarding damages, see case note to Johnston & G. Bros. v. Bunn, ante, 1064. Such note, however, does not assume to include cases of the kind herewith reported, in which the question seems to be not so much one of the existence of jurisdiction to award pecuniary compensation, as of the propriety of its exercise.

Injunction — violation of completed contract.

2. Injunction will not lie to prevent violation of a contract to lease a certain floor space in a building to be constructed after the construction of the building is completed with a provision for less floor space than called for by the contract.

Mandatory injunction — alteration of building.

3. The court will not grant a mandatory injunction to compel the alteration of a completed building to make it comply with the terms of a contract executed before its construction, for the lease of a certain floor space therein.

Equity — specific performance — damages.

4. A bill for specific performance of a contract will not be retained for the assessment of damages where a case is not made for specific performance, and no other special equity is shown which will support jurisdiction of the court.

(December 17, 1908.)

APPEAL by complainant from a decree of the City Court of Birmingham dismissing a bill brought to enforce the specific performance of a contract to lease a certain amount of floor space in a proposed building, a part of which complainant alleged he would be deprived of by the manner in which the building was being constructed. Affirmed.

The facts are stated in the opinion.

Messrs. Tillman, Grubb, Bradley, & Morrow for appellant.

Messrs. Campbell & Johnston, for respondents:

The performance of a contract to erect a certain kind of building will not be specifically enforced by courts of equity.

Madison Athletic Asso. v. Brittin, 60 N. J. Eq. 160, 46 Atl. 652; Wharton v. Stoutenburgh, 35 N. J. Eq. 277; Kendall v. Frey, 74 Wis. 26, 17 Am. St. Rep. 118, 42 N. W. 466; Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430; Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co. 135 Mass. 34, 46 Am. Rep. 442; Iron Age Pub. Co. v. Western U. Teleg. Co. 83 Ala. 509, 3 Am. St. Rep. 758, 3 So. 449; Bridgeport Land & Improv. Co. v. American Fire-proof Steel Car Co. 94 Ala. 592, 10 So. 704; 26 Am. & Eng. Enc. Law, pp. 93, 94.

Where the bill does not make out a case entitling complainant to a decree for specific performance, compensation for damages resulting from a breach of the contract will not be decreed.

Sims v. McEwen, 27 Ala. 184; 20 Enc. 19 L.R.A. (N.S.)

Pl. & Pr. p. 482; 1 Pom. Eq. Jur. 237; Harrison v. Deramus, 33 Ala. 468.

Where specific performance is impossible, or where the complainant knew before bill filed that defendant had disabled himself to perform, then, in either case, the bill will not lie.

26 Am. & Eng. Enc. Law, p. 86; Harrison v. Deramus, 33 Ala. 463; Hatch v. Cobb, 4 Johns. Ch. 559; Beeler v. Levy, 26 N. J. Eq. 333; Morss v. Elmendorf, 11 Paige. 277; Milkman v. Ordway, 106 Mass. 256; 4 Pom. Eq. Jur. 3d ed. 1410.

Dowdell, J., delivered the opinion of the court:

The appeal in this case is taken from a decree on the demurrer to the bill. The bill is to enforce the specific performance of a contract, and in the alternative, as it is urged in argument, to enjoin the violation of a contract. The contract is for the lease of a storeroom in a proposed building, and by the terms of said lease contract the lessee was to have a certain amount of floor space, of a part of which he complains in his bill he is being deprived of by the respondent, lessor, in the manner of construction of the said building. The question is whether a court of equity will entertain a bill for the enforcement of this contract.

In Madison Athletic Asso. v. Brittin, 60 N. J. Eq. 160, 46 Atl. 652, in speaking of the specific performance of building contracts, it was said by the New Jersey court: "The doctrine of the later cases is that the court will not ordinarily enforce specific performance of building contracts, not only on the ground that damages at law are generally an adequate remedy, but also on the ground of the inability of the court to see that the work is carried out." In Wharton v. Stoutenburgh, 35 N. J. Eq. 266, it was said: "There is a class of special and exceptional contracts in which courts of equity refuse to exercise jurisdiction by way of specific performance. These are contracts having such terms and provisions that the court could not carry into effect its decree without some personal supervision and oversight over the work to be done, extending over a considerable period of time, such as agreements to repair or build, to construct works, to build or carry on railways, mines, and the like." In Kendall v. Frey, 74 Wis. 26, 17 Am. St. Rep. 118, 42 N. W. 466, which was a suit to compel specific performance of a contract to erect a building on a certain lot, the court, adopting the rule above announced, denied relief. In Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430, where the suit was for the specific performance of a contract in a lease on the part of

the lessor to repair damages by fire, among other things, it was said by the court: "The idea that the court can appoint a receiver to take possession of the property and cause the work to be done with money furnished by the defendant would be, in the language of Lord Worthington, absurd." The relief sought was denied. In a case of our own (*Bridgeport Land & Improv. Co. v. American Fireproof Steel Car Co.* 94 Ala. 502, 10 So. 704), it was said: "We are of opinion that a bill for a specific performance would not lie under the facts as they appear in the present case. The consideration expressed is the 'erecting and operating of a car factory,' etc. To carry out this agreement requires the exercise of labor and special skill, judgment, and discretion; . . . and, furthermore, a court of chancery will not undertake to enforce a specific performance, 'when it involves the exercise of special skill, judgment, and discretion,'"—citing *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449, and *Clark's Case*, 1 Blackf. 122, 12 Am. Dec. 214.

It seems, both on reason and authority, that where the erection of the building requires the exercise of skill, judgment, and discretion, a court of equity will not assume jurisdiction for the enforcement of specific performance of a contract in such a case. There can be no doubt that the erection of the building, such as is referred to in the contract in this case, would require the exercise of "special skill, judgment, and discretion," and would extend over a considerable period of time. The erection of such a building would require the services of the architect, the skilled mechanic, and various workmen and superintendents. Necessarily the distribution and placing of the beams, vents, and air-shafts, component parts of such a building, and the very things of which the bill complains as diminishing the "floor space" contracted for in the lease, are involved in the exercise of the required special skill, judgment, and discretion in the construction of the building. Under the authorities cited above, and on the facts stated in the bill, we are clearly of the opinion that there cannot be an enforcement of specific performance of the contract in a court of equity.

It is insisted by counsel for appellant that, even though the appellant be not entitled to have the contract specifically performed by the decree of the court, yet, since his prayer for relief is in the alternative for relief by injunction, that he ought to be granted that relief. The prayer for injunction is in the alternative,—to restrain the defendant from violating its contract as to the "floor space" leased to complainant, 19 L.R.A. (N.S.)

"or" commanding the respondent to perform its contract in this respect. It is insisted that the bill has equity for this purpose. The equity of the bill is to be determined on the facts stated in the bill, and not on the prayer for relief alone. It appears on the face of the bill that the thing complained of as constituting a violation of the contract, and asked to be enjoined, had already been done, and hence the violation was complete at the time of the filing of the bill. There is, therefore, no room for invoking the doctrine of the interposition of a court of equity to prohibit the violation of a contract. As to the alternative prayer for a mandatory injunction to compel the respondent "to so distribute the floor space on the ground floor of said building as to give your orator the amount to which he is entitled by the terms of said lease," for the same reasons, in a case like the present one, that a court of equity would decline to enforce a specific performance of the contract, it would refuse to interfere by mandatory injunction. Practically there can be no difference in the application of the two remedies—that of specific performance and mandatory injunction—under the facts in the case. The court, in either event, would be confronted with the proposition of the "special skill, discretion, and judgment" required in the erection of the building. Manifestly the relief sought by injunction would compel a removal of the "beams, vents, and air shafts" which have already been placed, and, for aught that appears, such a thing, if feasible, could not be accomplished without materially deranging the whole plan of structure of the building. We repeat that, under the facts in this case, the same principal is involved in the granting of relief by mandatory injunction as in the enforcement of a specific performance of the contract. The case of *Hendricks v. Hughes*, 117 Ala. 501, 23 So. 637, cited by counsel for appellant, is not in point. The facts of the present case clearly differentiate these two cases.

It is further insisted that the bill should be retained for the purpose of compensation in damages. The rule is stated as follows in 20 Enc. Pl. & Pr. p. 483: "The power to grant relief by way of compensation exists only as ancillary or incidental to the power to grant specific performance. It is only under special circumstances and upon peculiar equities, as, for instance in cases of fraud, or when a party has disabled himself by matters *ex post facto* from a specific performance, or when there is no adequate remedy at law, that the court awards pecuniary compensation in lieu of other relief. Where the court has no jurisdiction to decree specific performance, and no other

special equity intervenes, the bill cannot be retained for the purpose of awarding damages." *Sims v. McEwen*, 27 Ala. 184; *Harrison v. Deraamus*, 33 Ala. 463; 1 Pom. Eq. Jur. 237.

The bill here must depend for its equity upon the doctrine of specific performance; and, as we have seen, under the facts stated, that principle cannot be applied. There is no other special equity shown by the facts that would justify a retention of the bill for the purpose of awarding damages. For this purpose the complainant has a complete and adequate remedy at law.

It follows, from what we have said, that the decree must be affirmed.

Simpson, Denson, and McClellan, JJ., concur.

ILLINOIS SUPREME COURT.

LUDWIG A. D. GATHMAN

v.

CITY OF CHICAGO, Appt.

(236 Ill. 9, 86 N. E. 152.)

Pleading — variance.

1. There is no variance between a declaration charging a city for negligent injury by the act of its bridge tender, and evidence showing that the injury was caused by persons who, to the knowledge of the city, were employed by its appointee to do the actual work of operating the bridge.

Trial — fellow servants — jury.

2. Whether or not a city employee sent by an officer of one department of the government to take measurements of a bridge, and the persons tending the bridge, who are in another department of the government, and under the control of other officers, and whose duties do not bring them into habitual association with the former, are fellow servants, is a question for the jury.

Case Note. — Liability of municipality for negligence of bridge tender.

The following cases hold that a municipal corporation is not liable for the negligence of its bridge tender unless such liability is imposed by statute: *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397; *Butterfield v. Boston*, 148 Mass. 544, 2 L.R.A. 447, 20 N. E. 113; *French v. Boston*, 129 Mass. 592, 37 Am. Rep. 393.

And this doctrine of nonliability was applied in *Corning v. Saginaw*, 116 Mich. 74 40 L.R.A. 528, 74 N. W. 307, where a municipal corporation did not derive any benefit from a drawbridge which it maintained for the public good in its governmental and public character.

But, as the doctrine that a city is liable for the negligence of its servants in its cor- 19 L.R.A. (N.S.)

Servant — assumption of risk — raising bridge.

3. A servant sent to take measurements underneath a bridge, who, before going beneath it, has an understanding with the bridge tenders that the bridge shall not be raised without a signal from him, does not assume the risk of their negligent violation of that understanding.

Master — liability — employees of agent.

4. A municipal corporation is liable for the negligent operation of a bridge by persons employed with its knowledge by its duly-appointed bridge tender to do the actual work required in the operation of the bridge, although they are not in the actual employment of the city.

Municipal corporation — employee — injury — liability.

5. A municipal corporation is liable for injury through the negligent operation of a bridge maintained as part of its highway system to one sent to take measurements beneath it.

(October 26, 1908.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Hand, J.:

This was an action on the case commenced by Ludwig A. D. Gathman against the city of Chicago and James O'Connor, in the circuit court of Cook county, to recover damages for a personal injury alleged to have been sustained by him while in the employ of the city of Chicago, through the negligence of the defendants. The plaintiff dismissed the case as to O'Connor, and thereafter there was a trial upon a declaration containing one count (to which the general issue was filed), which, in substance,

porate as distinguished from its governmental duty prevails in Wisconsin, it was held in *Naumburg v. Milwaukee*, 77 C. C. A. 67, 146 Fed. 641, that a city is liable for the negligence of a bridge tender where, by statute, he was declared to be a city officer, and the duty of maintaining and attending the bridge was thereby imposed upon the city. However, a *dictum* is found in *Stephani v. Manitowoc*, 89 Wis. 467, 62 N. W. 176, to the effect that there is no liability unless created by statute.

So, the combined negligence of a bridge tender and one whom he has employed to assist him, although not a servant of the municipality, in driving a child from the open draw of a bridge, will render the city liable where the child received an injury. *Chicago v. O'Malley*, 196 Ill. 197, 63 N. E. 652.

charged that on January 10, 1901, the defendant the city of Chicago owned, controlled, and operated a certain bridge, known as the "Van Buren street bridge," in said city, and employed the defendant James O'Connor as a bridge tender thereon, and to have charge of the machinery and attachments of said bridge for the operation thereof, and to raise and lower the same; that on said day the plaintiff was also employed by the said defendant the city of Chicago as a machinist, and was by said defendant ordered to make certain measurements, and to perform certain work, on the said Van Buren street bridge, and beneath and about the same; and while he was in the performance of said work, and at work beneath the bridge, the said defendants carelessly and negligently set the machinery of said bridge in motion, and that, while the plaintiff was exercising reasonable care for his own safety, because of the negligence of the defendants, he was caught between two heavy pieces of iron, and was greatly and permanently injured. At the first trial the jury returned a verdict, under the direction of the court, against the plaintiff, upon which the court rendered judgment in favor of the city, which judgment was reversed by the appellate court. 127 Ill. App. 150. Upon the second trial the plaintiff recovered a verdict for the sum of \$5,000, upon which judgment was rendered against the city, which judgment has been affirmed by the appellate court for the first district, and a further appeal has been prosecuted to this court.

The appellate court, in its last opinion, made the following statement of facts, which we find, from an examination of the record, to be substantially correct: "Appellee, at the time of his injury, had been in the employ of the city for a number of years in the bridge department; a subordinate department of the department of public works of

the city. A Mr. Willman had immediate charge of the bridge department, under Patrick White, the superintendent of bridges, and had authority to give directions to appellee. January 10, 1901, Mr. Willman directed the appellee to go to the Van Buren street bridge, and take a measurement of the stroke of the arm of the heel lock when the bridge was stationary, and then the bridge tender would raise the bridge for him to take another measurement, so as to get the full stroke of the arm. The evidence tends to prove that, in order to ascertain the full stroke of the arm, it was necessary to take one measurement when the bridge was stationary and another when it was raised. Van Buren street lies east and west, and the bridge in question is across the Chicago river on the line of Van Buren street, and connects the part of the street east of the river with the part west of it, so that when it is closed it is a part of the street. The bridge is a rolling lift bridge, and is operated by machinery moved by electrical power. The machinery which operates the east part of the bridge is under the street on the east side, and that operating the west part under the street on the west side. The parts of the bridge each side of the center are operated separately by separate machinery, and each part requires a man to operate it, so that the operation of the bridge requires at least two men. There is a shanty at the southeast corner, and another at the northwest corner, of the bridge, in which are situated the appliances to turn on and regulate the power which moves the bridge machinery. When either part of the bridge is raised, the end next the approach to the bridge goes up. To take measurements as directed, it was necessary for the appellee to go beneath the part of the bridge which lay east of the center when the bridge was closed or stationary. James O'Connor was the bridge tender at the time

And it was held in *Chicago v. Mullen*, 54 C. C. A. 94, 116 Fed. 292, and in *Lehigh Valley Transp. Co. v. Chicago*, 237 Ill. 581. 86 N. E. 1093, that a municipality is liable for the negligence of a bridge tender in operating the draw of a bridge over navigable water so as to inflict an injury upon a passing vessel, as, in operating a bridge, it acts in its private, instead of its governmental or public, capacity. To the contrary, however, see *Corning v. Saginaw*, supra.

And the doctrine just stated was applied in *Weisenberg v. Winneconne*, 56 Wis. 667, 14 N. W. 871, where, by statute, a municipality was charged with the duty of maintaining a bridge, keeping it repaired "and attended," and the negligence of the bridge tender in operating the draw resulted in 19 L.R.A. (N.S.)

the death of one upon a boat which attempted to pass through it.

So, a municipality will be liable for injuries sustained by a vessel in passing through a drawbridge as the result of the negligence of the bridge tender, where, by statute, the bridge is declared a public highway, and the control thereof vested in the department of parks. *Edgerton v. New York*, 27 Fed. 233.

Attention may be called to the case of *Woodhull v. New York*, 150 N. Y. 450, 44 N. E. 1038, reversing 76 Hun, 390, 28 N. Y. Supp. 120, where it was held that a city was not responsible for a false arrest made by a bridge policeman, appointed pursuant to statute, in the discharge of his public duty, even assuming that it would have been liable had he acted merely as a servant or agent of the municipality.

of the accident, having been regularly appointed as such by the mayor of the city, with the concurrence of the city council. The actual work of operating the bridge was done by James O'Brien, who operated the part of it east of the center, and by James McDonald, who operated that part of it west of the center. These men were not employed or paid by the city, but were hired and paid by James O'Connor, the bridge tender. Patrick White, superintendent of bridges, testified that he 'had authority, if he saw a man operating a bridge improperly, to discharge him, or make him leave that work; that it made no difference who he was, if he was doing something wrong, he could discharge him immediately.' Appellee testified that after he was directed by Willman, as above stated, he went to the bridge, and into the bridge house on the east side, and told O'Brien that he was sent there to take a measurement; that he would take one measurement first, and then would signal him (O'Brien) that he had taken that measurement, and for him to lift the bridge, and then he would take the other, and when through would signal him to lower the bridge; and O'Brien said, 'it was all right.' The appellee further testified that after the conversation above mentioned, and four or five minutes before he went beneath the bridge, he went to the west side of the bridge, and talked with McDonald, and then went back to the east side and repeated to O'Brien what he had said to him before. McDonald, who operated the west side of the bridge, testified that plaintiff came to him about 10 o'clock, and said he wanted to take some measurements, and would want the bridge raised, and witness told him to notify the operator on the other side, and plaintiff said he would do so, and give that operator the signal when he was ready; and the arrangement was that plaintiff and his helper, James Burke, were to notify the operator on the east side of the bridge when they were ready to have that side raised, and that four or five minutes after plaintiff went underneath the bridge, witness was signaled from the east side to raise the bridge; that it was necessary for witness to raise his part of the bridge 5 feet to unlock the bridge, so as to allow the east half to be raised. It appears from the evidence that James J. Kennedy, a common laborer, who had been employed occasionally by McDonald and O'Brien to assist them, and paid by whichever of them employed him, was on the bridge at the time in question. He testified that he was in the shanty at the east end of the bridge when the plaintiff was on his way below, and that O'Brien, who was shoveling snow at the time, told witness to get ready to make a lift,—to go ahead and

make the lift, as plaintiff wanted to make some measurements,—and witness signaled to McDonald, who signaled back that he was ready, and rang the bell to clear the bridge, and started to raise his end when the west side went up several feet; that witness turned on the current, and started to raise the east end, when he heard a voice, 'Stop! for God's sake, stop!' and witness shut off the current. He also testified that before he made the lift he received no signal from below. While plaintiff was underneath the floor of the bridge, with James Burke, his helper, and engaged in making the first measurement of the arm of the heel lock, the power was turned on, the machinery set in motion, and the east half of the bridge raised without any signal from either him or Burke. The consequence was that appellee was caught and crushed between the moving arm of the heel lock and an iron column, and was seriously, and, as the evidence tends to prove, permanently, injured."

Messrs. Edward C. Fitch and Charles B. Stafford, with Messrs. Edward J. Brundage and John R. Caverly, for appellant.

Mr. Charles J. Trainor, for appellee:

A bridge across a river in the street of a city is a part of the street, and the city is bound to control and manage it in such manner as to avoid injury to those rightfully using it or about it; and for a neglect of which duty the city will be responsible in damages.

Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418, Mechanicsburg v. Meredith, 54 Ill. 84; Kreigh v. Chicago, 86 Ill. 407; Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 295; Chicago v. McDonald, 57 Ill. App. 250; Gavin v. Chicago, 97 Ill. 66, 37 Am. Rep. 99.

A delegation of power, such as was given to the bridge tender, carries with it the implied power to use all means reasonably necessary to carry out the delegated power.

Mechem, Agency, §§ 280-311; 2 Dill. Mun. Corp. 4th ed. p. 881.

When the master delegates duties which the law imposes upon him, to an agent, the agent, in whatever rank, in performing said duties, acts as the master, and the master is liable for injury caused by his negligence.

Mobile & O. R. Co. v. Godfrey, 155 Ill. 78, 39 N. E. 590; Baier v. Selke, 211 Ill. 517, 103 Am. St. Rep. 208, 71 N. E. 1074; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285; Libby, McNeill, & Libby v. Scherman, 146 Ill. 541, 37 Am. St. Rep. 191, 34 N. E. 801; Chicago & A. R. Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826; Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225; Leonard v. Kinnare, 174 Ill. 532, 51

N. E. 688; *Kewanee Boiler Co. v. Erickson*, 181 Ill. 549, 54 N. E. 1044.

The question of who are fellow servants is one of fact for the jury.

Pullman Palace Car Co. v. Laack, supra; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12; *Hartley v. Chicago & A. R. Co.* 197 Ill. 440, 64 N. E. 382; *Chicago & E. I. R. Co. v. Driscoll*, 207 Ill. 15, 69 N. E. 620; *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95.

The injured employee and the party whose negligence caused the injury must be servants of the same master before the fellow-servant rule will apply.

Pullman Palace Car Co. v. Laack, supra; *Tierney v. Chicago Junction R. Co.* 92 Ill. App. 631.

When a servant is employed in a department separate and distinct from that of a servant whose negligence causes an injury, the master is liable.

Chicago City R. Co. v. Leach, 208 Ill. 205, 100 Am. St. Rep. 216, 70 N. E. 222; *Ryan v. Chicago & N. W. R. Co.* 60 Ill. 171, 14 Am. Rep. 32; *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341; *Chicago & A. R. Co. v. Hoyt*, 122 Ill. 374, 12 N. E. 225.

Hand, J., delivered the opinion of the court:

It is first contended that there was a fatal variance between the declaration and the proof in this: That the declaration charged that O'Connor was the employee of the city, responsible for the accident which caused the injury of appellee, while the evidence showed that O'Connor was not present at the time of the accident, but that the actual work in raising the bridge at the time appellee was injured was performed by James O'Brien and James McDonald, who were in the employ of O'Connor, and not in the employ of the city. There are two satisfactory answers to this position of the city: First, by the dismissal as to O'Connor, he was eliminated from the case, and the declaration thereafter, without amendment, charged the city with the negligent acts which caused the injury to the appellee; and secondly, the proof sustained the averment of the declaration that it was the negligent act of O'Connor which caused the injury. The evidence showed that O'Connor, a saloonkeeper, was regularly appointed by the mayor of the city of Chicago bridge tender of the Van Buren street bridge; that he did not tend the bridge personally, but employed O'Brien and McDonald to do the work for him, and that James J. Kennedy, under the direction of O'Brien, set the machinery in motion on the occasion when the appellee was injured. The city knew that O'Brien and McDonald were

in the employ of O'Connor, and were in actual control of the bridge. O'Brien and McDonald, therefore, as to the city, stood in the place of O'Connor, and the negligence of O'Brien in directing Kennedy to raise the bridge at the time of the injury was the negligence of O'Connor, and proof that the negligent order to raise the bridge was given by O'Brien sustained the averment of the declaration that it was the negligence of O'Connor which caused the accident.

It is next contended that O'Connor, O'Brien, McDonald, and Kennedy were the fellow servants of the appellee, and that appellee cannot recover for the negligence of O'Connor, or persons in his employ, in handling said bridge. The question whether the servants of a common master are fellow servants is usually a question of fact, and never becomes a question of law, unless the facts proven show such relation so clearly to exist that all reasonable minds will readily agree that such is the relation of the servants of the common master to each other. *Duffy v. Kivilin*, 195 Ill. 630, 63 N. E. 503; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, 71 N. E. 371; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12. Here the injured servant was performing service in one department of the city government, and was sent by his superior officer to the bridge to make certain measurements, while the servants of the city causing the injury performed service in another department of the city government, and were under the control of other superior officers, and the servants of the city handling the bridge had nothing to do with making the measurements which appellee had been directed to make; their duties being to care for and handle the bridge. The appellee and the servants of the city who caused the injury were not, therefore, at the time of the injury, co-operating with each other in the particular business of making said measurements or of raising said bridge, but, at the time the appellee was injured, he was engaged in one employment,—i. e., in making measurements,—while the other servants of the city who caused his injury were engaged in doing an entirely other thing,—i. e., raising the bridge. The appellee and said servants were not therefore necessarily co-operating together at the time appellee was injured. Neither did the line of the employment, or the usual duties of the appellee and the servants of the city who operated the bridge, necessarily bring the appellee and said servants into habitual association, so that they might exercise a mutual influence upon each other promotive of the caution which would protect each other from an injury which might result from the negligence of each other. In *Chicago & A.*

R. Co. v. Hoyt, 122 Ill. 369, 12 N. E. 225, on page 374, it was said: "It was said by this court in North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186, that the servants of the same master, to be coemployees, so as to exempt the master, from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business,—i. e., the same line of employment,—or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution." We therefore think it clear the court properly submitted the question whether the appellee and the servants of the city who controlled the bridge at the time he was injured were fellow servants to the jury as a question of fact.

It is also urged that the appellee assumed the risk of being injured by the negligence of the bridge tenders in prematurely raising the bridge while he was beneath the bridge, making the measurements which he had been sent to the bridge to make. The general rule is a servant only assumes the ordinary risks of the business in which he is employed. In this case, before going beneath the bridge, he had an understanding with the servants of the city in charge of the bridge that they would not raise the bridge until he signaled them so to do, and the injury which he subsequently sustained was caused by reason of the fact that said servants violated that understanding, and raised the bridge before the appellee had signaled them so to do, and without notice to the appellee that they were about to raise the bridge. Clearly, the negligence of the servants of the city in charge of the bridge in raising the bridge, after they had agreed not to raise it until they had been signaled to raise the same by the appellee, was not a risk which the appellee assumed by virtue of his contract of employment with the city. In *Illinois Third Vein Coal Co. v. Cioni*, 215 Ill. 583, 74 N. E. 761, on page 590, it was said: "When a servant enters the employment of the master, the ordinary risks of such employment which he assumes include the negligence of fellow servants associated with him. But he does not assume the risk of the negligence of employees of the same master who are not fellow servants with him." And in *Chicago & E. I. R. Co. v. White*, 209 Ill. 124, 70 N. E. 588, on page 132, it was said: "A servant, however, does not assume the risk of a negligent manner of doing the work by other servants who are not his fellow servants, unless it is customary to do the work in that manner. The risk of such an act is not one of the

usual or ordinary hazards of the employment."

It is also urged that the court erred in instructing the jury that the city was responsible for the negligent acts of the men in charge of the bridge in raising the same without being signaled so to do by appellee, as it is contended O'Brien, McDonald, and Kennedy were not the servants of the city. O'Connor was the regularly appointed representative of the city, and in charge of the Van Buren street bridge, and the city was responsible for his negligent acts, done in the line of his duty. With the knowledge and consent of the city, O'Connor did not personally perform the duties imposed upon him, but the city permitted such duties to be performed by persons employed by O'Connor. When the city permitted O'Connor to employ men to operate the bridge, and the persons employed by him did operate the bridge with the knowledge and the consent of the city, we think it clear the city became liable for the negligent acts of such employees to the same extent that it was liable for the negligent acts of O'Connor, and that it cannot escape liability by reason of the fact that the men in active control of the bridge were paid by O'Connor instead of by the city. Suppose the persons employed by O'Connor operated the bridge in a negligent manner, and, in consequence of such negligence, a person crossing the bridge had been injured. It clearly would not have been a defense to an action brought by such person that the persons in charge of and operating the bridge, with the knowledge and consent of the city, were paid by O'Connor instead of by the city. Our conclusion is that the city was responsible for the negligent acts of the persons in charge of said bridge, and that the court did not err in so instructing the jury.

Other instructions given on behalf of the appellee have been criticized. We think, however, the jury were instructed substantially in accordance with the law.

It is finally contended that the city is not liable to the appellee for the injury which he sustained. The bridge forms a part of one of the public streets of the city, and while it is not stationary, like the street of which, when closed, it forms a part, it is as much under the control of the city as the street; and, if the servants of the city, in raising or lowering the bridge, injured a person rightfully crossing the bridge, or a person upon a boat beneath the bridge, the city would clearly be liable for such injury; and we are unable to see why the city should not be held liable to the appellee, who was lawfully upon the bridge at the time he was injured, for the negligence of

the persons who were operating the bridge with the knowledge and consent of the city.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

IOWA SUPREME COURT.

ELECTRIC STORAGE BATTERY COMPANY

v.

WATERLOO, CEDAR FALLS, & NORTH-ERN RAILWAY COMPANY, Appt.

(138 Iowa, 369, 116 N. W. 144.)

Contract — warranty — parol.

1. Liability for breach of warranty that the apparatus installed will produce certain results cannot be established by parol under a written contract to furnish certain elec-

Case Note. — Right to show parol warranty in connection with a contract of sale of personalty.

It is not intended in this note to include cases involving fraudulent representations or fraudulent warranties, or cases involving fraud or mistake in omitting a warranty in a written contract of sale. Neither will cases be included which involve warranties as to property other than chattels. Cases of implied warranties are also excluded.

Evidence of an oral warranty relating to an article which is the subject-matter of a written contract of sale is generally held inadmissible.

Some jurisdictions, however, recognize exceptions to this general doctrine. Thus, it has been held that even though a contract of sale is in writing, and contains specific warranties, yet evidence of a parol warranty relating to a matter as to which the written warranties are wholly silent is competent.

This exception to the rule prevails in England, and the doctrine of a majority of the American decisions on the subject is there modified to this extent, although the earlier decisions of that country applied the doctrine of exclusion of oral warranty as strictly as do a majority of the jurisdictions of this country. Such cases, however, have been expressly disapproved by the later cases on the subject. The doctrine was first modified in that country in passing upon the admissibility of evidence to show other agreements made contemporaneously with a written contract, which induced the contract, but which were not incorporated therein. Such oral agreements were held to be collateral to the written contract, and therefore evidence of the same was held admissible. Among such cases are: *Morgan v. Griffith*, 23 L. T. N. S. 783; *Ersine v. Ardeane*, 29 L. T. N. S. 234; and *Angell v. Duke*, L. R. 10 Q. B. 174.

Influenced by the foregoing cases, in *Edward Lloyd Limited v. Sturgeon Falls Pulp Co.* 85 L. T. N. S. 162, the earlier cases hold-
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trical apparatus, to be first-class and of latest type, all work to be done in first-class manner.

Same — waiver.

2. Acceptance and use for months of electrical apparatus without criticism or complaint will preclude reliance on a defense of breach of parol warranty of results from its use in an action for the purchase price.

(May 6, 1908.)

APPEAL by defendant from a judgment of the District Court for Blackhawk County in plaintiff's favor in an action brought to recover the contract price of certain electrical apparatus. Affirmed.

Statement by Deemer, J.:

Action to recover the balance of the purchase price of certain storage batteries and

ing that evidence of a parol warranty of an article sold by written contract was inadmissible were disapproved, and the doctrine was enunciated that where a contract of sale contained no warranty as to the matters in reference to which it was claimed that a parol warranty had been made at the time of the execution of the contract, and which had not been incorporated therein, evidence of such warranty was competent. In this case the parol warranty sought to be proved related to a water power and appurtenances, which was the subject-matter of the contract of sale. The oral warranties were in effect as follows:

(a) That water power to a given extent could and would, at a stated price, be developed within a reasonable time and at a specified maximum expense at a certain place without the utilization of any other falls. (b) As to the quantity of pulpwood conveyed. (bl) As to the cost of cutting and delivering at the mill logs for making pulp. (c) As to the condition of the property and suitability for the purpose intended. (d) As to the time when the buildings and works could be completed. (e) As to the amount of pulpwood which would be at the mill at a given time to enable the purchaser to operate the mill. (f) That there was no contract or agreement which interfered with the rights of the claimants (purchasers) in respect to the property in question, or restricted their use or enjoyment thereof.

In reaching its conclusion, after having considered the cases already mentioned, the court said that these authorities were binding upon it, and that they could no longer act on the principle laid down in *Kain v. Old*, 2 Barn. & C. 627, wherein evidence tending to prove a verbal warranty that a ship conveyed by written contract was copper-bolted was held incompetent. As to warranties b 1, c, d, and e, *Bruce, J.*, said: "On the authority of the cases I have mentioned, I think evidence, as I have already said, may be given to prove a verbal war-

Iowa, 464, 56 N. W. 541; 30 Am. & Eng. Enc. Law, 2d ed. p. 168.

Whether a written instrument does purport to be a complete and final repository of the agreement, so as to exclude parol testimony, is a question of law for the court, to be determined upon an inspection of the instrument.

Mechem, Sales, § 1256; Thompson v. Libby, supra; Naumberg v. Young, 44 N. J. L. 333, 43 Am. Rep. 380; Hei v. Heller, 53 Wis. 415, 10 N. W. 620; Union Selling Co. v. Jones, supra.

If the vendee retains goods purchased by him beyond a reasonable time, it constitutes an acceptance, and is a waiver of any defect.

Brown v. Foster, 108 N. Y. 387, 15 N. E.

collateral agreement of warranty constituting no part of the contract of sale, properly speaking. The warranty in this case was given at the time the order was executed, and was to the effect that the machine contracted for would be capable of doing certain work in a good, workmanlike, efficient, and satisfactory manner.

The doctrine of the Chapin Case was also recognized in Eighmie v. Taylor, 98 N. Y. 288, wherein it was held that writings for the exchange of property for oil wells and improvements relating thereto, which, taken together, covered both sides of an entire contract and were designed to signify and to execute its terms, and were adequate for that purpose, although containing no warranty, could not be varied or affected by evidence of a contemporaneous parol warranty to the effect that the oil wells which were covered by the lease would yield a certain number of barrels of oil per day, and that the machinery, etc., used in connection with the wells, was new and of improved pattern, and that the debts of the concern did not exceed a given amount. In reaching this conclusion the court distinguished this case from the Chapin Case. Referring to that case, the court said: "That case did sustain a parol warrant in the face of a written agreement of sale: but that warranty was not as to the then present quality or condition of the thing sold, but as to what it would accomplish in the future, after the completed and executed sale, the terms of which it did not seek to touch or modify." After quoting that portion of the opinion of that case which is quoted herein, the court continued: "The guaranty sustained, it is thus apparent, was founded upon a future contingency which assumed the completed contract as executed, and to remain unchanged. Indeed, the agreement was, in the specified emergency, to take the machines back. If the case be near the border line in the application of the exception to the facts, there can be no question as to the soundness of the doctrine asserted."

Waterbury v. Russell, 8 Baxt. 159, also holds that a memorandum of the terms of a contract which is reduced to writing, and 19 L.R.A. (N.S.)

608; Columbia Rolling Mill Co. v. Beckett Foundry & Mach. Co. 55 N. J. L. 391, 26 Atl. 888; McCormick Harvesting Mach. Co. v. Martin, 32 Neb. 723, 49 N. W. 700; McCormick Harvesting Co. v. Chesrown, 33 Minn. 32, 21 N. W. 846; Gammon v. Abrams, 53 Wis. 323, 10 N. W. 479; Pratt v. Peck, 70 Wis. 620, 36 N. W. 410; Rosenfield v. Swenson, 45 Minn. 190, 47 N. W. 718; Allison v. Vaughan, 40 Iowa. 421; Mackey v. Swartz, 60 Iowa, 711, 15 N. W. 576; Wineland v. Jones, 77 Iowa, 401, 42 N. W. 333.

Decmer, J., delivered the opinion of the court:

The defendant owns and operates a system of electric street railway in the cities

which contains no warranty, may nevertheless be enlarged or added to by proof of an oral warranty as to the quality of corn conveyed in such contract. This decision follows as authority Hogg & Belcher v. Cardwell, 4 Sneed, 157, wherein it was held that a contract in writing for the trade of tobacco, which contained no warranty clause, could be added to or enlarged by evidence of an oral warranty as to the quality of the tobacco. The court treated the representations as to the quality of the tobacco as made to influence the contract, and said that if in fact they had that effect, it was equivalent to a warranty.

So where a written order for roofing material contained no warranty, but did not in terms exclude a warranty, it was held, in Florence Wagon Works v. Trinidad Asphalt Mfg. Co. 145 Ala. 677, 40 So. 49, that the purchaser could show a contemporaneous oral warranty of the roofing against defects for a designated period of time, and could set off damages for the breach of such warranty in an action against it for the purchase price.

Merriam v. Field, 24 Wis. 640, seems also to recognize the doctrine that where no express warranties are contained in a written contract of sale, evidence of parol warranty is competent; and it apparently limits this exception to the general rule to such a case. On this point the court said: "The plaintiff offered to show a warranty, by showing that the vendor represented the lumber to be merchantable at the time of the sale. But this was excluded, upon the ground that it was an attempt to add to the terms of the written contract by parol. This ruling was correct. The plaintiff relied on a class of cases holding that, although a bill of sale or other conveyance had been executed in writing, still, where such paper did not profess or attempt to express the entire agreement between the parties, but was merely executed in part performance of it, the whole agreement might be shown, although part of it rested in parol. But the difficulty in applying that rule here is, that the written bill of sale does contain express warranties in respect to one or two particulars. And where that

of Waterloo and Cedar Falls, an interurban line between said cities, and also an electric line to Denver Junction, in Bremer county. Defendant's power house is located in Waterloo. It has a rotary transformer for its Denver line at the station of Glasgow. It had a storage battery in Cedar Falls for several years prior to the time involved in this case. As the business of the defendant increased, it became necessary to increase its power in Cedar Falls. It had secured the business of delivering coal to the State Normal School, which is located on the outskirts of Cedar Falls, on a hill. It did not have sufficient power to move the coal to the Normal during the day without interrupting its other traffic, and was compelled to haul the coal

at night. The matter was taken up by Mr. Cass, president of the defendant, with the plaintiff at its office in Chicago, and the object which the defendant desired, to wit, sufficient power with which to haul defendant's coal cars to the Normal School, was stated. In November Mr. Osthoff, plaintiff's engineer, who had charge of such matters, came to Waterloo, and made a personal examination of defendant's plant, lines, and equipment, with a view of working out a plan which would produce the results required by the defendant. In February of the year 1903, after Osthoff had been at Waterloo, and returned to the plaintiff's place of business, plaintiff wrote defendant a plan for bringing about the results desired, and making a proposition

is the case, it can no longer be said that the writing does not attempt to express the contract of the parties, so far as express warranties are concerned. The presumption then is, that it expresses the whole contract, as to such warranties; and to allow others to be shown by proving verbal statements at the time of the sale would be in violation of the old and salutary rule against varying and adding to written contracts by parol evidence."

The doctrine was enunciated in *Tufts v. Verkuyl*, 124 Mich. 242, 82 N. W. 891, that where there is an implied warranty that an article is suitable for the purpose for which it was bought, evidence of a verbal warranty, similar to that which would be implied by the contract itself, does not change the terms of a written instrument, and is therefore admissible. It was applied as to the purchase of a soda fountain, the court saying that there was an implied warranty that the fountain was suitable for the purpose for which it was bought, although the written order for it contained no such warranty; and that because the law would imply such a warranty, proof of an oral warranty to the same effect was admissible.

To the same effect is *Little v. G. E. Van Syckle & Co.* 115 Mich. 480, 73 N. W. 554 (contract for sale of a piano).

But in *Ehrsam v. Brown*, 64 Kan. 466, 67 Pac. 867, where neither a written order for the purchase of certain gyrators for use in a flour mill, nor the letter of acceptance, contained words of warranty of any kind, the order and letter were held to constitute such a contract in writing as to preclude the purchaser, in an action against him for the purchase price, from showing by parol evidence the existence and terms of an express warranty, independent of such writings, to the effect that such gyrators would be constructed of good material and of first-class workmanship, and would be supplied with necessary and suitable fixtures, and would in all respects be suited for the work intended. It was, however, said that if the defendant had based his right to affirmative relief upon the existence of an implied warranty substantially to the effect of the claimed parol ex-
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press warranty, and had the trial court submitted this theory of the case to the jury, the argument that the law would imply a warranty as to the suitability of the article for the purpose intended might be applicable, but would not be applicable, where the right to relief was based upon such a warranty as an express warranty.

Where written contract contained no warranty.

As stated, the majority of the decisions in this country on the subject do not recognize any exceptions to the general rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument apparently complete on its face. These cases may therefore be said to be opposed to the doctrine of the foregoing cases, wherein certain exceptions to this general rule have been either recognized or applied. The failure, however, in many instances, to consider the question from the standpoint of the cases already considered detracts considerably from their value as opposing authority. The nature of the question presented also tends greatly to diminish or enhance the value of the case as opposing those considered, even though no distinction is made, but the general doctrine of exclusion is applied without reference to the particular facts presented. Perhaps as clear-cut a denial of the existence of any exceptions to the general doctrine stated as can be found is contained in the cases cited in this subdivision, wherein the general rule of exclusion was applied although the written contract contained no warranties at all and it was sought to show a parol warranty.

The doctrine of the cases already discussed, which admit exceptions to the general rule excluding evidence of parol warranties where there is a written contract seems to have been considered and denied in *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* 60 Minn. 156, 68 N. W. 854, holding that a written contract for the sale of machinery, formal and complete in its character, and specifying with minute detail the particular make, name, size, and power of

which it was hoped would be satisfactory. This proposition was in writing, and reads as follows:

Chicago Office, Marquette Building, February 19, 1903.

Waterloo & Cedar Falls Rapid Transit Company.

Waterloo, Iowa.

Gentlemen:—

We propose to furnish and install two couples, consisting of two positive and two negative type F plates in each of your present 215 F-13 glass jars, in your plant at Cedar Falls, Iowa, for the sum of \$4,000. This quotation includes the cleaning of the present battery by us, and also new acid for the present battery. We have assumed that there will be sufficient room to install the additional cells. All additional racks and wire or cable connections between the old and the new cells, and any changes in the present wiring which may be necessary

to be furnished and done by you. All material to be first-class and of our latest type, and all work to be done in a first-class workmanlike manner and satisfactory to your company. Two thousand (\$2,000) dollars or fifty per cent (50 per cent) to be paid us upon delivery of the material, and two thousand (\$2,000) dollars or the remaining fifty per cent (50 per cent) when the material is installed.

Respectfully submitted by the Electric Storage Battery Company,

by Otto E. Osthoff, Engr. Chicago Office.

Accepted. The Waterloo & Cedar Falls Rapid Transit Company,

by L. S. Cass, President.

Routing of shipment to be supplied by Waterloo & Cedar Falls Rapid Transit Company.

Osthoff, plaintiff's engineer, followed this to Waterloo; and it is claimed that, before the proposition was accepted, the parties

the engine and boiler, and the appurtenances to be furnished, but which contained no warranty, could not be added to by proof of an oral warranty that the machinery would be capable of operating the plaintiff's mill at its full capacity, although it was claimed that the warranty was made in connection with, and at the same time as, the written contract. In reaching this conclusion, and in answering the contention that evidence of a parol warranty did not fall within the rule of exclusion, as the evidence thereof tended to prove a separate oral agreement as to a matter on which the writing was silent, and which was not inconsistent with its terms, the court said that the doctrine that, where an instrument was incomplete and did not contain the whole agreement, parol evidence of the omitted portion was admissible, did not go to the length of holding that this may be done by going outside the writing, and proving that there was a stipulation entered into, not contained in it, and hence that only part of the contract was put in writing; adding that if any such doctrine were to obtain, there would be very little left of the rule against varying written contracts by parol. And again: "If the written contract, construed in view of the circumstances in which, and the purpose for which, it was executed,—which evidence is always admissible to put the court in the position of the parties,—shows that it was not meant to contain the whole bargain between the parties, then parol evidence is admissible to prove a term upon which the writing is silent, and which is not inconsistent with what is written; but, if it shows that the writing was meant to contain the whole bargain between the parties, no parol evidence can be admitted to introduce a term which does not appear there. In short, the true rule is that the only criterion of the completeness of the written 19 L.R.A. (N.S.)

contract as a full expression of the agreement of the parties is the writing itself; but, in determining whether it is thus complete, it is to be construed, as in any other case, according to its subject-matter, and the circumstances under which and the purposes for which it was executed."

And in *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1, it was held that a written agreement for the sale of logs, which contained nothing on its face to indicate that it was a mere informal and incomplete memorandum, must be conclusively presumed to contain the whole engagement of the parties, and the manner and extent of the undertaking. The court said that a warranty of quality was an item and term of such a contract, and not a separate and independent collateral agreement, and it could not, therefore, be added to the written agreement by oral testimony although the agreement contained no warranty.

The theory that a representation as to the manner in which a dry kiln would operate might amount to a collateral oral warranty, in the absence of any warranty in the written contract of sale, was considered by Judge Taft in *Curran v. Hauser*, 6 Ohio N. P. 281, who, after considering the cases on the subject, held that such representations, either oral or by way of a circular furnished the purchaser, were not collateral warranties, and could not be received in evidence as such.

The doctrine was enunciated in *McClure v. Jeffrey*, 8 Ind. 79, as to contracts conveying the right to sell certain patent improvements to force pumps, which consisted of certain deeds of the patent rights, and a note for the purchase price, that it would be presumed under such circumstances that all oral negotiations or stipulations between the parties, which preceded or accompanied the execution of the instrument, were merged in it, and it would be treated

entered into an oral agreement, whereby the plaintiff undertook and agreed to make such changes and install such additions to the battery of the defendant then in use in Cedar Falls, in connection with other changes in defendant's equipment and additions thereto, as would enable the defendant to operate a freight train, consisting of a 23-ton locomotive and a 60-ton trailer loaded with coal to the Normal School at the same time defendant was operating its two 21-ton cars on other parts of its line, as well as its other traffic. Defendant further contends that plaintiff, through its agent, represented and guaranteed that, if defendant carried out the plan proposed, it would produce the results desired. Defendant contends that the real contract between the parties was oral, while plaintiff insists that its agreement is to be found in the proposition before referred to, which defendant accepted; that this embodies the entire agreement, and that parol evidence is

not admissible to change or vary the same. Further, it argues that, even if there was a warranty which was not complied with, defendant retained and used the goods for such a length of time, without objection or complaint, as that it should be held to have waived any defects in the property sold. Reduced to its last analysis, defendant's claim is not that there were any defects in the specific items of property furnished, but that, as a whole, it did not produce the results which plaintiff's engineer promised it would. The exact statement which it is claimed plaintiff made is shown by the testimony of one of defendant's witnesses, as follows: "When Mr. Osthoff came to my office in February, after I had received the written proposition and recommendations, we made up the figures as to the cost of making the changes and improvements set out in Mr. Osthoff's letter of February 19th. The figures amounted to fully the cost of installation of a rotary transformer station,

as the exclusive medium in ascertaining the agreement to which the parties bound themselves. Therefore, where the warranties sought to be proved were not contained in the written contract, parol evidence thereof was held inadmissible. It does not appear that the written contract contained any warranties at all.

The doctrine was also stated in *McCormick Harvesting Mach. Co. v. Yoeman*, 26 Ind. App. 415, 59 N. E. 1069, that where a written contract is made, oral warranties are merged in the written contract, and by its terms the parties must be bound. It was, however, not applied, as the case was disposed of on a question of pleading. The doctrine was also stated in *Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850; and *Rose v. Hurley*, 39 Ind. 77; *Smith v. Dallas*, 35 Ind. 255; but the cases were disposed of on other grounds.

In *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46, evidence tending to show an independent collateral oral contract to the effect that a certain refrigerating machine—the subject-matter of the original contract, which was in writing—was capable of cooling certain rooms in a brewery, which had been examined by the seller prior to the execution of the contract, was held inadmissible. The contract itself contained no warranty clause. This case has often been cited as one of the leading cases on this question, and it is therefore interesting to note that it is based on a state of facts very different from that usually presented, and from that presented in the cases which have followed it as authority. From the statement of facts it appears that, subsequent to the execution of the contract in question, a correspondence was had between the parties or their agents, in which the purchaser expressed his dissatisfaction with the contract because a warranty similar to the alleged

oral warranty was not incorporated therein, and the seller expressly refused to make such a warranty a part of the contract. Thereafter the purchaser, through his agent, wrote to the seller that he would like to have him commence at once to put up the machine. The court also said that, even if the evidence of the representations alleged to be a parol warrant were received, they would amount to no more than mere expressions of opinion.

So, where the contract for the sale of a boiler specifically described the boiler, and contained no warranty in reference thereto, it was held, in *Fitch v. Woodruff & B. Iron Works*, 29 Conn. 82, that evidence on the part of the purchaser that the seller warranted the boiler purchased to be as efficient as the purchaser's old boilers in operating his mill was inadmissible. It was further held that the rule that a written contract of purchase could not be varied, contradicted, or added to by parol proof was not affected by the fact that, during negotiations which resulted in the agreement, the purchaser informed the seller as to the amount of machinery the old boilers in his mill would operate, and that he wanted a new boiler which would operate as much machinery as the old one, and that the seller assured him that the boiler they were selling him would be as efficient in all respects as the old boilers, and consume at least one third less fuel.

And in *Detroit Shipbuilding Co. v. Comstock*, 144 Mich. 516, 108 N. W. 286, in an action on a note representing a part of the purchase-price of a steam boiler manufactured and sold by plaintiff to defendants under a written contract containing no warranty, evidence of parol representations made prior to the execution of the contract, and not contained therein, to the effect that the boiler would give greater steam power, pressure, and economy than the purchaser's

and this fact was stated by me in the conversation. When Mr. Osthoff came in, I had the figures all prepared. We went over them, and I said to Mr. Osthoff: 'Now, Mr. Osthoff, this expenditure of money will install a rotary transformer station at Cedar Falls, and give us something that we absolutely know there is no question about doing our business. Now, if you know and will guarantee that this expenditure of money will produce the results that you know we must have, which you are thoroughly familiar with, we will buy this battery from you, and permit you to go ahead and install an electric battery; but, if you are not prepared to guarantee absolutely and positively that this will do the work, then we propose to throw out the battery and expend this

money by putting in a rotary transformer.' Mr. Osthoff said: 'There is absolutely no question but that, with the expenditure of this money, you will have very much better results than you would obtain from a rotary transformer, and I have no hesitancy in guaranteeing to you that it will do so.' It was upon these alleged statements that it is claimed defendant placed the order. Plaintiff denies that Osthoff made any representations or guaranties, save that he proposed a plan and made recommendations for the equipment of the plant, so as to produce the desired results. Defendant claims that the plan did not produce the desired results, that plaintiff could not make it do so, even after repeated attempts, and that the scheme was an absolute failure;

old boiler, was held inadmissible to aid the implication of a warranty.

A written order for machinery, which contains no warranties, cannot be added to by evidence of an oral warranty that the machine mentioned therein would be strong and sufficient for the purpose for which the purchaser intended it, as such a warranty is not necessary to complete the original contract, and, although contemporaneous therewith, is not collateral to it. *Buckeye Mfg. Co. v. Woolley Foundry & Mach. Works*, 26 Ind. App. 7, 58 N. E. 1069.

Conant v. National State Bank, 121 Ind. 323, 22 N. E. 250, held that where the provisions of a written contract were to the effect that the sellers were to furnish and put in operation machinery for a 100-barrel flour mill, and the machinery to be furnished was particularly described and designated, but there was no warranty, at least, none as to capacity, the purchaser could not add to the written contract an oral stipulation to the effect that the sellers were to furnish and place in operation machinery that would manufacture three designated grades of flour, and with the capacity of 100 barrels daily. It is not clear whether the language in the contract constituted a warranty. No distinction was made, however, as the court regarded it as unimportant whether the contract contained a warranty or not.

Where a contract for the sale of coal is in writing, and it contains nothing to indicate that a sample was used or referred to, parol evidence cannot be allowed to show a sale by sample. Neither is evidence admissible to show that the contract was for coal of the same kind and quality as the purchaser had previously bought of the seller. *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830.

Although the case was disposed of principally upon the theory that the rule of an implied warranty did not apply, it was also held in *Davis Calyx Drill Co. v. Mallory*, 69 L.R.A. 973, 69 C. C. A. 662, 137 Fed. 332, that evidence of oral contemporaneous statements that a drill sold by written contract would bore holes through specific strata in

the earth, at a designated locality, was incompetent, although the contract contained no warranty. The court said that evidence of such an agreement was excluded by the fact that the contract was in writing, and by the rule that where the written contract of the parties is complete in itself, the conclusive presumption is that it embodies the entire engagement of the parties, and the manner and extent of their obligations, so that parol evidence of other terms is inadmissible to extend, modify, or contradict it.

In *Lower v. Hickman*, 80 Ark. 505, 97 S. W. 681, evidence of an oral warranty as to the capacity of a sawmill, the subject-matter of a written contract of sale, containing no warranty, was held to have been properly excluded.

A contract for the sale of machinery, which constitutes a perfect and complete contract for the sale of the property therein described, stating the consideration and acknowledging its payment, but which contains no terms relative to the condition, quality, or value of any articles enumerated, cannot be affected or added to by proof of an oral contemporaneous warranty as to the condition of the machinery. *Chamberlain v. Van Campen*, 7 N. Y. S. R. 99.

Neither can such a contract in writing for the sale of machinery, which contains no warranties, be changed by proof of a contemporaneous oral warranty as to the suitability of the machinery for the purpose intended. *Hungerford Co. v. Rosenstein*, 46 N. Y. S. R. 195, 19 N. Y. Supp. 471. To the same effect as to a written contract for the sale of adding registers is *Lamson Consol. Store Service Co. v. Hartung*, 46 N. Y. S. R. 191, 19 N. Y. Supp. 233. No warranty was contained in this contract, and the nature of the alleged oral warranty does not appear.

A contract in writing for the sale of machinery for a flour mill, which, so far as the opinion shows, contained no warranty, cannot be added to by evidence of a contemporaneous parol warranty as to how long it would take to put the machinery in place, and as to the quality of flour it would pro-

the contention here being that the equipment was too small, the booster and the feeders being inadequate in size from 75 to 100 per cent.

The first question in the case is the admissibility of the parol testimony to establish the warranty pleaded by defendant. Upon no subject known to the law of evidence has there been more difficulty than with what is known as the "parol evidence rule." The cases are not at all harmonious, and the decisions are often conflicting in the same jurisdiction. The difficulty is intensified when application of the rule is sought to be made to sales of personal property where there has been a written contract of sale. Plaintiff contends that the instrument of date February 19, 1903, heretofore

set out, is a complete, unambiguous, and certain contract, and that to import therein such a warranty as defendant relies upon would be contrary to the parol evidence rule. This is the primary question in the case, and with that solved in plaintiff's favor, there is nothing further to consider. The rule, as stated by Mr. Mechem in his work on Sales, is as follows: "Where the parties have reduced to writing what appears to be a complete and certain agreement importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous, or subsequent conversations, representations, or statements will not be

duce. *Kummer v. Dubuque Turbine & Roller Mills Co.* 4 Neb. (Unof.) 347, 93 N. W. 938.

Evidence of an oral warranty as to the condition and value of two newspaper establishments sold by written contract of sale is not admissible in behalf of the defendant to the foreclosure of a chattel mortgage given for the purchase price, where the written contract was silent as to any provision of warranty. *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625.

In *Mast v. Pearce & Cowan*, 58 Iowa, 579, 43 Am. Rep. 125, 8 N. W. 632, 12 N. W. 597, evidence of an oral warranty that certain cultivators were well made, of a material adapted to the purposes for which they were constructed, in all respects sound and perfect, and of merchantable value and quality, was held to have been improperly received where the contract for the sale of the cultivators was in writing and contained no warranty.

An interesting case, wherein the doctrine of exclusion of an oral warranty was applied, is *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 904. It was there held that a written contract for the sale of a quantity of beans, which contained no warranty, and was silent as to quality, nevertheless precluded evidence of a parol warranty that the beans would be of a quality similar to the sample shown upon the execution of the contract. The action was by the original owner of the beans against a subsequent purchaser from the original purchaser, the question involved being whether title had passed under the original contract, and this question depended upon whether or not the sale was by sample. If by sample, title had not passed, as it was conceded that the original purchaser, although he retained possession of the beans, refused to accept them under the contract, on the ground that they did not compare in quality with the samples. This claim was acquiesced in by the original owner, but, before he had removed the beans, the purchaser sold them to the defendant. By a majority of one, the court applied the doctrine of *Harrison v. McCormick*, *supra*, and *Thompson v. Libby*, 34 19 L.R.A. (N.S.)

Min. 374, 26 N. W. 1, and held that evidence that the sale was by sample was inadmissible.

Wiener v. Whipple, 53 Wis. 298, 40 Am. Rep. 775, 10 N. W. 433, holds it to be incompetent for the purchaser of barley by written contract, which contained no warranty, and did not show the sale to have been made by sample, to show by parol that the seller represented that the barley should be of the quality of a sample exhibited at the time of the contract.

Thompson v. Gortner, 73 Md. 474, 21 Atl. 371, also held that evidence of a verbal agreement for the sale of corn, in which the corn was warranted to be equal in quality to a sample, was incompetent to vary or contradict the terms of a written contract covering the same subject-matter, but containing no warranty.

Although a written contract for the sale of a quantity of apricots contained no warranty, it was held in *Germain Fruit Co. v. I. K. Arnsby Co.* 153 Cal. 585, 96 Pac. 319, that parol evidence was inadmissible to prove the existence of a warranty of quality. The court said that when, on the sale of personal property, a warranty was given, it was one of the terms of sale, and not a separate and independent contract; that to justify the admission of parol evidence on the ground that it is collateral, it must relate to a subject distinct from that to which the writing relates.

A contract in writing for the sale of a patent right to manufacture a certain type of sewing machine, which contained no representations or warranties of any kind, cannot be engrafted upon by evidence of a contemporaneous oral warranty that such machines would work so as not to drop stitches and that they would do the promiscuous sewing of a family. *Galpin v. Atwater*, 29 Conn. 93.

In *Jolliffe v. Collins*, 21 Mo. 338, where the written conveyance of a patent-right improvement to hay rakes contained no warranty, the purchaser was not permitted to set up a parol warranty. The court said that it would be presumed that the written instrument contained the entire contract.

received for the purpose of adding to or varying the written instrument. If, therefore, such a writing exists between the parties, and it contains no warranty at all, no warranty can be added by parol; if it contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies." *Mechem, Sales, § 1254.* Perhaps the leading case on this subject is *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46. This case is very closely in point, and is a strong authority in favor of appellee. In *Mast v. Pearce*, 58 Iowa, 579, 43 Am. Rep. 125, 8 N. W. 632, 12 N. W. 597, this question was before us, and during the course of the opinion the following language

The deed of a patent right, which contains no warranty, cannot be added to by proof of a contemporaneous oral warranty that the patent is a useful improvement. *Van Ostrand v. Reed*, 1 Wend. 424, 19 Am. Dec. 529.

A contract in writing for the sale of a patent right for a churn, which contains no warranty, excludes parol proof of an oral warranty to the effect that the churn, the subject-matter of the contract, is a valuable and useful invention, and is in great demand and fast coming in general use. *Bond v. Clark*, 35 Vt. 577.

Engelhorn v. Reitlinger, 23 Jones & S. 485, holds that proof of a verbal warranty by the seller of a quantity of quinine, to the effect that he would only sell quinine to the trade at a stipulated price, which warranty the purchaser claimed was the inducement to the contract of purchase, was incompetent, the contract being in writing and containing no warranty.

That a previous or contemporaneous warranty as to material and workmanship of snaths sold under a written contract of sale containing no warranty cannot be engrafted by parol evidence on such contract was also held in *Frost v. Blanchard*, 97 Mass. 155.

In *Quinn v. Moss*, 45 Neb. 614, 63 N. W. 931, in an action on a written contract of guaranty for the payment of an order in writing for a bill of cigars, which contained no warranty, evidence on the part of the defendant, tending to show that, at the time the cigars were purchased and the guaranty given, plaintiff agreed that the cigars should be union-made and union-labeled, was held to have been properly excluded.

Day Leather Co. v. Michigan Leather Co. 141 Mich. 533, 104 N. W. 797, also held that it was not error to exclude evidence of an express oral warranty as to the quality of a quantity of leather sold by a written contract, which contained no warranty clause.

Evidence of an oral warranty as to the quality of hides conveyed by written bill of sale containing no warranty was held to be inadmissible in *Reed v. Wood*, 9 Vt. 285. The court said that, in order that a war-

ranty of the quality of property, made before a bill of sale thereof had been executed by the parties, should apply, it should have been inserted in the writing of the parties when executed.

Where a contract to redecorate a house and reupholster furniture has been reduced to writing in the shape of written propositions by the seller, and written acceptances by the purchaser, but which contains no warranty, it cannot be contradicted or varied by evidence of an oral warranty that the material to be furnished and the work to be performed will be satisfactory to the purchaser. *Pitcairn v. Philip Hiss Co.* 61 C. C. A. 657, 125 Fed. 110.

In *Etheridge v. Palin*, 72 N. C. 213, it was held that a written contract for the sale of a fishery, and seines, ropes, and other appurtenances thereto, which contained no warranty, could not be added to by proof of a contemporaneous oral warranty by the seller as to the quality and quantity of materials described in the contract, although, in the trial court, the jury found as a fact that the parties to the contract intended conditions of sale other than those included in the written contract.

McCormick Harvesting Mach. Co. v. Thompson, 46 Minn. 15, 48 N. W. 415, held that a written contract for the sale of a quantity of binding twine, which apparently embodied a complete expression of the agreement of the parties, but, so far as appears from the opinion, contained no warranty, would preclude evidence of a prior or contemporaneous oral warranty of quality.

A contract in writing for the sale of barrels, which contains no warranty as to coo- perage, cannot be added to by proof of an oral express warranty relating to the coo- perage. *Graham v. Eiszner*, 28 Ill. App. 269.

Where a contract for the sale of accounts contained no warranty as to their collectability, it was improper to add to its terms by proof of what the parties said as to the collectability of the accounts at the time of the execution of the contract. *Robinson v. McNeill*, 51 Ill. 225.

A bill of sale of a vessel, which contains

is supposed to contain all the contract, and that it cannot be added to or varied by parol evidence. It will be understood that there is no fraud, accident, or mistake averred in the answer in this case, and that the written contract amounts to a contract of sale. It is not an instrument merely intended as a receipt or as an acknowledgment of the payment of the price or the like. It seems that, in such cases, parol evidence is not admissible to show a warranty. 1 Parsons, Contr. p. 589. We think the court should have excluded the evidence as to a parol warranty, and should have instructed the jury that the parties were bound by the terms of the written contract." See also Nichols v. Wyman, 71 Iowa, 160, 32 N. W.

258; Warbasse v. Card, 74 Iowa, 310, 37 N. W. 383.

A case very like the one now before us is *Western Electric Co. v. Baerthel*, 127 Iowa, 467, 103 N. W. 475, which seems to be the latest pronouncement of this court upon the subject. There, as here, there was a purchase of electrical apparatus, and a guaranty or warranty as to some of the items thereof. Defendant attempted to show a parol warranty to the effect that the plant would be sufficient to light the hotel and run the elevators therein, but, upon the authority of *Mast's Case*, supra, he was not permitted to do so. That case seems to be conclusive of the question now before us. None of the cases cited for appellant run counter to the views here expressed. Peter-

no warranty, cannot be enlarged by proof of an oral warranty that the vessel was composition-fastened, complete for coppering. *Mumford v. M'Pherson*, 1 Johns. 414, 3 Am. Dec. 339. Considering this subject, the court said: "Admitting a parol warranty to have been fully proved, no action could have been maintained upon it. The contract between the parties was reduced to writing and contained in the bill of sale, and recourse must be had to that instrument to ascertain its extent."

A written memorandum for the sale of a vessel, which contains a statement of the fact that a sale had been made, a description of the thing sold, and the price and terms of the credit, is all that is necessary to make a complete contract of sale, and it would be violating the rule that no new terms may be added to a written contract by extraneous evidence to allow proof of an oral warranty that the vessel in question was built mostly of white-oak timber. *Randall v. Rhodes*, 1 Curt. C. C. 90, Fed. Cas. No. 11,556.

A promissory note for the purchase price of a mule, which contains no warranty as to soundness, cannot be added to by proof of an oral warranty of soundness. *Fleming v. Satterfield*, 4 Ga. App. 351, 61 S. E. 518.

Jackson v. Helmer, 73 App. Div. 134, 77 N. Y. Supp. 835, also held that where a contract for the sale of a colt was in writing, and it contained no language that amounted to a warranty, it must be assumed that none was intended; and therefore evidence of conversations which preceded the execution of the contract, and which tended to show a warranty, was incompetent.

Storer v. Taber, 83 Me. 387, 22 Atl. 256, also held that a bill of sale of a one-half interest in a Spanish jack, containing no warranties, could not have a warranty of soundness affixed thereto by parol. (But see *Neal v. Flint*, 88 Me. 72, 33 Atl. 769.)

In *Bullard v. Brewer*, 118 Ga. 918, 45 S. E. 711, a note for the purchase price of a horse, which described the horse as a little thick-winded, was held not to amount to an express warranty of soundness, and that

evidence of an oral warranty of soundness was inadmissible.

Based on the Louisiana Code, 2255, 2256, which in substance provided that the transfers of slaves should be in writing, and parol evidence should not be admitted against or beyond what was contained in the sale acts, or as to what might have been said before or at the time of making them, or afterwards, it was held in *Goodloe v. Hart*, 2 La. 447, that parol proof of an agreement made at the time of the execution of the bill of sale, to the effect that, if any of the slaves mentioned therein should run away, abscond, or prove sickly, the note in suit, which was given for a portion of the purchase price, should be void and of no effect, was incompetent, as there was no warranty to that effect in the bill of sale.

Milliken v. Andrews, 11 Rob. (La.) 241, also held that where the sale of a slave was evidenced by an act of sale, which contained no reference to certain qualities which the seller had declared the slave to possess, parol evidence of representations of such qualities was incompetent.

To the same effect as to a warranty of the soundness of a slave, where the bill of sale contained no warranty, is *Hanger v. Evins*, 38 Ark. 334.

Among some of the earlier English cases, wherein the same doctrine was applied as is applied in this country, is *Powell v. Edmunds*, 12 East, 6, wherein it was held that a contract in writing for the sale of standing timber sold at auction, and which contained no warranties, could not be enlarged by evidence of an oral warranty of quality, made by the auctioneer at the time of the sale.

Also in *Schweir v. Thorns*, 3 Fost. & F. 243, wherein, in an action on an oral warranty of sugar bags, to the effect that they were sugar bags, they having been sold in a lump, *Martin, B.*, said that, as the result of the bargain was put into a sale note, the parties could not travel out of it to show such an oral warranty.

And the same doctrine was applied in *De Lassalle v. Guildford* [1901] 2 Q. B. 215, as to an oral warranty that a house, leased by

son v. Chicago, R. I. & P. R. Co. 80 Iowa, 92, 45 N. W. 573, has reference to a railway ticket which was held to be a memorandum or receipt, subject to parol explanation. Keen v. Beckman Bros. 66 Iowa, 672, 24 N. W. 270, involved a receipt given by defendants to plaintiff, which, as is well known, does not, as a rule, come within the principles we are now discussing. Fawcner v. Lew Smith Wall Paper Co. 88 Iowa, 173, 45 Am. St. Rep. 230, 55 N. W. 200, is really an authority for appellee, as parol evidence was rejected in that case. The supreme court of Minnesota has adopted the view taken by this court, and, in Thompson v. Libby, 34

Minn. 374, 26 N. W. 1, held that parol evidence of a warranty, where there is a written contract of sale, is inadmissible.

Following the cases heretofore cited, it is manifest that the testimony offered by defendant as to the parol warranty should be rejected. This being true, defendants have presented no defense to plaintiff's cause of action. Moreover, even if such testimony were admissible, we should not feel like disturbing the decree of the trial court. There is nothing in the correspondence antedating the contract which indicates that a guaranty such as is now claimed was intended by either party, and it was not for a long time

written lease, containing warranties, was dry and the drains perfect.

Parol warranty relating to different subject-matter than written warranty.

In the following cases where the written contract contained an express warranty, evidence was held incompetent, although tending to establish a parol warranty relating to some matter as to which there was no written warranty. As a rule, no distinction was made between such a case and one where the parol warranty related to the same matter as the written warranty. These cases, in principle at least, are opposed to such cases as Edward Lloyd Limited v. Sturgeon Falls Pulp Co. 85 L. T. N. S. 102, although as to just what weight should be given most of them on that point is not clear, as the majority of them applied the general doctrine of exclusion without apparently having the distinction in mind.

The subject was, however, apparently considered in Merriam v. Field, 24 Wis. 640, which held that where a written bill of sale of lumber contained express warranties of title and against encumbrances, evidence of an oral warranty that the lumber was merchantable was properly excluded. The court said that the presumption was that the writing expressed the whole contract as to such warranties, and to allow others to be shown by proving verbal statements at the time of the sale would violate the salutary rule against varying and adding to written contracts by parol evidence. It was, however, held in this case, that while evidence of the parol warranty of the quality was not admissible, yet, that under the circumstances, an implied warranty, substantially to the same effect, was raised, which could be relied upon by the purchaser.

Also in Humphrey v. Merriam, 46 Minn. 413, 49 N. W. 199, wherein it was held that, where a written contract for the sale of mining stock contained an express warranty as to title and against assessments, such warranty legally precluded the purchaser from recovering upon oral representations, made in the course of the negotiations, as to the condition and productiveness of the mine, as warranties.

In the following cases, however, the general L.R.A. (N.S.)

eral rule of exclusion was applied without the court apparently giving any consideration to the question whether there should be an exception where the parol warranty related to some matter as to which there was no written warranty. Such a case is Willard v. Ostrander, 46 Kan. 591, 26 Pac. 1017, where evidence of oral warranty of the soundness of sheep conveyed by written bill of sale containing a warranty only as to title was held inadmissible.

A bill of sale conveying the exclusive right under certain patents to manufacture, sell, and use certain ice-making, refrigerating machines in a designated territory, which contained no warranty except a warranty of title, was held, in Kansas Refrigerator Co. v. Pert, 3 Kan. App. 364, 42 Pac. 943, to render inadmissible evidence of an oral warranty that the machine would do certain things. (The specific terms of the warranty are not set out.)

To the same effect as to an oral warranty as to the condition and quality of a churn-drill outfit, where the bill of sale contained warranties of title, is McNaughton v. Wahl, 99 Minn. 92, 116 Am. St. Rep. 389, 108 N. W. 467.

The same may be said of McFarland v. McGill, 16 Tex. Civ. App. 298, 41 S. W. 402, wherein a bill of sale of horses, containing a warranty of title, was held to render incompetent proof of a contemporaneous oral agreement to furnish proofs of pedigree sufficient to enable the purchaser to procure the registration of the horses purchased.

To the same effect where the contract contained a warranty as to pedigree and title, where it was sought to prove a parol warranty of soundness, is Bradford v. Neill, 46 Minn. 347, 49 N. W. 193; also Rodgers v. Perrault, 41 Kan. 385, 21 Pac. 287, where a written contract contained a warranty of title, and it was sought to prove a parol warranty of soundness.

That an oral warranty of soundness could not be added to a written contract for the sale of a slave, which contained a warranty of title, was also held in Smith v. Williams, 5 N. C. (1 Murph.) 426, 4 Am. Dec. 564. A similar doctrine, upon substantially similar facts, was also applied in Stucky v. Clyburn, Cheves, L. 186, 34 Am. Dec. 590;

after the installation of the equipment that defendant said anything about a guaranty. Plaintiff's engineer was undoubtedly called upon to make plans for the improvement, and there is no doubt that he thought, believed, and so stated, that, if his recommendations were followed, the items which he planned would do the work. Defendant did not demand any other guaranty when they made the contract than was expressed therein, and made no complaints as to any breach of warranty until pressed many times for the payment of its bill. Plaintiff gave instructions as to the use of the apparatus after it was installed, but these were not

followed by the defendant. Again, it appears that defendant accepted and used the equipment furnished by plaintiff for many months, without criticism or complaint, and did not refer to or seemingly rely upon the alleged warranty until plaintiff commenced proceedings to enforce its claim. This in itself would be a sufficient answer to defendant's defense. *Mackey v. Swartz*, 60 Iowa, 710, 15 N. W. 576; *Allison v. Vaughan*, 40 Iowa, 421.

An examination of the entire record convinces us that the decree is correct, and it is affirmed.

Smith v. Cozart, 2 Head, 526; *Wood v. Ashe*, 1 Strobb. L. 407.

Smith v. McCall, 1 M'Cord, L. 220, 10 Am. Dec. 666; held that where a bill of sale of a slave contained a warranty of title and soundness, evidence of an express parol warranty as to the moral character of the slave was inadmissible.

A bill of sale under seal of a vessel, containing only a covenant of warranty as to title, cannot be added to by proof of a contemporaneous oral warranty of soundness. *Pender v. Fobes*, 18 N. C. (1 Dev. & B. L.) 250.

A contract for the sale of a horse, which contained a written warranty against an existing temporary lameness, but nothing whatever as to his being a sure foal-getter, was held, in *Farmers' Stock Breeding Assn. v. Scott*, 53 Kan. 534, 36 Pac. 978, not subject to be enlarged or changed by evidence of an oral warranty, prior to the execution of the contract, relating to the horse's qualities as a foal-getter.

A contract for the sale of horses, which amounts to a bill of sale, and which contains nothing to indicate that it does not fully express the contract of the parties, and which contains no warranty in terms, unless it be as to pedigree, cannot be enlarged by evidence of a parol warranty of soundness and age. *Bush v. Bradford*, 15 Ala. 317.

This doctrine was also applied in *McQuaid v. Ross*, 77 Wis. 470, 46 N. W. 892, where an attempt was made to add to a written contract for the sale of a bull, which contained a warranty of pedigree, by showing an oral warranty against sterility.

In *Arden Lumber Co. v. Henderson Iron Works & Supply Co.* 83 Ark. 240, 103 S. W. 185, where a written contract for the sale of machinery contained a description of each piece in detail, giving the name, kind, make, and dimensions, and which also contained a written guaranty that the machinery should be "as represented" in the contract, the court said that the circuit court might very properly have narrowed the defense of breach of warranty to the question as to whether or not the machinery was as represented in the written contract. That, "as to all other matters alleged as breach of warranty, the contract was sufficient." 19 L.R.A. (N.S.)

lent, and appellant could not, as to these, engraft upon the written contract a warranty by parol proof."

Where a contract for the sale of a furnace is in writing, and contains no warranty other than a guaranty to keep the furnace in good condition for one year, an oral warranty made at the same time, or previously, to the effect that the smoke consumer in such furnace would save fuel, prevent smoke, and increase the efficiency of the boilers, is inadmissible. *McMillan v. De Tamble*, 93 Ill. App. 65.

To the same effect as to a written contract for the sale of an oil tank, wherein it was guaranteed for a specified period of time, where it was sought to engraft on the contract an oral warranty that the use of the tank would not interfere with the buyer's fire insurance, is *Johnson v. Hughes*, 83 Ark. 105, 103 S. W. 184.

Where the specifications attached to a contract for the sale of elevator machinery mentioned the number and size of the articles to be furnished, but made no mention of the capacity of the machinery, except as to one item, the hopper to the scales, it was held, in *Barry-Wehmiller Machinery Co. v. Thompson*, 83 Ark. 283, 104 S. W. 137, that evidence tending to establish a verbal warranty as to the capacity of the elevator, or evidence of representations from which a warranty might be implied, was incompetent.

In *Sullivan Machinery Co. v. Breeden*, 40 Ind. App. 631, 82 N. E. 107, an answer to a complaint to recover for the purchase price of machinery sold by written contract of sale was held to be demurrable where it admitted the execution of the contract as averred in the complaint, but undertook to avoid it by alleging an altogether different parol contract of warranty from that contained in the writing sued upon. The written guaranty contained in the contract of sale between the parties was to the effect that a channeling machine conveyed thereby was equal in design, material, and workmanship to other machines recently shipped into the district where it was intended to use this machine. There was also an agreement to replace defective machinery. No breach of this warranty was alleged in the answer, but it alleged the breach of a parol

warranty to the effect that this machine was the best on the market, that it would cut a designated number of lineal feet of stone per day, and that it was economical in operation.

Wilson v. United States Cattle-Ranch Co. 20 C. C. A. 244, 36 U. S. App. 634, 73 Fed. 994, enunciates the doctrine that where the parties to a written contract for the sale of a herd of cattle expressed therein guaranties or warranties as to the number and description of the cattle in general, the legal inference irresistibly followed that all prior representations, statements, and declarations made in good faith, and all prior oral contracts, were merged in the written agreement, and that it contained all the warranties and guaranties that the parties to the negotiations made; and, in the absence of fraud or mistake in reducing the complete contract containing the warranties to writing, the presumption was conclusive that it contained all the warranties that the parties intended to, or did, make. It was therefore held to be improper to receive evidence of a warranty to the effect that there were 800 beef cattle among the herd covered by the contract.

In *Shepherd v. Gilroy*, 46 Iowa, 193, it was held that a judgment based upon the finding of a jury that there was a parol warranty and a breach thereof, made with reference to the sale of a threshing machine by the seller, should be set aside where it appeared that the contract for the sale of the machine was reduced to writing which contained warranties (the nature of which does not appear). The trial court instructed the jury that the warranties contained in the written contract were conclusively presumed to be the only warranties made, which instructions the jury violated by finding for the defendant upon the theory of the breach of a parol warranty.

So, in *Nichols, S. & Co. v. Wyman*, 71 Iowa, 160, 32 N. W. 258, in an action for the purchase price of a steam engine and separator, sold under a written contract containing an express warranty (the terms of which do not appear), it was held incompetent for the defendants to show a different oral warranty to the effect that the machinery covered by the contract was to be perfect and capable of doing good work, and that the engine would haul the separator, tank, water, and one-half ton of coal through stubble and over plowed fields anywhere in the territory wherein defendant intended to operate it. The court said that where there was a written contract of sale, an oral warranty of the things sold could not be shown; and when there was a written warranty, the vendee could not show an additional parol warranty.

In *Western Electric Co. v. Baerthel*, 127 Iowa, 467, 103 N. W. 475, evidence of a parol warranty of an engine and electrical supplies was held inadmissible where there was a written warranty as to the capacity of such articles, which it was not alleged was breached. The oral warranty sought to be proved was to the effect that the ma-

chinery furnished would produce sufficient electricity to light the purchasers' hotel and run the elevator therein to their satisfaction.

Parol warranty relating to same subject-matter as written warranty.

The courts are practically unanimous in holding that evidence to establish a parol warranty relating to a matter covered in part by a written warranty is incompetent. As a rule, however, the decisions are not based upon the fact that the warranties relate to the same matter, but rather upon the application of the general rule of exclusion of oral evidence to vary or contradict the terms of a written contract; and no point is made of the fact that the oral warranty relates to the same subject-matter as the written warranty. While in the following cases the foregoing doctrine was usually stated in sufficiently broad terms to include cases involving the exceptions to the general doctrine heretofore considered, yet the weight to be attached to them, as bearing on the exceptions to the rule, is questionable, as the facts presented to and considered by the court did not require the consideration of the latter question.

The fact that the warranties related to the same matter was, however, apparently in the mind of the court in some of the cases. Thus, in *J. I. Case Plow Works v. Niles & S. Co.* 90 Wis. 590, 63 N. W. 1013, wherein it was held that oral representations as to the construction and suitability of iron wheels for agricultural implements were incompetent to establish a parol warranty of quality and suitability, where such representations preceded the execution of a written contract which contained a warranty guaranteeing the wheels against breakage in shipping, and against defects in material and workmanship. The court characterized this warranty as a limited warranty in respect to material and workmanship, going to and covering in part the suitability of the wheels for the purpose for which the purchaser desired them.

So, in *John Hutchison Mfg. Co. v. Pinch*, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340, where a written contract for the purchase of machinery to be used in a mill contained a provision that the machinery was to be paid for when it gave good results, the court said that parol testimony of an agreement adding to this requirement, to the effect that the machinery would require no more power for its operation than machinery then in use by the buyer, was necessarily contradictory of the instrument, and therefore inadmissible; and the fact that the warranty was somewhat vague would not permit parol testimony to show that it was in fact more definite.

And in *Nichols, S. & Co. v. Crandall*, 77 Mich. 401, 6 L.R.A. 412, 43 N. W. 875, evidence was held incompetent to show a parol warranty of the power of an engine to run a separator under stated conditions, made prior to an order in writing for such

engine and separator, which contained a provision to the effect that the machine was purchased and sold subject to the "following express warranty and agreement." The warranty in substance was that, with good management, the separator was capable of doing a good business in threshing and cleaning grain, etc. Also, that the engine was well made and of good material, and, if properly run and rightly managed, was capable of driving the separator to do good business in threshing.

Van Pub. Co. v. Westinghouse C. K. & Co. 72 App. Div. 121, 76 N. Y. Supp. 341, while recognizing that it was entirely competent, where the written agreement was not complete and did not embody the entire understanding between the parties, to prove an oral collateral agreement not inconsistent with the written, held that the rule did not go so far as to permit prior oral negotiations to be introduced in evidence for the purpose either of supplementing or contradicting a formal written contract for the sale of a gas engine, which contained a warranty that the engine conveyed thereby would develop a certain horse power. The court said that, in the absence of any claim that at the time the formal proposal to sell the machine was made and accepted, any other or different agreement than that embodied in the writing was made, prior conversations between the parties as to the character and advantages of the machine would not be considered collateral oral warranties, and were therefore not admissible in evidence. The fact is emphasized in this case that the statements relied upon as oral warranties were not contemporaneous, but were prior in point of time, and were not alluded to when the contract in writing was made.

In *Williamson v. Seely*, 22 App. Div. 389, 48 N. Y. Supp. 196, where a written assignment of a contract to furnish electric lighting to a town contained no warranty, but did contain an agreement on the part of the assignor that he would superintend and manage the performance of the assigned contract without compensation for one year, and operate the electric light plant in accordance with the terms of the contract, and use his best endeavors properly and successfully to perform the same, it was held that it was incompetent to prove a parol warranty to the effect that the assignor would guarantee that the plant would be run at a certain expense per month, since that part of the agreement already quoted was an agreement on the identical subject of the additional contract which the buyer was attempting to prove.

In *Mayer v. Dean*, 115 N. Y. 556, 5 L.R.A. 540, 22 N. E. 261, it was held that a written contract for the sale of mustard seed, which showed that it was sold by sample, but which contained no other warranty, could not be added to or enlarged by evidence of parol warranty as to quality. The court, however, held that such evidence was admissible to show that the contract was procured by fraudulent representations. 49 L.R.A. (N.S.)

(The latter question, however, is not included herein.)

Stonehill Wine Co. v. Lupo, 110 N. Y. Supp. 408, held that a written order for a quantity of wine described as "Tipso Castelvetro (light in color laich Dry Catawba)" embodied both the character and quality of the goods, and that therefore evidence that the goods delivered were not like the sample shown at the time of the execution of the order, and not as guaranteed at that time, was incompetent.

In *Whitehead v. Lane*, 72 Ala. 39, where sawmill machinery was sold under a written warranty to the effect that the machinery was of good material and workmanship, and that it would do work well if properly used, and would do as good work and as much work under the same conditions as any machinery of its class in the United States, it was held that, in the absence of fraud or misrepresentation, there was no room for parol evidence of a different warranty to the effect that the machinery conveyed in the contract was adapted to squaring large timber, for which use the purchasers intended it.

The doctrine that evidence of an oral warranty as to the power of an engine sold under a written contract of sale containing particular warranties comes within the rule excluding parol evidence to vary the terms of a written contract, and is therefore inadmissible, was applied in *Buchanan v. Lamber*, 39 Wash. 410, 81 Pac. 911. The oral and written warranties were substantially similar, the only difference being that a provision of the written contract that notice must be given the seller of the failure of the engine to comply with the written warranties would apply unless waived, if the parol warranty was excluded.

In denying the admissibility of evidence of a contemporaneous oral warranty as to mill machinery, that certain mill stones would be prepared ready for use, in addition to a written warranty as to the quality and condition of the machinery described in the written contract of sale, the court, in *Cooper v. Cleghorn*, 50 Wis. 113, 6 N. W. 491, said: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."

A contract for the sale of a self-feeder for a threshing machine, which contains a warranty as to its working qualities and against defects, will be conclusively pre-

manifest defects in the material. The contract also contained a clause to the effect that no terms thereof could be modified or changed unless in writing, and signed by the seller.

To the same effect, under a very similar contract for the sale of a corn harvester, is *D. M. Osborne & Co. v. Wigent*, 127 Mich. 624, 86 N. W. 1022.

So, in *S. Morgan Smith Co. v. Monroe County Water Power & Supply Co.* 221 Pa. 165, 70 Atl. 738, evidence of a warranty in the nature of a contemporaneous oral agreement by the agent of the seller as to what certain water-wheel governors would do was held inadmissible to vary the terms of an express warranty contained in a written contract for the sale of such governors, as to quality of machinery and against defects. There was also a restrictive clause to the effect that all prior communications, agreements, etc., relating to the subject-matter of the contract, were annulled, and that no modification of the contract, unless consented to in writing by the parties, should be binding upon the seller.

National Computing Scale Co. v. Eaves, 116 Ga. 511, 42 S. E. 783, also held, where there was a written contract between the parties for the sale of a set of computing scales, which contained no warranties, but which contained a provision that it contained all the stipulations entered into by them, that a plea to an action for the purchase price, which set forth certain representations which had been made by the agent of the seller to the buyer in regard to the character and quality of the scales, should have been stricken upon the seller's motion so to do.

It was also held in *Stimpson Computing Scale Co. v. Taylor*, 4 Ga. App. 567, 61 S. E. 1131, that where a written contract for the sale of a set of scales contained an express warranty as to accuracy, and also a provision that no agreement or warranty other than that specified in the contract should be binding upon the seller, such warranty precluded all anterior agreements and stipulations. The nature of the parol warranty does not appear.

In *Electric Vehicle Co. v. Price*, 138 Ill. App. 594, a circular issued by the manufacturers of automobiles, descriptive of the vehicle sold, setting forth its mechanism and qualities, and its ability as to speed and endurance, which was exhibited to the buyer, and in reliance upon which he entered into a contract in writing to purchase an automobile of the kind described therein, was held inadmissible in evidence to establish a warranty other and different from that contained in the written contract (the terms of which are not given). The written contract contained a provision to the effect that all previous representations and communications between the parties with reference to the subject-matter of the contract were thereby abrogated.

Ford Motor Co. v. Osburn, 140 Ill. App. 633, also held that evidence of a parol warranty that an automobile was all right was

improperly received, where the automobile was sold by written contract which contained a warranty limited to replacement of all parts of the automobile giving out under normal service, in consequence of defective material or workmanship. The written contract also contained a clause to the effect that the seller would not be responsible for any undertakings or warranties made by its agents beyond those contained in the written contract.

So, in *McCray Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 269, 41 Am. St. Rep. 599, 58 N. W. 320, it was held that a contract in writing for the purchase and erection in a refrigerator of a patent system of refrigeration, which contained no warranty, but did contain a clause that the sellers would not be responsible for any promises made by their agents that were not made a part of the contract attached thereto, either printed or written therein, could not be varied or added to by proof of an oral warranty that the system would preserve fresh meat for a designated period of time.

And in *Hallwood Cash-Register Co. v. Millard*, 127 Mich. 316, 86 N. W. 833, where a written contract for the sale of a cash register contained an agreement to repair and keep it in order, also a stipulation that the contract covered the entire agreement between the parties, evidence was held inadmissible to show an oral warranty made to induce the purchaser to give the order for the machine, to the effect that it could not, by any means or assistance, be manipulated so as to register incorrectly, and could not be so worked as to show the purchaser one figure and register another, and that it would be a full protection to the purchaser against any dishonest employee.

Where corn planters were sold under a written contract which provided that no agreement other than that incorporated in the contract would be recognized, and the contract contained no warranty or representation as to quality or fitness of the corn planters, it was held in *Ramsey v. Beedle*, 8 Ky. L. Rep. 702, that it was not competent for the purchaser to show warranties by the sellers or their agent in regard to the quality or fitness of the planters.

So, in *Hooven & A. Co. v. Wirtz*, 15 N. D. 477, 107 N. W. 1078, where an order in writing for the purchase of binding twine contained no warranties, but did contain a clause to the effect that no agreement, condition, or stipulation, verbal or otherwise, save those mentioned in the order, would be recognized unless approved or accepted in writing by the seller, it was held that testimony on the part of the buyer, tending to prove that the seller's salesman, at the time he procured the order in question, orally warranted the quality of the twine, was properly excluded.

In *Martin v. Moore*, 63 Ga. 531, in an action on a written contract for the sale of fertilizer, which contained a stipulation that the sellers did not in any way warrant the quality of the fertilizer, or its beneficial

effects on crops, but the same was sold with all faults at the risk of the purchaser, it was held that a plea alleging an oral representation or warranty as to the quality of the fertilizer was inconsistent with the written contract, and therefore inadmissible.

So, in *Allen v. Young*, 62 Ga. 617, where the buyer of fertilizer accepted in writing a limited guaranty, and stipulated not to exact anything beyond such guaranty, it was held that parol evidence that the seller represented or warranted the fertilizer to be of good quality was inadmissible to establish a different oral warranty.

A subscription contract for Balzac's "Comedie Humaine," which contained a stipulation that no other conditions or representations than those therewith printed would be binding upon the subscriber or publisher, cannot be changed or enlarged by evidence of oral representations or warranties as to the moral character of the work. *Barrie v. Smith*, 105 Ga. 34, 31 S. E. 121. It does not appear what, if any, warranties, were contained in the subscription contract, except that it contained no warranties as to the moral character of the book subscribed for.

Branch v. James, 4 Ga. App. 90, 60 S. E. 1027, held that it was not error to exclude evidence of an oral warranty as to the soundness of a mule, offered as a defense to an action on a note which contained a clause that the seller "does in no wise guarantee except in title."

MAINE SUPREME JUDICIAL COURT.

ORLANDO WEEKS
v.
FESSENDEN E. HACKETT.

EDWIN E. MORTON
v.
SAME.

(— Me. —, 71 Atl. 858.)

Treasure-trove — right of landowner.

1. The owner of the soil in which treasure-trove is found acquires no title to it by virtue of his ownership of the land.

Trover — property found.

2. A joint finder of a package containing legal tender coins may maintain trover to recover possession of his share from his companion, who takes charge of the entire property, and refuses to divide it.

Lost property — joint finding.

3. A joint finding of treasure-trove may be found from evidence that, while several workmen were engaged in making an excavation, one discovered the top of an old can, and called the attention of the others to it, whereupon all proceeded to get it out of the soil, in doing which it was broken

and its contents of coin disclosed, and that, in securing such contents, other cans containing coin were discovered and secured.

(June 11, 1908.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Franklin County made during the joint trial of separate actions of trover, each brought to recover the value of an alleged interest in certain coins, which resulted in a verdict for each plaintiff. Overruled.

The facts are stated in the opinion.

Mr. Joseph C. Hillman, for defendant: One tenant in common cannot maintain an action against his original cotenant.

Dain v. Cowing, 22 Me. 347; *Carter v. Bailey*, 64 Me. 464, 18 Am. Rep. 273; *Witham v. Witham*, 57 Me. 447, 99 Am. Dec. 787; *Huchinson v. Chase*, 39 Me. 512, 63 Am. Dec. 645; *Waller v. Bowling*, 108 N. C. 289, 12 L.R.A. 261, 12 S. E. 990; *Cooley, Torts*, 455.

There has been no conversion of the property by the defendant.

Weld v. Oliver, 21 Pick. 559.

Mr. Frank W. Butler, for plaintiffs:

When common property is of such a nature that it can be separated and equally

Case Note. — Rights inter se of joint finders of lost property.

But few cases are to be found which pass upon the rights *inter se* of joint finders of lost property.

Upon the facts of *Cummings v. Stone*, 13 Mich. 70, as detailed in *WEEKS v. HACKETT*, it was held that the owner of the tugboat might maintain assumpsit against the owner of the raft to recover his portion of the proceeds of the sale of the anchor, which they had agreed to divide equally between them.

And the case of *Keron v. Cashman* (N. J. Ch.) 33 Atl. 1055, in which the chancery court divided the money found equally among the joint finders, is sufficiently set out in *WEEKS v. HACKETT*.

Coins found upon the body of an unknown man, floating at sea, which are unclaimed by anyone, will be divided in admiralty, one half to the vessel owners and crew, and the balance to the United States, as successor to the prerogative rights of the King of England. *Gardner v. 99 Gold Coins*, 111 Fed. 552.

And this method of division was applied in *Peabody v. 28 Bags of Cotton*, Fed. Cas. No. 10,869, to the proceeds of derelict property found afloat at sea.

As to the joint rights and liability of the finder of lost property, see subject note to *State v. Hayes*, 37 L.R.A. 116, and the case note to *Kuykendall v. Fisher*, 8 L.R.A. (N.S.) 94.

And as to the rights of finder of long hidden property, after all traces of ownership are extinct, see case note to *Ferguson v. Ray*, 1 L.R.A. (N.S.) 477.

divided by count, weight, or measure, and one tenant in common takes possession of the whole, and refuses on demand to count out, weigh out, or measure out, the part thereof belonging to a cotenant or tenant in common, that is a conversion for which trover lies.

Pickering v. Moore, 67 N. H. 533, 31 L.R.A. 698, 68 Am. St. Rep. 695, 32 Atl. 828; *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Tuttle v. Campbell*, 74 Mich. 652, 16 Am. St. Rep. 652, 42 N. W. 384; *Gates v. Bowers*, 169 N. Y. 14, 88 Am. St. Rep. 530, 61 N. E. 993; *Stall v. Wilbur*, 77 N. Y. 158; *Channon v. Lusk*, 2 Lans. 211; *Loddell v. Stowell*, 51 N. Y. 70; *Newton v. Howe*, 29 Wis. 531, 9 Am. Rep. 616; *Tripp v. Riley*, 15 Barb. 333.

The right of each finder to the custody of his share is absolute except as against the true owner.

Danielson v. Roberts, 44 Or. 108, 65 L.R.A. 526, 102 Am. St. Rep. 627, 74 Pac. 913; *Burns v. Clark*, 133 Cal. 634, 85 Am. St. Rep. 233, 66 Pac. 12; *Vining v. Baker*, 53 Me. 544; *White v. Bascom*, 28 Vt. 268; *Duncan v. Spear*, 11 Wend. 54; *Harrington v. King*, 121 Mass. 269; *Shaw v. Kaler*, 106 Mass. 448; *M'Laughlin v. Waite*, 9 Cow. 670; *Tancil v. Seaton*, 28 Gratt. 601, 26 Am. Rep. 380.

The landowner had no rights in the money, as it was treasure-trove.

Danielson v. Roberts, 44 Or. 108, 65 L.R.A. 526, 102 Am. St. Rep. 627, 74 Pac. 913; *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600; *Ferguson v. Ray*, 44 Or. 557, 1 L.R.A.(N.S.) 477, 102 Am. St. Rep. 648, 77 Pac. 600, 1 A. & E. Ann. Cas. 1; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; *Burns v. Clark*, 133 Cal. 634, 85 Am. St. Rep. 233, 66 Pac. 12; *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172; *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Huthmacher v. Harris*, 38 Pa. 491, 80 Am. Dec. 502; *Lawrence v. Buck*, 62 Me. 275.

Whitehouse, J., delivered the opinion of the court:

These were actions of trover brought by each of these plaintiffs to recover one third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other and with the defendant, Fessenden E. Hackett. It is not in controversy that the coins in question, of the aggregate par value of \$1,284.67, were found contained in three metallic cans buried and concealed in the soil and underneath the surface of land owned by one

Leonard J. Hackett in the town of New Vineyard, and it appears in evidence that after the coins were found, and prior to the commencement of these actions, the defendant, Fessenden E. Hackett, purchased all the right, title, and interest, if any, which Leonard J. Hackett had in and to these coins as owner of the land where they were found.

Three contentions were set up in defense:

(1) That the defendant found the coins under circumstances which made him the sole owner of them as against these plaintiffs.

(2) That, if the plaintiffs participated in the finding, they are joint tenants or tenants in common with the defendant, that he is entitled to hold the coins in trust for the true owner, and that the plaintiffs, as tenants in common, cannot maintain trover against him for their respective shares.

(3) That the defendant became the sole owner of the coins by purchase from Leonard J. Hackett, the owner of the premises where they were found.

The presiding justice did not sustain the legal propositions involved in these contentions of the defendant, but instructed the jury, in substance: That gold or silver coin deposited in the soil, as this appeared to have been, becomes what is known in law as treasure-trove, the title to which does not pass with the soil, the owner of the premises where the coin was found acquired no title to it by virtue of his ownership of the land, and that the defendant consequently acquired no title by purchase from Leonard J. Hackett; that, if the coin was purposely buried in the soil, and forgotten, or its place of concealment remained undisclosed by reason of the death of the depositor, the finder acquired a right to the possession of it and a qualified property in it, subject to the right of the true owner when he appeared, and in that sense became a trustee for the owner; but, if several participated in the finding, so as to become joint finders, with equal rights, the ownership pertained to all of them, and one of them was not authorized to hold exclusive possession as against his fellows; and, finally, that since the coins were separable and divisible by weight or count, if the defendant refused to deliver to each of such tenants in common the share to which he was entitled, an action of trover would lie against the defendant for the conversion of such number or portion of the coins as rightfully belonged to each of the joint finders.

The jury returned a verdict in favor of each plaintiff for the sum of \$291.20, being one third of the aggregate market value of the coins, and the cases come to the law court on exceptions to these instructions

and on a motion to set aside the verdicts as against the law and the evidence.

1. It is the opinion of the court that the instructions given by the presiding justice were correct, and that the exceptions must be overruled.

"Treasure-trove" is a name given by the early common law to any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground; the owner of the discovered treasure being unknown. 1 Bl. Com. 295; 19 Cyc. Law & Proc. p. 339; 28 Am. & Eng. Enc. Law, p. 472; Livermore v. White, 74 Me. 452, 43 Am. Rep. 600; Sovern v. Yoran, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100. To what extent the doctrine of the English common law in regard to treasure-trove has been merged, in this country, into the law respecting the finding of lost property, and whether, in modern commercial life, the term "treasure-trove" may be held to include not only gold and silver, but the paper representatives of them, are questions not necessary to be considered here (see Huthmacher v. Harris, 38 Pa. 499, 80 Am. Dec. 502, and Danielson v. Roberts, 44 Or. 108, 65 L.R.A. 526, 102 Am. St. Rep. 627, 74 Pac. 913); for while it is not in controversy that the coins here in question clearly fall within the common-law definition of "treasure-trove," the general rule is established by a substantially uniform line of decisions in the American states, with respect to both lost goods, properly so termed, and treasure-trove, that, in the absence of legislation upon the subject, the title to such property belongs to the finder as against all the world except the true owner, and that, ordinarily, the place where it is found is immaterial. Lawrence v. Buck, 62 Me. 275; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528; Hamaker v. Blanchard, 90 Pa. 377, 35 Am. Rep. 664; Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172; Danielson v. Roberts, *supra*; Armory v. Delamirie, 1 Strange, 505, 1 Smith, Lead. Cas. 631; Bridges v. Hawkesworth, 7 Eng. L. & Eq. 424, 21 L. J. Q. B. N. S. 75. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land. R. v. Thomas, Leigh & C. C. C. 313; 28 Am. & Eng. Enc. Law, 2d ed. p. 473. According to Bracton, lib. 3, chap. 3, as quoted in Viner's Abridgement: "He to whom the property is shall have treasure-trove, and, if he dies before it be found, his executors shall have it, for nothing accrues to the King unless when no one knows who hid that treasure." [20 Vin. Abr. 414.] And according to Lord Coke (3 Inst. 132), the common law originally left treasure-trove to the person who deposited it, or, upoh his omission to claim it, to the

finder. 2 Kent, Com. 458. The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many states, but the provisions of the Maine statutes (Rev. Stat. chap. 100, §§ 10 et seq.) have no reference to the law of treasure-trove.

In Danielson v. Roberts, *supra*, in which the facts were strikingly analogous to those at bar, two boys unearthed on the defendant's premises an old tin can containing gold coin of the value of \$7,000. The circumstances under which the money was discovered, the rust-eaten condition of the can in which it was contained, and the place of deposit, tended strongly to show that it had been buried for a long time, and that the owner was probably dead or unknown. It was held that the fact the money was found on the premises of the defendants in no way affected the plaintiffs' right to possession or their duty in relation to the treasure, and that they could maintain trover therefor against the defendants, to whom they had been induced to deliver the money. In a well-reasoned opinion, the court says:

"Ever since the early case of Armory v. Delamirie, 1 Strange, 505, where it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrongdoer, the right of the finder of lost property to retain it against all persons except the true owner has been recognized. In that case a chimney sweeper's boy found a jewel and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that, by the finding, he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled. Sovern v. Yoran, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; 19 Am. & Eng. Enc. Law, 2d ed. p. 579. But it is argued that property is lost, in the legal sense of that word, only when the possession has been casually and involuntarily parted with, and not when the owner purposely and voluntarily places or deposits it in a certain place for safe-keeping, although he may thereafter forget it, and leave it where deposited, or may die without disclosing to anyone the place of deposit.

"But, at the present stage of the controversy, it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure-trove; or, if treasure-trove, whether it belongs to the state or the finder, or should be disposed of as lost property if no owner is discovered. In either

event the plaintiffs are entitled to the possession of the money as against the defendants, unless the latter can show a better title. The reason of the rule giving the finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface."

In *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528, the plaintiff bought an old safe and soon afterwards, through his agent, left it for sale with the defendant, who was a blacksmith. Upon examination of it soon after it was left with him, the defendant found secreted between the exterior and the lining a roll of bank bills amounting to \$165. Neither the plaintiff nor the defendant knew the money was there before it was found, and the owner was unknown. The plaintiff brought suit against the defendant to recover the money, claiming that, as owner of the safe, he was entitled to the money by right of prior possession; but the court held that the plaintiff "never had any possession of the money except unwittingly, by having possession of the safe which contained it;" that although it was originally deposited in the safe by design, it was not so deposited after the safe became the property of the plaintiff, so as to be in the protection of the safe as his safe, or so as to affect him with any responsibility for it, and it was accordingly held that the defendant, as finder of the money, was entitled to retain it as against the plaintiff, the owner of the safe, and as against all the world except the real owner.

In *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172, the plaintiff, while engaged as an employee in the defendant's paper mill, found two \$50 bank bills, in a clean, unmarked envelope, in a bale of old paper which the defendant had bought for manufacture, and delivered the bills to the defendant for the purpose of ascertaining if they were good, and upon his promise to return them. The defendant refusing to return them, the plaintiff brought suit to recover their value, and the court held that she was entitled to recover, citing, among other cases, *Lawrence v. Buck*, *Durfee v. Jones*, *supra*, and *Armory v. Delamirie*, 1 Strange, 505, and stating that the place of the finding was ordinarily immaterial.

The result, therefore, seems unquestionable that, in the case at bar, the coins sued for belonged to the finder or finders as against all the world except the true owner or his legal representatives, when discovered. Indeed, the defendant's counsel does not seriously contend to the contrary; but, as already noted, he claims under the motion that the defendant was in fact the sole

finder of the coins, and further insists under the exceptions that, in any event, these actions are not maintainable, for the reason that an action of trover will not lie in favor of one tenant in common against his original cotenant.

With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, it is undoubtedly a well-established rule that one tenant in common cannot maintain trover against his cotenant, for the reason that the two are equally entitled to possession, and the one who has it cannot be guilty of conversion by retaining it; but this rule "can have no reasonable application to such commodities as are readily divisible by tale or measure into portions absolutely alike in quality, such as grain or money." *Cooley, Torts*, 2d ed. p. 533. *Cessante ratione legis, cessat ipsa lex*. If A. and B. are tenants in common of a car load of corn, and B. denying A.'s right to any part of it, refuses to surrender his half on demand, this is deemed in law a conversion, because the commodity would be capable of exact division by weight or measure, and, by refusing to surrender A.'s half, B. exercised a dominion over it inconsistent with A.'s rights. As observed by the court in *Pickering v. Moore*, 67 N. H. 536, 31 L.R.A. 698, 68 Am. St. Rep. 695, 32 Atl. 830: "One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another than there is in selecting A.'s marked sheep from B.'s flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which either may make without expense and without danger of injustice to his cotenant." See, also, *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Gates v. Bowers*, 169 N. Y. 14, 88 Am. St. Rep. 530, 61 N. E. 993; *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, 35 Am. Rep. 137.

It is also familiar law that absolute and unqualified ownership of a chattel is not essential to enable one to maintain trover for its conversion. Either a general or special property in the plaintiff, with the right of possession at the time of the conversion, will be sufficient. It has been seen that, in all the cases above cited in which it has been held that the finder of lost property is entitled to retain possession of it as against all the world until the rightful owner appears, it was also held that the finder had a special or qualified property in the thing found sufficient to enable him to maintain trover for

its conversion against anyone except the true owner.

Upon the assumption, then, that the plaintiffs and the defendant were joint finders, and therefore tenants in common, of the coin contained in the cans found in the case at bar, each was entitled to possession of one third of it, and charged with the duty of holding it for the true owner if he could be ascertained. He was under obligations to exercise reasonable care to safely keep his share of it, and be prepared to restore it to the true owner whenever he might appear; and was therefore authorized to maintain such action as might be necessary to entitle him to retain or recover possession of it. The coins were readily divisible into three parts by counting and weighing, but the defendant denied the plaintiffs' rights and refuses to surrender any part of the coin. This was effectually a conversion of their respective shares as tenants in common, and an action of trover was the appropriate remedy for each plaintiff.

2. Under the motion the defendant insists that he discovered the cans under circumstances that constitute him the sole finder of the coins; but, under instructions upon this point to which no exceptions were taken, the jury evidently reached the conclusion that the plaintiffs participated in the discovery so as to become joint finders with the defendant, with equal rights in the property found. They awarded to each plaintiff \$291.20, and this appears to have been precisely one third of the aggregate market value of all the coin. As it satisfactorily appears that the quantity of coin in any one can was not of the same value as that in any other, the jury must have decided that there was a joint finding by all, and not a separate finding of a single can by each, and the question now is whether this conclusion of the jury was warranted by the evidence.

A mill owned by Leonard J. Hackett had been destroyed by fire, including a small building 14 feet distant from it and a covered passageway connecting it with the mill. The plaintiffs and defendant were employed by the owner of the premises, among other things, to make an excavation about 8 feet wide for a shaftway preparatory to the erection of a new mill on the same site. At the time of the discovery of the coin, they were all engaged in digging out the gravel and small stones in the passageway connecting the old mill with the small building. It appeared in evidence that there had been some "joking" between these workmen and Mr. Sweet, a neighbor who happened to be present, with reference to a tradition that one Porter, a former owner, had buried some money on the premises; but, according to the 19 L.R.A. (N.S.)

testimony in behalf of the plaintiffs, the coin was discovered under the following circumstances: The plaintiffs and defendant were working in the trench about 4 or 5 feet from each other, when the defendant discovered the top of an old can, and asked Sweet, who was walking away, to come back, saying, "I have found it." Thereupon the plaintiff Morton commenced to dig out the stones and gravel around the can, when the defendant tried to pull it out with his hands, and said: "I can't lift it. I guess it is filled with sand." After further digging the plaintiff Morton took up the can, when the bottom dropped out, and the silver coins were seen falling from the can among the stones. The defendant exclaimed: "It is money. I wish I hadn't said anything, for there will be a row over it." While digging out more stones for the purpose of picking up the coins that fell among stones, the plaintiff Morton discovered the second can, which was taken out by the defendant and Mr. Sweet. Morton continued to dig out the stones and gravel and soon uncovered the third can, the top of which, however, appears to have been first seen by the plaintiff Weeks. This can was removed by the defendant and the plaintiff Morton. The three cans were set in a triangular position about a foot equidistant from each other; the spaces between them being filled with stones and gravel.

The money was turned into a pail and pan and carried to the house of Leonard J. Hackett by the defendant and Mr. Sweet, where it remained from Saturday afternoon until the following Monday, when, by arrangement between the defendant and the owner of the land, the money was deposited in a national bank.

The defendant's account of the finding is materially different. He testifies that the cans were standing in a row close to each other, and that when he unearthed the first one, and before it was taken out, he discovered the other two through the openings in the stones, and plainly saw the bright coins in the cans. He expressly admits, however, that "we all had hold of these cans," and it is the opinion of the court that there was sufficient evidence to warrant the jury in accepting the plaintiffs' version of the finding, and in drawing the inference that neither the plaintiffs nor the defendant had any knowledge or belief that silver coins had been discovered until they were seen to fall through the bottom of the first can after it was taken out by the plaintiff Morton. It may also be fairly inferred from the conduct of the parties that, at the time of the discovery of the coins, neither the plaintiffs nor the defendant understood that the finder of money under such circumstances acquired

any legal claim to it as against the owner of the soil where it was found.

The solution of the question thus raised, respecting the rights of the several parties who participated in the discovery and removal of the cans containing the coin in dispute, is necessarily attended with some practical difficulties. Other courts have encountered similar difficulties under analogous circumstances.

In *Keron v. Cashman* (1896; N. J. Ch.) 33 Atl. 1055, one of several boys playing along a railroad track picked up an old stocking in which something was tied, and, after he had swung it about in play for a time, a second one of the boys snatched it, or, it having been thrown by the finder, the second boy picked it up and began striking the other boys with it. In this way it passed from one to another, and, finally, while the second boy was swinging it, it broke open, and paper money to the amount of \$775 was found therein; all then examining it together. It was held that the money belonged to all the boys in common. In the opinion the court says:

"This money within the stocking was therefore the lost property, and, as to this money, the first intention, idea, or 'state of mind,' as it is called in some of the authorities, arose on this discovery. As a plaything the stocking with its contents was in the common possession of all the boys; and inasmuch as the discovery of the money resulted from the use of the stocking as a plaything, and in the course of the play, the money must be considered as being found by all of them in common. . . .

"All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal 'finder' of such property, and the peculiarity of the present case is that the intention or state of mind necessary to constitute the finder must relate to the lost money inclosed within a lost stocking, and not to the lost stocking itself, in the condition when first found; and, under the circumstances established by the evidence in this case, the finder of the lost stocking was not, by reason of such finding, the legal finder of the lost money within the stocking. A decree will therefore be advised dividing the money equally between the defendants."

In *Cummings v. Stone*, 13 Mich. 70, the plaintiff's tugboat, while towing a raft belonging to the defendant, slackened speed, and on starting again, the tow line, which was the property of the defendant, caught and drew up an anchor and chain, which were secured and put on the raft by the defendant, and it was held that the plaintiff

and defendant were joint finders of the property.

In these decisions the courts appear to have been governed by those practical considerations of fairness and conceptions of common right which influence just and thoughtful men in the ordinary affairs of life, and which are in harmony with the principles of equity, and not discountenanced by rules of law. In reaching the conclusion that the discovery of the three cans should be deemed one transaction, and that the participation of the plaintiffs in the discovery of the coins was sufficient to constitute them joint finders with the defendant, the jury in the cases at bar appear to have been governed by the same equitable considerations, and it is the opinion of the court that the verdicts were warranted by the evidence.

Exceptions and motions overruled.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SHANBERG, Plff. in Err.,

v.

FIDELITY & CASUALTY COMPANY OF NEW YORK.

(85 C. C. A. 343, 158 Fed. 1.)

Appeal — jurisdiction — waiver.

1. A plaintiff who makes no objection to the jurisdiction of a Federal court to which the case is removed on the ground of diverse citizenship because neither party resides within the district, but proceeds with the trial, will not be heard to raise the objection on appeal.

Accident insurance — rupture of heart — liability.

2. Rupture of the heart, which is in a state of fatty degeneration, by assisting in carrying a door weighing 86 pounds, or by filling the lungs with air by drawing a long breath after putting it down, causing death, is not within the provisions of a policy insuring against death from bodily injuries sustained through external, violent, and accidental means.

(November 4, 1907.)

Case Note. — Rupture of blood vessel as an accident within accident insurance policy.

In *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362, Fed. Cas. No. 8,682, it was held that the rupture of a blood vessel while exercising with Indian clubs would not be accidental if the insured voluntarily used the clubs in the ordinary way for taking such exercise, without the occurrence of any unusual circumstance interrupting or interfering with such use, or causing any un-

ERROR to the Circuit Court of the United States for the Western District of Missouri to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Affirmed.

The facts are stated in the opinion.

Argued before Van Devanter and Adams, Circuit Judges, and Riner, District Judge.

Mr. I. J. Ringolsky, with Mr. J. C. Rosenberger, for plaintiff in error.

Messrs. Charles S. Cryster and Clifford Histed, with Mr. J. H. Harkless, for defendant in error.

Riner, District Judge, delivered the opinion of the court:

This was an action to recover upon an ac-

foreseen, accidental, or involuntary movement of the body; but that if, while engaged in such exercise, there occurred any unforeseen, accidental, or involuntary movement of the body, or any unforeseen or unexpected circumstance interfered with or obstructed the usual course of such exercise, and produced an involuntary movement, strain, or wrenching, by means of which the injury was occasioned, it would be an accident within the spirit of the policy.

In *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49, it appeared that the insured, at the time of the injury, was healthy and strong, and, while removing a cylinder head from a railroad locomotive, which was one of his duties as a machinist, and which he had frequently done in safety, he made some sudden, unusual, unexpected, and involuntary movement of the body in order to prevent the head from falling, which caused the rupture of a blood vessel. It was held that the rupture was accidental.

In *McGlinchey v. Fidelity & C. Co.* 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13, it appeared that the insured was driving a carriage containing himself and his two small boys when the horse became frightened and ran away, nearly colliding with other teams, but was brought under control before upsetting the carriage or throwing anyone out. Immediately afterwards, the insured experienced great sickness and pain and died within about one hour. The court said: "Our belief is, on the facts legitimately before us, that death was produced by a ruptured blood vessel about the heart, and that such rupture was caused by the extraordinary physical and mental exertion which the deceased put forth to save his children and himself from injury;" and held that death was caused by bodily injuries effected through external, violent, and accidental means within the terms of the insurance policy.

In *Taylor v. General Acci. Assur. Corp.* 208 Pa. 439, 57 Atl. 830, the insured fell down the steps leading up to his office, and stated that he did not know how he happened to fall. The fall was followed by vio-

lident insurance policy. The action was originally brought in the state court, and removed by the defendant to the circuit court of the United States for the western district of Missouri. The defendant answered in the case, the plaintiff filed her reply thereto, and the case proceeded to trial before the court and a jury. At the conclusion of the evidence, the court directed the jury to return a verdict in favor of the defendant.

While numerous errors are assigned in the record, two, only, are relied upon here: First, the court erred in entertaining jurisdiction of the case, because it affirmatively appears from the record that neither plaintiff nor defendant was, at the time the suit was brought and tried, a citizen of the state or district in which the suit was brought,

lent hemorrhages due to the rupture of blood vessels in the stomach, from which he died. His physicians agreed that there was nothing in his condition indicating that he was afflicted with any disorder that might have contributed to the fall or to his death. It was held that his death was caused by an accident within the terms of the policy.

In *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252, it was held that death resulting from a ruptured artery was not accidental, where the rupture occurred while the insured was reaching over a chair to close window shutters, and he did not fall, slip, or lose his balance, and nothing was done or occurred which was not foreseen and planned, except the rupture of the artery.

In *Smouse v. Iowa State Traveling Men's Asso.* 118 Iowa, 436, 92 N. W. 53, it appeared that insured, just recovering from an attack of pneumonia, being suddenly aroused from sleep, arose in a somewhat confused condition of mind, and hurriedly attempted to remove his nightshirt over his head, and while his arms were raised above his head, became entangled in the garment, and, putting forth more or less violent exertion in an effort to extricate himself, ruptured a blood vessel, causing his death. It was held error to instruct the jury that "an accidental cause is such as may happen by chance; unexpected taking place; not according to the usual course of things, or not as expected," since the use of the word "may" served to weaken the definition given of "accident," and suggested by inference that the element of chance and unexpectedness was not always necessary to an accidental result; and held, further, that while the insured's confused condition may have caused him to become entangled in his garment, and may have made him incapable of exercising ordinary care and prudence in the physical exertions employed by him in escaping therefrom, nevertheless, those exertions were voluntary, in the proper sense of the word, and therefore the fatal result could not be regarded as accidental.

In *Niskern v. United Brotherhood of Car-*

the plaintiff in error being a citizen and resident of the state of Kansas, and the defendant in error being a citizen and resident of the state of New York; therefore the case was not one which could be removed into the circuit court; second, that the court erred in instructing the jury to return a verdict for the defendant.

The question of jurisdiction was not raised in the court below. No objection whatever to its jurisdiction was made in that court; plaintiff voluntarily appeared, filed a reply, and proceeded in the trial without objection, the question of jurisdiction being now raised for the first time in the brief of plaintiff in error, filed in this court. It is insisted that the case of *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150, is controlling in this case, and fully sustains the contention of the plaintiff. It must be conceded that there is a statement found in the opinion of the court in that case which tends to give color to this contention, but, to determine what was really decided, we must look at the case then before the court. In that case, *Wisner*, a citizen of the state of Michigan, commenced an action in the state court in the state of Missouri against *Beardsley*, a citizen of the state of Louisiana. *Beardsley* filed his petition to remove the case from the state court into the circuit court of the United States for the eastern division of the eastern district of Missouri, on the ground of diversity of citizenship, together with the bond required in such cases; an order of

removal was thereupon entered by the state court, and a transcript of the record was filed in the circuit court. *Wisner* moved to remand on the ground that the circuit court had not acquired jurisdiction by the removal. The motion was heard and denied. *Wisner* then applied to the Supreme Court for leave to file a petition for mandamus, which was granted, and rules entered returnable upon a day fixed, and the case submitted on the returns to the rules. The Supreme Court held that the motion to remand to the state court should have been sustained on the ground that the circuit court had no jurisdiction to proceed. It will thus be seen that the *Wisner* Case differs materially from the case at bar, in that in that case the plaintiff took advantage of the first opportunity to raise the question of jurisdiction by presenting his motion to remand upon that ground, whereas, in this case the plaintiff not only failed to ask that the case be remanded, but voluntarily filed her reply and proceeded to trial, thus bringing the case more nearly within the principle announced by the Supreme Court in the case of *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286. In the case last cited, the *Central Trust Company*, a corporation created by and existing under the laws of the state of New York, filed a bill in equity in the circuit court of the United States for the western district of Virginia against the *Virginia, Tennessee, & Carolina Steel & Iron Company*, a corporation created by and existing under the laws of the

penters & Joiners, 93 App. Div. 364, 87 N. Y. Supp. 640, the insured, a carpenter, claimed that he was suffering from a hardening of the blood vessels of the body, and that a strain, to which he was subjected in lifting heavy timber, ruptured a diseased blood vessel. The evidence showed that he suddenly became dizzy while engaged in endeavoring to put up the frame and rafters of a porch. It was held that, since the most liberal inference that could be drawn from the evidence was that he put forth an effort in the performance of his work which proved too much for him in his physical condition, an accidental injury was not established.

In *Scarr v. General Acci. Assur. Corp.* [1905] 1 K. B. 387, 1 A. & E. Ann. Cas. 787, it appeared that the assured's heart was in a weakened condition; that he attempted to eject a drunken man, using some physical exertion by pushing or pulling the man, who offered only a passive resistance, no blow being passed. It was held that, since the exertion was intended, and there was no slip or fall, there was no accident within the meaning of the policy.

It will be observed that, upon the question here discussed, none of the preceding cases is in conflict with the rule adopted and applied in *SHANBERG v. FIDELITY & C. Co.*, 19 L.R.A. (N.S.)

viz., that where the act of the assured which causes the rupture of the blood vessel is done by the assured voluntarily, and in an ordinary way, with no unforeseen, accidental, or involuntary movement of the body, such rupture is not an accident.

But *Horsfall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac 1028, appears to be out of harmony with this view. Here the insured, accustomed to lifting from 200 to 250 pounds, was assisting in lifting a bar of iron weighing 350 or 400 pounds; he had to stand on the top of a pile and reach below his feet in order to pick up his end, and, by reason of his position, was at a disadvantage; he ruptured his heart, which was in a healthy condition, and died in consequence. This was held to be an accident upon the ground that the "result" was unexpected and not according to the usual course of things. The holding might be justified, however, upon the ground that his disadvantageous position was unusual, occasioning an unforeseen and unintentional overexertion.

Upon the general subject of what constitutes an accident within the meaning of an accident insurance policy, see note to *Fidelity & C. Co. v. Johnson*, 30 L.R.A. 206.

state of New Jersey. The defendant company entered a general appearance, and joined with the complainant in its prayer for the appointment of a receiver, without objection to the jurisdiction. Thereafter the circuit court dismissed the bill on the ground that, under the act of March 3, 1887, chap. 373, 24 Stat. at L. 552, as amended by the act of August 13, 1888, chap. 866, 25 Stat. at L. 433, U. S. Comp. Stat. 1901, p. 508, it was without jurisdiction of the cause. The Supreme Court reversed the decree dismissing the bill, holding that exemptions from being sued out of the district of its domicile is a privilege which a corporation may waive, and which is waived by pleading to the merits; and, further, that the fact that neither the plaintiff nor the defendant resides in the district in which the suit is brought does not prevent the operation of the waiver. See also *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. ed. 282, 10 Sup. Ct. Rep. 37; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Southern Exp. Co. v. Todd*, 5 C. C. A. 432, 12 U. S. App. 351, 56 Fed. 104; *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, and cases cited in note on page 192 (115 Fed. 96); *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44. In the two cases last cited, the right of a corporation to avail itself of the exempting clause of the acts of 1887-88 was maintained, yet in both cases the defendants appeared specially and set up the right of exemption. If the plaintiff in this case had, upon its removal from the state court, filed a motion to remand on the ground that the circuit court was without jurisdiction, the case would clearly come within the rule announced in the *Wisner Case*; but, not having done so, by pleading to the merits and voluntarily submitting herself to the jurisdiction of the circuit court, we think the objection to the jurisdiction now raised in this court for the first time comes too late.

The second assignment of error relates to the action of the court in directing a verdict for the defendant. It appears from the record that P. Shanberg, the husband of the plaintiff, who lived in Kansas City, Kansas, on the 22d of March, 1904, applied for and obtained from the defendant's agent in Kansas City, Missouri, an accident policy. The provisions of the policy, so far as they are material here, are as follows: "The Fidelity & Casualty Company of New York (herein called the company), in consideration of the premises, and of the statements in the schedule of warranties, hereinafter 19 L.R.A. (N.S.)

contained, which statements the assured makes on the acceptance of this policy and warrants to be true, does hereby insure the person named and described in said schedule (and herein called the assured) for the period of one year from noon, standard time, of the day this contract is dated (1) against disability or death resulting directly and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means. . . . If death shall result within ninety days from said injuries, the company will pay the beneficiary hereinafter named, if surviving, \$5,000.'

The policy also insures against disability from certain illnesses therein specified, and then provides: "This insurance does not cover disability from disease or illness resulting from voluntary or unnecessary exposure to contagion or infection; nor any illness or illnesses other than those specified in this policy; nor any illness complicated with or resulting from a disease not specifically covered by this policy; nor any illness occasioned by or resulting from a surgical operation; nor any disease contracted within fifteen days from noon of the day this policy is issued."

It is further shown by the record that, at the time of his death, which occurred January 30, 1905, the assured was the owner of two buildings in Kansas City, Kansas; that the distance between the two buildings was about three city blocks; that, on the morning of the 30th of January, he and the witness, Higgins, carried a cellar door, 3 feet, 4 inches in width by 6 feet, 9 inches in length, and weighing about 86 pounds, from one of these buildings to the other. The witness, Higgins, testified that, upon arriving at their destination, and just as they had set the door down, the assured turned to him and said: "Shorty, I am tired." He then turned his head back, and a few seconds afterwards his head drew back with a quick jerky motion, his lips turned blue, he grabbed the door with both hands and fell forward on his face from the door; that witness attempted to pick him up, but found he was dead. This witness further testified that the weather was cold, with some snow on the ground; that during the time they were engaged in carrying the door from one building to the other the assured did not at any time slip or stumble; that the door did not strike the assured at any time, nor the assured strike the door; that on that morning, up to the time he died, he had suffered no wrench, slip, injury, or fall. The autopsy disclosed that the assured was suffering from what is known to the medical profession as "fatty heart" or "fatty degeneration of the heart," and

that the heart was ruptured. Dr. Hailey, who conducted the examination, testified that the walls of the heart of the assured were thin and it was a feeble heart, the muscular structure being thin and degenerated, what was known as "fatty degeneration of the heart," and that straining, holding the breath, filling the chest with air, as is done by making powerful exertion, could, under the facts as disclosed by this case, cause the rupture of the heart.

The policy is one of indemnity against disability or death, resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means, and also against disability from certain illnesses therein specified. The disease from which the assured was suffering at the time of his death was not enumerated in the policy, and, as we view the case, there was no accident in the means through which the bodily injury was effected. It would not help the matter to call the injury itself—that is, the rupture of the heart—an accident. That was the result, and not the means, through which it was effected. Carrying the door, or, after putting it down, the act of filling his lungs with air by drawing a long breath, was the means by which the injury was caused. Both were done by the assured voluntarily, and in an ordinary way, with no unforeseen, accidental, or involuntary, movement of the body whatever. There was no stumbling, slipping, or falling; there was nothing accidental in his movements, any more than there would be in walking on the street, or passing down the steps of his house, during each of which he might have filled his lungs by drawing a long breath, and ruptured his heart. The policy does not
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purport to be a contract of indemnity against death or injury by all means. The cause of death must, in all cases where it is sought to recover under the provisions above quoted, result directly, and independently of all other causes, from bodily injury sustained through external, violent, and accidental means, or the event is without the scope of the contract. The degree of violence or force is not material. Had the assured, while assisting in carrying the door, lost his balance and fallen and struck upon some unforeseen object, or slipped on the ice, his death might be said to have resulted from violent or accidental means, and, assuming that there was no want of due diligence on his part, would doubtless be covered by the policy. But, from the facts as disclosed by the record in this case, we do not think it can be said that the rupture of the assured's heart, and which caused his death, was in any sense the result of an accident. He engaged in carrying this door for his own convenience; he encountered no obstacle in doing so; he accomplished just what he intended to, in the way he intended to, and in the free exercise of his choice. No accident of any kind interfered with his movements, or for an instant relaxed his self-control.

Even assuming that the walls of the heart gave way under the strain to which the assured had voluntarily put it, under circumstances free from all peril or necessity, we are of opinion that the case would not come within the provisions of the policy, and therefore that the circuit court rightly instructed the jury to return a verdict for the defendant.

Judgment affirmed.

RÉSUMÉ

GIVING a brief and comprehensive view of the points of special interest and importance in this volume.

- I. PUBLIC MATTERS AND RELATIONS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY RELATIONS; PERSONAL CAPACITY; AGENCY.
- VI. TORTS; NEGLIGENCE; NUISANCES.
- VII. PROPERTY RIGHTS; WILLS.
- VIII. CIVIL REMEDIES; PRACTICE AND PROCEDURE.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC MATTERS AND RELATIONS.

Attorneys. Conviction in another jurisdiction held not within a statute declaring that an attorney must be disbarred upon his conviction of a crime punishable by imprisonment in the penitentiary. 892. A Kentucky case holds that a proceeding to disbar an attorney for unfitness to practice his profession because he has collected money for clients which he has refused upon demand to pay over may be instituted by the commonwealth's attorney in the name of the commonwealth, although a statute permits him to be disbarred for such cause upon application of the person whose money is withheld. 413.

Commerce. The right of a merchant of another state to sell his goods carries with it the right to deliver them and to employ for that purpose any agency he may deem proper, provided that at no time before delivery the goods become so mingled with the common mass of property in the state as to deprive the transaction of its interstate features. 405. A state statute requiring express companies to make free delivery of parcels held invalid as applied to interstate shipments as an attempted regulation of interstate commerce. 93.

Courts. That a judge is an active partisan, held not to disqualify him to try a contested election one of the parties to which is a member of his political party. 602. A Kansas case holds that a police judge of a city of the second class, though exercising judicial functions, is not a repository of judicial power, so as to prevent the legislature from requiring him to notify the county attorney of violations of the prohibitory liquor law which come to his notice, and to furnish the names of the wit-

nesses by whom such violations may be proved. 615.

Elections. A Louisiana case holds that the term "residence," used by the Constitution in fixing the qualification of voters, does not mean domicil. 759.

Eminent domain. That a corporation seeking by right of eminent domain property necessary to enable it to generate electricity has power to serve a private use, held not to defeat its application for property which it proposes and proves shall be used exclusively for a public service. 725. A drainage district which constructs a levee along a river and from the river to the highlands, in such a way as to obstruct the natural flow of the flood water of the river and cast it back upon property farther up the stream, held liable for the injury caused thereby, where the Constitution provides that property shall not be taken or damaged for public use without compensation. 991.

Insurance agents. The New York statute limiting amounts which insurance companies may expend for securing new business held not applicable to an existing long-term contract with a general agent, so as to reduce the amounts to be paid him under his contract; if the statute were construed otherwise, it would contravene the provision of the Federal Constitution against impairing the obligation of contracts. 946.

Monopolies. The circuit court of appeals of the sixth circuit, in a decision affirmed by the United States Supreme Court, holds that jobbers who are compelled to become parties to a general undertaking between manufacturers of a household neces-

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sity for the creation of a corporation to act as their sales agent for the purpose of stifling competition between them, which is void under the Federal anti-trust act, cannot be compelled by the sales agent to pay for goods purchased under and in accordance with the agreement. 143.

Municipal corporations. A Minnesota case holds that the legislature may legally require ten days' written notice to the city prior to the accident, of the existence of a defect in a street or sidewalk, as a condition precedent to liability for damages caused thereby. 689. Charter authority to regulate, suppress, and impose taxes on skating rinks, held not to empower a municipality to require such rinks as are not in fact nuisances to close at 6 o'clock P. M. 637. The power conferred upon a municipality to establish waterworks held not limited to the establishment of a municipal plant, but to empower the city to confer upon a corporation proper privileges and franchises in the use of the streets to enable it to furnish an adequate supply of water for the purposes of the city and its inhabitants. 183.

Towns. A town council has no authority to satisfy a judgment obtained by the town upon payment of the costs of the action, since such satisfaction is in fact a gift to the judgment debtor which the council has no power to make. 320.

Peddlers. A state statute imposing a heavy license tax upon the right to canvass from house to house for a certain limited number of articles not produced or manufactured within the state not injurious to health or morals, for the apparent purpose of favoring resident merchants with established places of business, held to violate the provisions of the Federal Constitution against abridging the privileges or immunities of citizens of the United States and denying equal protection of the laws. 297.

Physicians and surgeons. One licensed to practise "medicine and surgery" held not entitled, by virtue thereof, to practise "dentistry" without securing a license as a dentist. 877.

Public officers. A Nebraska case denies the power of the legislature to provide for the appointment of park commissioners of cities by judges of the district court of the judicial district in which the cities shall be situated. 578. A Minnesota case holds that there may be a *de facto* officer though no *de jure* office exists, as in *de facto* municipal corporations or *de facto* courts. 775. A mayor who sanctions a system of imposing fines upon places where liquor is illegally sold as a method of obtaining public revenue, and fails to make a bona fide attempt to enforce the law against them or inform the prosecuting attorney of known 19 L.R.A. (N.S.)

violations of the law, held to forfeit his office. 224. The members of a board of health acting in the performance of a public duty under a public statute to prevent the spread of an infectious or contagious disease held not personally liable for damages arising out of their acts in establishing a quarantine, even where the disease does not actually exist, provided they act in good faith. 262.

Mandamus. Mandamus held the proper remedy to restore a party to an office from which he has been illegally removed. 49.

Public records. An Illinois case upholds the right of private abstract companies to make copies of books containing abstracts of title, which are required to be made by the recorder, and for copies of which made by him he is required to charge a fee. 386.

Railroads. A statute and ordinance requiring the maintenance by a railroad company at street crossings of lights which are not excessive in foggy or stormy weather held not, because they may be so in clear weather, to be so unreasonable as to amount to unconstitutional invasion of property rights. 658. A Kentucky case denies the right of a railroad company to give one hackman the right to occupy such a position on its grounds as necessarily to result in his securing by far the larger share of patronage. 756.

Schools. Taxpayers of a school district, who for a long series of years permit the school moneys to be expended in sectarian instruction, held not entitled to maintain a suit to compel reimbursement to the district by the school officers and the recipients of the money. 171. Publishers of school books held not entitled to enjoin discontinuance in a particular school of the books published by them because the school board has not complied with the provisions of the statute in making the change. 1003.

Street franchise. A Massachusetts case holds that a street railway company having the right or license to operate its tracks in a public street only until revoked or terminated by the public authorities may, at its pleasure, discontinue the operation of the whole track covered by a particular location, in the absence of any agreement to the contrary. 865.

Taxes. Constitutional provisions that a deduction of debts and credits may be allowed in assessing taxes, and that the property must be taxed, held not to recognize credits as property, so as to prevent the legislature from exempting credits. 707. A statute providing that any mining right may be conveyed by lease, and that such convey-

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ance shall be considered as separating such right from the land so that it may be taxed separately, held applicable to an oil lease. 746. A New Jersey case holds stock in a New Jersey corporation belonging to a testator domiciled in England is not subject to an inheritance tax. 887. Personal estate of a testator situated at his domicile in one state and real estate situated in another, which he directs to be converted into money, held not subject to a succession tax in the latter, although he directs the fund to be transmitted to trustees there situated, for distribution. 290.

Telephones. A rule of a rural telephone company that telephone rent must be paid six months in advance held reasonable, justifying the refusal of the company to con-

tinue the service to a subscriber who refuses to comply therewith. 693.

Timber law. State regulation of the cutting or destruction of trees growing on wild and uncultivated land, or prohibition of the wanton cutting of small trees on such land, which are of equal or greater value standing than cut, for the purpose of protecting the water supply of the state, held not a taking of property for which compensation must be made under the 14th Amendment. 422.

Local option. A statute denying an appeal in a proceeding to contest a local-option election held not unconstitutional as special legislation, even though an appeal is allowed in proceedings to contest other elections. 377.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Consideration. A release from the engagement, held a sufficient consideration to support an agreement to support a woman whom the promisor, after agreeing to marry, induced to submit to surgical operations which rendered her unable to support herself. 655. An agreement in writing, by one, to take up a past-due note of another if it remains unpaid at a certain future date, without additional consideration to support it, held to be without consideration and unenforceable, where the promisor makes no request for forbearance, and the promisee does not agree to forbear; the mere fact that he does so forbear is not sufficient to establish either such promise or request. 842. Shipping a display cabinet which a hotel proprietor has contracted in writing to place on the counter held not to make the contract mutual, so that it can be enforced against him although not signed by the other party, where it was to run for six years, with a change of cabinet every two years, since the undertaking of the shipper is void under the statute of frauds. 919. An assignment of a land contract held to be a transfer of an interest in real estate, within the statute of frauds. 879. Issued shares in a corporation held to be goods, within statute of frauds. 874.

Incompetent person; infant. A New York case holds that a deed by an incompetent person may be avoided in an action at law to recover possession of the granted premises. 461. An Oklahoma case holds that a grantor in the possession of land described in the deed cannot invoke the aid of equity to have the deed canceled, without offering to refund the consideration received by him, although the deed was executed by him while an infant upon his false and 19 L.R.A. (N.S.)

fraudulent representations, believed by the other party, that he was of age. 1056.

Attorney's contract. That an attorney, by the terms of a general employment, debars himself from employment by others whose interests are antagonistic to those of his client, held to be a proper matter for consideration in determining his compensation for services rendered under the contract. 960.

Assignment for creditors. An assignor for creditors held not entitled to complain that the property was sold to a corporation for shares of its stock, where the property was not sufficient to satisfy in full the demand of creditors, and then consented to take the stock in payment of their claim. 682.

Bills and notes. A Kansas case holds that, in the absence of stipulations evincing a different intention, the negotiable quality of a promissory note made in Kansas and payable in Missouri will be determined by the law of Missouri. 665. The word "trustee" added to the payee's name in a written instrument held sufficient to put a purchaser upon inquiry as to all the terms and conditions under which it may have been executed. 276. A New York case holds that parol evidence is admissible to show the true relation to a bill of exchange of an irregular indorser notwithstanding the provisions of the negotiable instruments law. 136. The rights of the owner of negotiable paper indorsed in blank and deposited in a receptacle in a bank for safe-keeping held inferior to those of a transferee for value without notice in due course from a bank official, who wrongfully misappropriates the paper and uses it for his own purpose. 106.

Checks. A Kansas case holds that it is

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not negligence for a bank to pay a check written on the blank of another bank, without making inquiry. 402.

Bonds. A Connecticut case holds that interest may be added to amount of recovery on a bond, although the total sum is thereby made to exceed the penalty of the bond. 83. Mere fear or suspicion on the part of the lessor that a lessee intends to sell intoxicating liquor on the leased premises without authority of law held not to avoid a bond by which the lessee undertakes to hold the lessor harmless from any expenditure or cost because of the unlawful sale of liquor upon the premises. 662.

Railroad-aid bonds. The construction of the road upon a certain route through the county, and the expenditure of the subscription therein, held not a condition precedent to the issuance of county bonds in aid of a railroad, under a vote upon a submission of the question whether or not bonds should be issued upon condition that the company so locate and construct the road and expend the money. 849.

Brokers. A contract by a real-estate broker to find a purchaser of real estate for a compensation held not void because of the failure of the broker to comply with a municipal ordinance enacted pursuant to statute, imposing a license tax upon the business of "real estate." 675. A broker receiving exclusive authority to sell real estate by a writing which he does not sign, held not entitled to recover commissions in case the property is sold by the owner without aid from him, if he fails to show that, prior to the sale, he had used ordinary diligence in attempting to make a sale of the property, resulting in the expenditure of time, money, or effort under the contract. 598.

Building and loan associations. A New Jersey case holds that, as to mortgage debts of borrowing shareholders that became due by the default of the borrower prior to the insolvency of the association, a receiver of an insolvent building and loan association, appointed, proceeds in like manner as the directors of the association might have done if the insolvency had not supervened, as to mortgage debts of borrowing members which became due prior to insolvency by the default of the borrowers. 588.

Carriers. One who boards a car plainly marked as going only as far as the nearest stop to which his ticket entitles him to ride held not entitled to damages where the car turns back after reaching that point, and he is ejected therefrom without undue force after being refused a transfer to another car. 704. A provision in a 19 L.R.A. (N.S.)

transportation ticket relieving the carrier from responsibility for the destruction of baggage by fire held binding as to fires not caused by the carrier's negligence, although it is in print so fine that the passenger cannot, because of defective sight, read it, the printed provisions of the ticket being sufficiently conspicuous to charge him with notice that they contain a contract. 100. A New York case holds that an attorney traveling over a street railway simply for the purpose of ascertaining whether or not a transfer will be given him at a certain point, as required by statute, which information he desires for the benefit of suits already commenced on behalf of clients for the statutory penalty, is not entitled to bring an action in his own behalf for such penalty. 778. One who boards a train after telegraphing for a reservation on a certain Pullman car, which is not attached to that train, but is to be picked up a few miles down the road, and is allowed to remain in the meantime on another Pullman car, held not a passenger of the Pullman company, so as to render it liable for the negligence of its conductor, resulting in the passenger's missing the car for which his reservation calls. 753. A North Dakota case discusses the general question of the liability of a common carrier of goods, with especial reference to the duty of the shipper and the carrier respectively as to the condition of the cars. 952. The common-law liability of the carrier held not to extend to any damage resulting from the nature, disposition, or viciousness of any animal transported by it. 191. Initial carrier held liable for any damages to goods resulting directly from its negligence, although the loss may not actually occur until after the goods are delivered to the second carrier.

Good will. A Massachusetts case holds that a sales agent located in a commercial center, who, upon surrendering the agency, sells to his principal the good will of the business, cannot derogate from his grant by engaging in a competing business and endeavoring to sell similar goods to his old customers. 762. A sale of the good will of an established business in connection with the sale of the business held not void because unlimited as to time, if reasonable in other respects. 769.

Guaranty. One guaranteeing payment for goods furnished to a certain individual held not liable on guaranty for goods furnished to a company bearing the surname of such individual, in the absence of proof that he solely comprised the company. 901.

Insurance. The holder of a policy of title insurance held not entitled, upon the

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insolvency of the company, to a return of that part of the premium which the application for insurance stipulated might be retained by the company for its services in investigating the title insured. 639. The appointment of a receiver in a suit to take possession and control of the property, who takes actual possession of it, held to prevent a recovery upon a fire-insurance policy conditioned that it shall be void if any change takes place in the interest, title, or possession of the property, "whether by legal process, or judgment, or otherwise." 643. Loss of a barn knocked down by lightning, but not burned, held not recoverable under a policy in a mutual insurance company insuring against loss by fire, although the custom has been to pay such losses and levy assessments therefor. 421. A fire caused by the leaking of gasoline from a tank of an automobile when it ran into a ditch, and the explosion when the vapor penetrated the lamp forming the headlight, held to have originated within the vehicle, within the meaning of an exception of fire so originating, in a policy of insurance on the automobile. 133. Failure to attach a copy of the application to the policy held not to preclude the insurer from relying on the breach of conditions and warranties in the policy, although they are similar to those contained in the application. 102. A statement in an accident-insurance policy that, in consideration of the warranties and agreements in the application, the applicant is insured, held not to make the application a part of the contract, so as to render a statement in it as to the age of the applicant a warranty. 88. Consultation by the applicant with a physician, within the meaning of a question in the application, shown by the fact that her husband notified a physician that she was indisposed and asked him to attend her, and, on his arrival at the house, she advised him of her symptoms and received aid from him. 798. Rupture of the heart, which was in a state of fatty degeneration, by assisting in carrying a door, or by filling the lungs with air by drawing a long breath after putting it down, causing death, held not within the provisions of a policy insuring against death from bodily injuries sustained through external, violent, and accidental means. 1026. Notification of a policy holder by an insurer, after the premium note is overdue, that, unless the note is paid at once, it will be compelled to return the note, which will cancel the policy, held to be a waiver of the forfeiture for nonpayment of the note when due, preventing the insurer from insisting upon the forfeiture upon learning that the insured was in a dying condition when the notification was mailed. 227. An adult 19 L.R.A. (N.S.)

son held to have an insurable interest in the life of his mother, although he is not dependent upon her for support and has no direct pecuniary interest in her life. 233.

Landlord and tenant. A Tennessee case holds that a lease for years of property to be used for the sale of intoxicating liquor is terminated by the adoption, during the term, of a law making the sale of liquor illegal. 964. But a Georgia case holds that the lessee is not entitled to a reduction or proportional abatement of the agreed rental upon the passage of a prohibitory act after the commencement of a lease of a hotel described as consisting, *inter alia*, of a bar, and providing that the tenant might sublet the bar. 966.

Release. An acknowledgment by the plaintiff of satisfaction against two of several defendants who are sued as joint wrongdoers held not to release the others, when the instrument discloses that it was not intended to have such effect. 618.

Sale. A conditional vendee of personalty, who agrees that, upon failure to make the requisite payments, the vendor may take possession of the property and remove the same, held not entitled to recover against the latter in trespass for using only such force "in retaking the property as was requisite to overcome resistance wrongfully interposed by him. 606. Where a merchant directed another to have shipped to him corn of a certain kind and grade at a certain price over a certain railroad, the weight and grade of the corn to be evidenced by a certain official certificate, held that the fact that the corn became heated while in transit will not excuse the vendee from payment of the purchase price. 261. The destruction of cotton by fire before actual delivery, preventing the ascertainment of the purchase price by weighing by the buyer at the time of actual delivery as contemplated by the contract, held to defeat the sale and prevent an action for the purchase price. 197. An Iowa case holds that a warranty that an apparatus installed will produce certain results cannot be established by parol, where the contract of sale is in writing. 1183.

Telegram. The sendee of a telegram held bound by the terms of the contract with the sender that the company will not be answerable for mistakes in transmission, beyond the price, unless the message is repeated, where the message is sent in response to one from the sendee seeking information, which makes the sender the sendee's agent to transmit it. 1021. See also *infra*, VIII., Mental anguish.

Usury. A loan held not usurious because the agent of the lender, without his

(CORPORATIONS AND ASSOCIATIONS—FIDUCIARY RELATIONS; PERSONAL CAPACITY; AGENCY.)
 knowledge or consent, exacts from the borrower a bonus for his services in addition to the highest legal rate of interest which the contract reserves for the benefit of the lender. 399. An Iowa case holds that a loan by one of money in his possession belonging to another, which he handles entirely according to his own judgment, cannot be freed from the taint of usury, whether he bears to the owner the relation of debtor or that of attorney, by the device of calling himself in the papers the agent of the borrower, and designating the excess over legal interest commission for his services. 391.

III. CORPORATIONS AND ASSOCIATIONS.

Corporations. The trust-fund doctrine, requiring one who pays for corporate stock in property to show that the property was actually worth the value of the stock, held not applicable as between the corporation itself and the stockholder. 115. A Minnesota case holds that, where shares of stock are transferred to a party as collateral, and are so registered in the stock record, the transferee is not liable as a stockholder for the debts of the corporation. 249. The statutory liability of stockholders for the debts of the corporation held to extend to interest on claims beyond the time the affairs of the corporation are placed in the hands of a receiver, although the commissioner appointed to determine the claims in the receivership proceedings was instructed to allow interest to the date of the receivership. 428.

IV. DOMESTIC RELATIONS.

Antenuptial contract. Acceptance by a wife of the sum allowed her by a decree of divorce in lieu of dower, held to bar her rights under an antenuptial contract which provides for payment to her, at her husband's death, of a certain sum of money in lieu of dower. 384.

Divorce. A Georgia case holds that a judgment *in personam* for temporary alimony and attorneys' fees cannot be lawfully rendered in a divorce suit against a non-resident husband who is not served with process within the state and does not appear, but is only constructively served by publication. 193. A Michigan case holds that the courts of one state may enforce the decree of another for alimony payable in instalments, where no power to change the decree is reserved by the court or conferred by statute. 245.

Entireties. A wife holding land by entireties with her husband held not entitled to partition of trees cut therefrom by him, nor of lumber into which they are converted, since both are seised of the entirety. 1037.

Death of wife. A husband held not entitled to recover damages for the loss of the society, care, and comfort of his wife, due to her death because of the neglect of a physician engaged by him to attend her, unless the action is brought under the statute providing for damages for death caused by negligence. 633.

Married woman's liability for tort. A Florida case holds that a married woman is not liable in an action of tort against her husband and herself jointly, for injuries sustained by a patron of a swimming pool and bath house on real estate owned by her, conducted by herself and husband as a public resort. 531.

Support. A decree refusing a divorce to a man because of his adultery held not to prevent his setting up the adultery of the wife, on which the former action was based, in defense of a statutory action by her for support, in which such a defense is expressly authorized by statute. 468.

V. FIDUCIARY RELATIONS: PERSONAL CAPACITY; AGENCY.

Executors and administrators. A claim against the estate of a decedent in the hands of an administrator with the will annexed in one state held not barred because not presented and therefore barred against the estate of the decedent in the hands of the domiciliary executors in another state. 553.

Principal and agent. A Washington case holds that an agent of a corporation 19 L.R.A. (N.S.)

may be properly found to have received property in satisfaction of notes, where he sold machinery for which the notes were issued, received the notes and the mortgage securing them, collected all payments upon them, and conducted the proceedings to foreclose the mortgage, although an officer of the corporation stated that his authority was only to collect the notes. 324.

VI. TORTS; NEGLIGENCE; NUISANCES.

Automobile. A Wisconsin case holds that an automobile which has been purchased with the understanding that the purchaser's son shall be taught to operate it may be found to be in the possession of the son as agent of the purchaser while the instructions are being given. 332. That the daughter of defendant was accustomed to drive his automobile, asking his permission when he was at home, but taking it without his permission when he was not at home, held insufficient to show that she was his servant or agent, so as to render him liable for injuries inflicted by her while negligently using the machine for her own pleasure. 335.

"Attractive nuisance;" "turntable doctrine." A California case applies the doctrine of attractive nuisance where a railroad company left a loaded push car unfastened and unattended, standing in a street on a grade down which, if started, it could not be readily stopped, a child having been caught and crushed while attempting to stop the car after it had been set in motion. 1094. But the doctrine is repudiated in a Connecticut case holding that persons engaged in the demolition of a building which is left with standing chimneys on Saturday night are not, although the building is uninclosed, bound to anticipate that children may, during the next day, trespass on the property and undermine the chimneys, suffering injury in their fall. 1101. So, a Kentucky case holds that the fact that a railroad company has left a pile of sand unguarded on a vacant lot adjacent to its tracks, which is attractive to children, will not render it liable to a child who, attracted thereto to play, attempts to board a passing train to his injury. 1112. And a North Carolina case holds that the mere maintenance of an insecurely covered well of hot water upon an open space unfenced from the street, near the rear of a theater, will not render the owner liable for injury to a thirteen-year-old child of average intelligence who falls into it, although the child is allured to the place by a desire to see what is going on in the rear part of the theater. 1116. And an Ohio case, disapproving the doctrine of the turntable cases, holds that a railroad company is not liable to an infant who comes upon its premises without invitation, and who is injured there while playing, without its knowledge, on a turntable. 1136. Likewise, a Pennsylvania case holds that a railroad company owes no duty to a trespassing child to lock or guard its turntables, al-

though such machines are calculated to allure children to them for amusement. 1162.

Fright. Damages for mental pain and anguish, illness, threatened miscarriage, and possibly permanent injuries, due to fright resulting from an assault committed by a stranger in the hearing of a pregnant woman, held too remote to form a basis of action on her behalf, against the assailant. 225.

Injury on highways. A property owner who throws water from his roof by means of a spout, onto his walk, from which it flows to a public walk, where it freezes, held liable for injuries thereby caused to a pedestrian who is in the exercise of due care. 236. A municipal corporation held liable for an injury through the negligent operation of a bridge maintained as part of its highway system, to one sent to take measurements beneath it. 1178. A municipal corporation permitting the maintenance by an electric railway company of a trolley pole in the street in such manner as to constitute a dangerous obstruction to public travel held liable to a traveler injured thereby. 506. The motorman of an electric car which passes immediately in front of a fire-engine house held guilty of double negligence when he drives the car at full speed in approaching the house and fails to see, in time to enable him to stop the car and avoid collision with an outgoing hose wagon, a signal given whilst his car is nearly 150 feet distant from the engine house. 623.

Master and servant. An Arkansas case holds that a miner does not assume the risk of injury from the master's breach of its statutory duty to furnish necessary props to make the room in which he is working safe. 646. A master held not chargeable with negligence in employing a minor to work on dangerous machinery in violation of the terms of a statute, if, in the exercise of proper vigilance and due caution, he was led to believe that the employee was above statutory age. 783. A wire stretched over and across a railroad track, not high enough to permit an employee standing on the top of a freight car to pass safely thereunder, held not to constitute a "defect in the way or track," within the employer's liability act, where there is nothing to indicate that the wire is not a mere movable object, temporarily placed too near the track. 738. One engaged in discharging coal from vessels, who provides suitable apparatus for the work, held not responsible to an employee for the manner in which it is set up by the men

(TORTS; NEGLIGENCE; NUISANCES.)

employed in doing the work. 680. A Massachusetts case holds that it may properly be found to be negligence for a street car company to fail to take precautions against the forgetting or misunderstanding of an order which requires a regular car to await the arrival of a special one before proceeding, where the result of its nonob-servance may be death. 239. A master held not negligent in failing to warn an adult employee of ordinary intelligence, who had had several months' experience in drilling holes for blasting and in the actual firing of the blasts, of the danger of putting powder into a drill hole in which dynamite had been exploded, before the fire from the fuse and wrappings had had time to burn out. 997. When the method adopted by a salt company for carrying on its business involves the occasional dislodging of masses of salt, held that the duty to warn employees before such dislodgment is a nondelegable one. 749. The promise of the master, on the complaint of an employee, to furnish another step ladder, held not to relieve the employee from the imputation of having assumed the risk by continuing to use the defective ladder. 793. The rights of a section man on a street railway, injured while riding to work from his home on the company's car without paying fare in accordance with a custom of the company to carry such employees free upon displaying badges furnished to them, held not those of a passenger, but merely those of an employee. 717. A Massachusetts case holds that an employer may be liable for an injury to his employee through his falling into a machine by stumbling over a nail projecting from the floor near the machine, which is concealed by the litter on the floor. 242. The rule that the master's duty to furnish a reasonably safe place to work cannot be devolved upon a fellow servant, so as to relieve the master, held not applicable in favor of a member of a gang of workmen whose duty it is to enter a portion of a trench in course of construction, after a blast had been fired by a preceding gang, and assist in removing broken stone, who was injured by the fall of some loose dirt by the side of the trench (340); or in favor of an employee injured while engaged with fellow servants under a competent foreman in a detail of the work of removing a bank of earth and gravel by the fall of an overhanging ledge, which was a condition arising on the day of the accident, and not a condition previously existing (344); or to a place at which railroad employees are engaged in clearing the tracks of *débris* from a land slide (348); or to the slippery condition of a passageway caused by ice formed 19 L.R.A. (N.S.)

as a necessary result of the trucking down over the platform as a part of the regular work of the establishment or through the negligence of fellow servants, the injured employee having long been cognizant of the fact of ice being there in freezing weather (355). So, the duty of caring for the safety of a place, or of appliances, in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the appliances as to safety as the work progresses, held to be the duty of the fellow servants to whom the work is intrusted, and not the duty of the master. 361. But one who puts his servant to work in a ditch, held bound, when he takes upon himself the direction and control of the work, to see that the place is reasonably safe when the servant enters it, and is kept reasonably safe so long as the servant is required to stay there. 367. A master held responsible for the torts of his servant, done in the course of his employment with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same are done wilfully but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of his master. 255.

Injury to passenger. One held not negligent as a matter of law in boarding a street car after it was in motion, so that he was on the running board looking for a seat when the car reached an obstruction near the track which was in plain view, notwithstanding that he might have boarded the car before it started and gained a seat inside the car. 296. A street railway company held negligent in maintaining tracks, used by cars running in opposite directions, so close together that the natural swaying of the cars in motion, emphasized by an uneven condition of the track, brings the cars from 3 to 6 inches from each other, without taking any precautions to prevent injury to passengers. 213. Failure of the conductor to notify passengers inside the car that the train had not reached the station when it stopped, held not the proximate cause of injury to a passenger who unnecessarily and voluntarily rode on the platform, and attempted to alight, to his injury, before the train had reached the station. 1028. One who, without paying fare, voluntarily attempts to ride in a cab of a locomotive at the invitation of those in charge of the train, held to assume the known hazards incident to the exposed position, so that he cannot hold the company liable for injuries in a collision of the cab with a car negligently left on a side track. 988.

Railroad crossing. One undertaking to

(TORTS; NEGLIGENCE; NUISANCES.)

cross between freight cars standing on a switch track with only a narrow opening between them, to reach a railroad station, held to assume the risk of injury from the opening being closed in the operation of the road. 558.

Electricity. An electric company which maintains defectively insulated wires over another's roof in violation of a penal ordinance of a municipality held not liable for the death of a boy who, in trespassing on the roof, comes in contact with the wires and is killed. 504.

Places of amusement. A roller-skating rink held to be within a statute imposing a penalty for exclusion, on account of color, of any person from the privilege of inns, restaurants, saloons, barber shops, eating houses, public conveyances, or any other place of public accommodation or amusement. 907. A ferry company which maintains a pleasure resort on its own property for a particular class of persons whose patronage it invites and for whose accommodation it runs a boat devoted exclusively to their transportation held not, so far as that enterprise is concerned, a common carrier. 872. That a transportation company maintaining a pleasure resort at the termination of its line as an inducement to persons to patronize the line charges no fee for admission, depending for its profit on the passengers carried, held not to exempt it from the rule requiring the owners of pleasure resorts to protect invited guests from unusual occurrences which may result in serious danger to them. 772.

Concurrent negligence. A tenant held not precluded from holding one who causes the fall of a wall of a building upon him through negligent excavation of the adjoining lot liable for the injury thereby caused to his goods, by the fact that one of the proximate and efficient causes of the falling of the wall was the negligence of his landlord. 498.

Contributory negligence. A Kansas case holds that it is not *per se* negligence for a man sixty-eight years old to stand up while riding in a dray in a city street. 223.

Imputed negligence. A husband's negligence as driver of a conveyance in which his wife was riding at the time of an injury held not imputable to her, so as to prevent her recovering against the other negligent person, where the relation of principal and agent or master and servant did not exist between them. 230.

Last clear chance. A licensee held not entitled to hold the railroad liable for injuries caused by a piece of lumber which is struck by a passing train, if, by the exercise of care which an ordinarily prudent 19 L.R.A. (N.S.)

man would have exercised under similar circumstances, he could have discovered the danger in time to have avoided the injury. 453. Whether the negligence of a railroad conductor, who, in the course of his work, placed himself in the way of an expected passenger train, will preclude his recovery for injuries received from the train, held to be for the jury upon evidence that the train was running at an extraordinary and illegal rate of speed, not under full control as required by the company's rule, and might have been stopped before striking him after the engineer discovered that he was so absorbed in his work as to be unconscious of his peril. 446.

Libel. The publication by a newspaper of the report of a meeting of a private corporation, which contains libelous statements made by stockholders against the officers, held not privileged. 862.

Trover. A sheriff who takes from a prisoner in his custody property rightfully belonging to the prisoner, and thereafter surrenders it to another, in disregard of the prisoner's rights, and in recognition of an adverse claim asserted by another, held guilty of conversion and liable in trover, without any precedent demand for a return of the property. 833.

Malice. A Massachusetts case holds that an officer of a corporation may be liable for maliciously inducing it to break its contract with its employee and discharge him from his employment. 561.

Manufacturer. A manufacturer of canned goods held to be under a duty to one who, in the ordinary course of trade, becomes an ultimate consumer, to exercise care that the goods are wholesome and fit for food, and not tainted with poison. 923.

Nuisance. An Arkansas case holds that the operation of a planing mill objectionable to occupants of neighboring houses by reason of noise, smoke, and cinders will not be perpetually enjoined where the preponderance of the evidence does not show that it is of such a nature as to deprive normal persons living where complainant lives, of the comforts of a home, or render living in such homes a positive discomfort. 174. An Alabama case holds that a state may maintain a bill to abate a nuisance in a city street. 1173. The owner of property adjoining that on which a liquor nuisance is maintained, held to have sufficient interest to entitle him to seek a writ of certiorari to review a consent decree, in a suit by a citizen to enjoin the maintenance of the nuisance, which permits acts contrary to the statute and prejudicial to the community. 610. A near-by property owner who, together with those in his employ, is compelled to witness indecent conduct of

(CIVIL REMEDIES; PRACTICE AND PROCEDURE.)

which would have resulted by a continuance of the mother's life. 128. See also *infra*, Mental anguish.

Mental anguish. A Minnesota case denies the right to recover for mental anguish from the breach of a contract by a railroad company to transport a corpse, occasioning a delay of twenty-four hours in the funeral arrangements, there being no evidence of wilful or malicious conduct on the part of the company or its agents. 564. A telegraph company which fails promptly to transmit money sent by a father to secure the forwarding of the corpse of his daughter for burial, held liable to him for mental pain and anguish by reason of the delay in shipment of the corpse. 575. The mere fact that the wife of the addressee of a telegram was a sister of the one whose death is announced by the message held not sufficient to entitle her to recover damages for mental anguish because of its non-delivery. 475. Damages for mental anguish held not recoverable by the undisclosed principal for delay in transmitting and delivering a telegram announcing death, although both the sender and sendee are his agents. 479. A Kentucky case holds that, in actions to recover for mental anguish from the failure to deliver a telegram, the plaintiff should be confined to a statement of the mere facts of mental anguish, and not permitted to introduce testimony as to special relations or conditions. 409. An Iowa case holds that no presumption of mental suffering will arise in case of failure to deliver a telegram announcing the death of a relative, by affinity only, such as a son's wife; and that it is necessary in such cases to plead and prove facts showing special friendship or affection, although it is not necessary to show that the telegraph company had notice of such facts. 374. One accompanying her invalid sister on a railroad journey, who does not make the contract for the transportation, held not entitled to recover damages for mental suffering due to the physical suffering of the invalid because of the wrongful acts of the carrier. 500.

Evidence. A Vermont case holds that one killed at a railroad crossing under circumstances of which there was no witness cannot be presumed to have been in the exercise of due care, in an action to hold the company liable. 973. The presumption of negligence arising from the setting out of a fire by a locomotive held not defeated by the fact that the setting of the fire by the locomotive was proven by circumstantial, rather than direct, evidence. 742. A Pennsylvania case holds that, where an intentional killing by the use of a deadly

weapon has been established, accused has the burden of showing that it was in self-defense, by a fair preponderance of facts. 483. The record of a deed held not admissible to prove its existence, on behalf of the grantee claiming under it. 438.

Res ipsa loquitur. A Virginia case holds that, when a passenger shows an injury to himself by the breaking of the carrier's bridge, the burden is cast upon the carrier of establishing by a preponderance of the evidence that the accident and resulting injury were caused by inevitable casualty, or by some cause which human care and foresight could not have prevented. 316. The derailment and overturning of a freight car in a train held not such evidence of negligence on the part of the railroad company towards its brakeman as to cast upon it the burden of exonerating itself from the charge of negligence. 790.

Election of remedies. Bringing an action upon express contract for electric lights furnished to a city held not an election which will preclude an action upon *quantum meruit* in case the first action is dismissed for failure to prove compliance with the contract. 219.

Limitation of actions. A single transaction on an account which has been dormant less than the statutory period, consisting of the debit of a small item and the credit of an amount necessary to cancel it a short time afterwards, held sufficient to bring the account within a statute providing that the cause of action in mutual accounts shall be deemed to accrue at the time of the last item proved in such account. 126.

New trial. A Colorado case holds that a verdict will be set aside, and the party in whose favor it was rendered required to pay the costs regardless of his intent, where, pending the action, he took jurors to a bar to drink in the absence of other jurors and the officers in charge of them. 733.

Judgment. A judgment discharging a subscriber to the stock of a corporation as garnishee for its debt upon failure of the plaintiff to contest his answer denying indebtedness held *res judicata* of the question of indebtedness, in a subsequent direct proceeding by the creditor against him to apply his individual stock subscription to the payment of the corporate indebtedness. 604. A Wisconsin case holds that equity will enjoin the enforcement of a judgment secured by perjury where the judgment debtor used diligence, but failed to discover the perjury in time to be available at the trial, or to secure the relief provided by statute in such cases. 1080.

Writ and process; name. A Califor-

(CRIMINAL LAW AND PRACTICE.)

nia case holds that jurisdiction in an action to quiet title to real estate may be acquired, as against a married woman, upon publication of a summons against her in her maiden name in which she took title to the prop-

erty. 983. Where initials instead of a given name before a surname are used to identify a person in court proceedings, the initials must be all given and correctly given. 905.

IX. CRIMINAL LAW AND PRACTICE.

Adultery. The spouse of either of the guilty parties held entitled to make complaint against either or both under a statute providing that no prosecution for adultery shall be commenced except on the complaint of the husband or wife. 786.

Confession. A confession of one charged with obtaining money by false pretenses by means of a worthless check, that the check was known by him to be worthless, held sufficiently corroborated by evidence that the check was forwarded through the regular channels for collection, and returned unpaid. 443.

Presence of accused. A West Virginia case holds that it is prejudicial error for the court, after receiving a prisoner's plea of guilty of murder in the first degree and before pronouncing judgment, to proceed with and inquire as to the circumstances and facts of the killing, whether the inquiry be for the personal satisfaction of the judge, or to advise him as to the character of the judgment that should be pronounced. 713.

Defendant's Testimony. An instruction to the jury in a criminal case that they are not bound to consider the testimony of defendant as absolutely true, but are to remember that he speaks in his own behalf, and to consider the great temptation which one so situated is under to speak so as to procure an acquittal, held erroneous. 802.

Gambling. A pool table for the use of which the loser of the game is, within the knowledge of the keeper, to pay, held a gambling device, within the meaning of a statute providing for punishment on one who exhibits such devices. 913.

Commitment. A court which, after imposing a judgment of imprisonment, makes an order under which the defendant is discharged from custody, held to have no power

er or jurisdiction, after the lapse of the time involved in the sentence, and after the term, to issue commitment on such judgment. 1041.

Embezzlement. A laundress held guilty of embezzlement who, upon discovering in a clothes basket committed to her a bag of money belonging to her employer, accidentally placed therein, recognized her duty to return it to the owner, but subsequently and before returning it fraudulently converted the money. 371.

Indictment and information. A paper writing purporting to be an information, not exhibited or presented by the county attorney or someone authorized by law, held invalid and incapable of amendment so as to confer jurisdiction of the prosecution upon the county court. 1050.

Intoxicating liquor. A Kansas case holds that, a Manhattan cocktail being generally and popularly known as an intoxicating liquor, no proof of its intoxicating character is necessary in a prosecution under the prohibitory law. 848.

Malice. An Idaho case holds that, in a prosecution for maliciously killing, wounding, or maiming dogs, the state must either show that the defendant entertained malice against the owner of the dogs, or that the killing, wounding, or maiming was characterized by such wanton and reckless disregard of the rights of property in others as to raise the presumption of malice from the manner of the commission of the act. 835. The word "maliciously" as used in a statute relating to the crime of "malicious mischief" held to import that the act to which it relates must have resulted from actual ill-will or revenge, implying an intent to vex and annoy the owner of the property injured. 273.

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A suit to ascertain, determine, and decree the extent and priority of a water right and appropriation partakes of the nature of an action to quiet title to real estate. *Taylor v. Hulett*, 19: 535, 97 Pac. 37, — Idaho, —
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ADMISSIONS.

Admissibility in evidence, see Evidence, 24, 34.

ADULTERY.

Effect of husband's adultery on right of relying on wife's adultery as defense to action for support, see Husband and Wife, 2, 3.

The spouse of either of the guilty parties is empowered to make complaint against either or both of them under a statute defining adultery as the voluntary sexual intercourse by a married person with a person other than the offender's husband or wife, and providing that no prosecution shall be commenced except on the complaint of the husband or wife. *State v. Wesie*, 19: 786, 118 N. W. 20, — N. D. —. (Annotated)

ADVERSE POSSESSION.

1. The possession beyond his true line, of the grantee of a particular lot, who occupies up to fences set over on his neighbor's property, claiming the ground as part of his lot and basing his possession on no other claim of right, is not adverse to the true owner. *Chicago, M. & St. P. R. Co. v. Hanken*, 19: 216, 118 N. W. 527, — Iowa, —.

2. Merely noting on a plat a dedication of land for depot purposes does not endow the entire tract set apart with the incidents of public use, so as to prevent the acquisition of title to it by adverse possession. *Chicago, M. & St. P. R. Co. v. Hanken*, 19: 216, 118 N. W. 527, — Iowa, —.

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Of corporate charter, see Corporations, 10.

AMUSEMENTS.

Exclusion of negroes from, see Civil Rights; Costs.

1. The owner of a pleasure resort, who permits the playing of ball away from the portion of the grounds devoted to such sport and near to that devoted to dancing, without notifying those interested in the dancing or taking precautions to protect them from injury, may be liable for an injury inflicted by a ball thrown upon a spectator of the dancing. *Blakeley v. White Star Line*, 19: 772, 118 N. W. 482, — Mich. —.

(Annotated)

2. That a transportation company maintaining a pleasure resort at the termination of its line as an inducement to persons to patronize the line charges no fee for admission to it, depending for its profit on the passengers carried, does not exempt it from the rule requiring the owners of pleasure resorts to protect invited guests from unusual occurrences which may result in serious danger to them. *Blakeley v. White Star Line*, 19: 772, 118 N. W. 482, — Mich. —.

ANCILLARY ADMINISTRATION.

See Executors and Administrators, 5.

ANIMALS.

As to transportation of live stock, see Carriers, 25, 26.

Injury to person on highway by kick of horse, see Master and Servant, 40; Negligence, 12.

Evidence in action for malicious killing of dogs, see Evidence, 33, 44.

Criminal liability for killing dog, see Malicious Mischief, 4.

1. Malice is the gist of the action in a statutory prosecution for maliciously killing, maiming, or wounding a dog, and must be established beyond a reasonable doubt in order to justify a conviction. *State v. Churchill*, 19: 835, 98 Pac. 853, — Idaho, —.

(Annotated)

2. In a prosecution for maliciously killing, wounding, or maiming dogs, the state must either show that the defendant entertained malice against the owner of the dogs, or that the killing, wounding, or maiming was characterized by such wanton and reckless disregard of the rights of property in others as to raise the presumption of malice from the manner of the commission of the act. *State v. Churchill*, 19: 835, 98 Pac. 853, — Idaho, —.

3. The owner of premises is justified in using such force in ejecting dogs which are 19 L.R.A. (N.S.)

chasing and worrying his live stock to its apparent danger, as a reasonably prudent man would use under like circumstances in defense and protection of his property. *State v. Churchill*, 19: 835, 98 Pac. 853, — Idaho, —.

4. An owner of premises is justified in using such force as is necessary to eject therefrom dogs which are harassing and worrying gravid animals in such a manner as will likely cause pecuniary loss, even though he has knowledge of the traits and habits of that particular breed of dogs, and that they would not in fact kill or maim a domestic animal. *State v. Churchill*, 19: 835, 98 Pac. 853, — Idaho, —.

ANTENUPTIAL AGREEMENT.

See Husband and Wife.

ANTI-TRUST ACT.

Enforcement of contract in violation of, see Contracts, 13.

In general, see Monopoly and Combinations.

APPEAL AND ERROR.

Statute denying appeal in proceedings to contest local-option election, see Constitutional Law, 3; Statutes, 4.

Right of appeal; finality of decision.

1. An order sustaining a demurrer to a petition to contest a local-option election is a determination of the merits, from which no appeal can be taken, under a statute providing that the trial court shall have final jurisdiction to hear and determine the merits of such cases. *Saylor v. Duel*, 19: 377, 86 N. E. 119, 236 Ill. 429.

2. A provision in a local-option law that the county court shall have final jurisdiction to hear and determine the matter of contested elections under the statute makes inapplicable a general statute providing for appeals in contested-election cases, and prevents an appeal in such cases. *Saylor v. Duel*, 19: 377, 86 N. E. 119, 236 Ill. 429.

3. A judgment on demurrer is a final judgment, reviewable on error. *Tomlinson v. Armour & Co.* (N. J. Err. & App.) 19: 923, 70 Atl. 314, 75 N. J. 748.
Record on appeal.

4. The court of appeals will not consider an objection based on a rule of the nisi prius court unless a copy of the rule appears in the record. *Bennett v. Bennett*, 19: 121, 66 Atl. 706, 106 Md. 122.

5. A record which sets forth simply that the court below, having heard argument upon a demurrer to the petition, and having duly considered same, did order that the demurrer be sustained with costs, recites a judgment sufficient in substance for purposes of review, although there was no formal judgment or any award of a specific sum for costs, and joinder in error and argument of the cause upon the merits having been made, the record should be treated as if amended in the court of review with respect to matters of form. *Tomlinson v. Armour*

& Co. (N. J. Err. & App.) 19: 923, 70 Atl. 314, 75 N. J. 748.

6. The common joinder in error is an admission by the defendant in error that what is returned as the record of the judgment below is true; and after such joinder neither party can of right allege diminution or have a certiorari. *Tomlinson v. Armour & Co.* (N. J. Err. & App.) 19: 923, 70 Atl. 314, 75 N. J. 748.

7. The technical phrase, *ideo consideration est*, is not necessary to constitute such a judgment as will support a writ of error, as the want thereof, being merely a defect of form, can be amended in the court of review. *Tomlinson v. Armour & Co.* (N. J. Err. & App.) 19: 923, 70 Atl. 314, 75 N. J. 748.

8. An order determining the provisions of the judgment on the subject of costs necessarily affects the judgment within the meaning of a statute requiring such orders to be included in the judgment roll, and also within the operation of a statute permitting intermediate orders to be reviewed, whether excepted to or not. *Jones v. Broadway Roller Rink Co.* 19: 907, 118 N. W. 170, — Wis. —.

Objections and exceptions.

9. An exception that a charge is contrary to law is too general to be of avail on appeal. *W. T. Walker Furniture Co. v. Dyson*, 19: 606, 32 App. D. C. 90.

What matters reviewable generally.

10. The allowance or denial of a motion for a new trial, filed after a general verdict in a lower court, is largely a matter of judicial discretion as to the finding of facts and the weight of evidence involved in the verdict, but alleged errors of law occurring upon the trial are not matters of discretion, and are fully subject to review upon appeal. *Manker v. Tough*, 19: 675, 98 Pac. 792, — Kan. —.

11. The exclusion, in an action against a property owner for injuries to a pedestrian falling on a sidewalk because of the alleged freezing of water turned from his roof onto the walk, of a photograph of the direction taken by water coming from the roof during a severe rainstorm, is not so plainly wrong that it will be interfered with by the reviewing court. *Field v. Gowdy*, 19: 236, 85 N. E. 884, 199 Mass. 568.

12. A person cannot complain of a favorable amendment, pending appeal, of a judgment which inadvertently failed to afford him relief to which he was entitled. *Brown v. Sebastopol*, 19: 178, 96 Pac. 363, 153 Cal. 704.

Discretionary matters.

13. The determination of the chancellor that, because of laches, a joint tenant should not be permitted to share in the benefit of a purchase by his cotenant under an outstanding encumbrance on the property, will not be interfered with on appeal, except in case of abuse of discretion. *Stevenson v. Boyd*, 19: 525, 96 Pac. 284, 153 Cal. 630.
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14. The right to permit a defendant to withdraw his plea of "guilty of murder in the first degree," after having withdrawn his former plea of "not guilty," and allow him to plead anew his plea of "not guilty," and to have a trial thereon before a jury, rests in the sound discretion of the trial court, and is reviewable on appeal for any abuse. *State v. Stevenson*, 19: 713, 82 S. E. 688, — W. Va. —.

15. The question of granting or overruling a motion to require an election between a count upon an express contract and a count upon *quantum meruit*, in a suit on account for legal services rendered, is addressed to the discretion of the court, where there is more or less uncertainty as to the grounds for recovery. *Mellon v. Fulton*, 19: 960, 93 Pac. 911, — Okla. —.

Questions not raised below.

16. A plaintiff who makes no objection to the jurisdiction of a Federal court to which the case is removed on the ground of diverse citizenship because neither party resides within the district, but proceeds with the trial, will not be heard to raise the objection on appeal. *Shanberg v. Fidelity & C. Co.* 19: 1206, 158 Fed. 1, 85 C. C. A. 343.

Errors waived or cured below.

17. Error in an instruction on a vital issue in a case is not cured by another instruction which correctly states the law which should be applied to that issue, but which is, in fact, applied to another contention in the case. *Wagner v. Atlantic Coast Line R. Co.* 19: 1028, 61 S. E. 171, 147 N. C. 315.

Review of facts.

18. Decisions by a referee that legal services were rendered under a general, as distinguished from a special, contract, will not be disturbed upon appeal where the evidence is conflicting. *Mellon v. Fulton*, 19: 960, 98 Pac. 911, — Okla. —.

Grounds for reversal.

19. Erroneous rulings, if not prejudicial to the rights of the party, may be disregarded; but where the findings are contrary to the evidence, and the erroneous rulings may have misled the jury, they are material and constitute reversible error. *Fleming v. Thorp*, 19: 915, 96 Pac. 470, — Kan. —.

20. Refusal to continue a case to permit defendant to take the deposition of plaintiff to enable him to prepare his defense, to which he has a right by statute, is prejudicial error. *Western U. Teleg. Co. v. Williams*, 19: 409, 112 S. W. 651, — Ky. —.

21. A judgment will not be reversed because of refusal of the trial court to strike out portions of a pleading because redundant, or a legal conclusion, in the absence of anything to show prejudice therefrom. *Smith v. Hicks*, 19: 938, 98 Pac. 138, — N. M. —.

22. An inadvertent insertion of a word in an instruction to the jury is not reversible error where it operates in favor of the complaining party. *Hiroux v. Baum*, 19: 332, 118 N. W. 533, — Wis. —.

23. Statements by counsel in argument, of facts outside the record, will not require reversal if the admonition of the court was sufficient to cause the jury to disregard the statement. *Cumberland Teleph. & Teleg. Co. v. Quigley*, 19: 575, 112 S. W. 897, — Ky. —.

24. A conviction for obtaining money by false pretenses will not be reversed because the prosecuting attorney, in his argument to the jury, stated that the defendant was committing adultery every day, where he was living with a woman not his wife, and the gist of the argument was not that his relations were such as the word used defines, but that they were immoral and affected the credibility of the accused. *People v. Ranney*, 19: 443, 116 N. W. 999, 153 Mich. 293.

25. It is prejudicial error for the court, after receiving a prisoner's plea of guilty of murder in the first degree, and before pronouncing judgment thereon, to proceed, in the absence of the prisoner to examine witnesses and hear, from the special judge who presided at the time of receiving such plea, statements respecting the circumstances and facts of the killing, whether such examination be for the personal satisfaction of the judge pronouncing the judgment of the court, or to advise him as to the character of judgment that should be pronounced on said plea. *State v. Stevenson*, 19: 713, 62 S. E. 688, — W. Va. —.

26. It is reversible error for a regular judge, pending the trial of a cause begun and continued before a special judge, duly elected to preside in the absence of such regular judge, on making his appearance at the same term, to assume jurisdiction thereof, proceed with the trial, and pronounce judgment therein. *State v. Stevenson*, 19: 713, 62 S. E. 688, — W. Va. —.

27. A verdict recovered by a party who, pending the action, took jurors to the bar to drink in the absence of other jurors and the officers in charge of them, will be set aside at the instance of the other party; and he will be required to pay the costs regardless of the absence of wrongful intent or the fact that the verdict was not influenced thereby. *Scott v. Tubbs*, 19: 733, 95 Pac. 540, 43 Colo. 221. (Annotated)

28. A verdict directed for defendant in an action against a railroad company for killing a person at a railroad crossing will not be reversed where nothing in evidence before the court tends to show the exercise of care by the person killed, or anything that in law would excuse it, merely because the jury viewed the premises and might have seen something not disclosed by the evidence which would have warranted a recovery. *Shum v. Rutland R. Co.* 19: 973, 69 Atl. 945, — Vt. —.

29. A judgment which is proper upon the undisputed facts shown by the record will be affirmed upon appeal without considering whether the reasons given by the trial judge for his conclusion were competent and ade-

quate to support the same. *Bowhay v. Richards*, 19: 883, 116 N. W. 677, — Neb. —.

APPEARANCE.

To set aside judgment for lack of jurisdiction, see Judgment, 3.

ARBITRATION.

1. A general stipulation in a contract of lease that, in case of difference between the parties, it shall be referred to arbitration, does not prevent either party from resorting to the courts in the first instance without such reference unless the stipulation makes such submission the only mode by which the amount of damages may be ascertained or by which liability can be fixed. *Lawrence v. White*, 19: 966, 63 S. E. 631, — Ga. —.

2. No valid award can be made without notice to the parties of the selection of the third arbitrator and of the time and place of meeting to make the award, where arbitrators who have failed to agree select a third arbitrator in accordance with the terms of the arbitration agreement. *Bray v. Staples*, 19: 696, 62 S. E. 780, — N. C. —. (Annotated)

3. The original rights of parties who have entered into an arbitration agreement are not affected by a judgment setting aside an award because the arbitrators acted without giving the necessary notice to the parties. *Bray v. Staples*, 19: 696, 62 S. E. 780, — N. C. —.

ASSAULT AND BATTERY.

On passenger, see Carriers, 11.

Damages for mental anguish resulting from assault on third person, see Damages, 8.

Liability for injury resulting from fright caused by assault on other person, see Fright.

ASSIGNMENT.

Of land contract, see Contracts, 6, 7.

ASSIGNMENT FOR CREDITORS.

Duty of assignor to show that he is entitled to interest on funds kept by assignee in bank, see Evidence, 4.

Enforcement against assignee of equitable mortgage on property, see Mortgage.

1. An assignor for creditors cannot set aside a sale of the property to a corporation because an agent of the assignee, who was managing the property, was a stockholder in the purchasing corporation, and, before the deed was executed, he increased his holdings out of stock issued to pay for the property, and one of the assignees became a stockholder, and both were elected directors of the purchasing corporation. *Whitman v. McIntyre*, 19: 682, 85 N. E. 426, 199 Mass. 436.

2. An assignor for creditors cannot complain that the property was sold to a corporation for shares of its stock where the

property was not sufficient to satisfy in full the demand of creditors, and they consented to take the stock in payment of their claims. *Whitman v. McIntyre*, 19: 682, 85 N. E. 426, 199 Mass. 436. (Annotated.)

ASSOCIATIONS.

See Building and Loan Associations.

ASSUMPTION OF RISK.

By person crossing between freight cars on switch, see Railroads, 1.

By teamster using sidewalk as driveway, see Highways, 9.

By servant, see Master and Servant, 18-22, 33.

ATTORNEY GENERAL.

Institution of disbarment proceedings by, see State.

ATTORNEYS.

Motion to require election between counts in suit for compensation, see Appeal and Error, 15.

Review of decision of referee in suit for compensation, see Appeal and Error, 18.

Statements by counsel in argument of facts outside record, see Appeal and Error, 23.

Institution of disbarment proceedings by commonwealth's attorney, see State.

1. Conviction in another jurisdiction is not within the provision of a statute declaring that an attorney must be disbarred upon his conviction of a crime punishable by imprisonment in the penitentiary, and permitting his disbarment if he shall have been convicted in open court of some criminal offense showing himself unfit to be trusted. *State v. Ebbs*, 19: 892, 63 S. E. 190, — N. C. —. (Annotated)

2. Courts have no inherent power to disbar an attorney for conviction of crime in a foreign jurisdiction where the legislature has expressly provided what convictions shall result in disbarment, which do not include those in foreign jurisdictions. *State v. Ebbs*, 19: 892, 63 S. E. 190, — N. C. —.

3. An attorney who impliedly debars himself, under the terms of a general retainer, from employment by others whose interests are antagonistic to those of his clients, may recover a retaining fee in a suit for services rendered under such general employment. *Mellon v. Fulton*, 19: 960, 98 Pac. 911, — Okla. —. (Annotated)

AUTOMOBILES.

Amount of damages for injury to person by, see Damages, 7.

Child as agent of father in operating, see Evidence, 51; Master and Servant, 1, 37; Trial, 16.

Insurance on, see Insurance, 16.

Unfair competition by imitation of lights for, see Unfair Competition.

AWARD.

By arbitrators, see Arbitration, 2, 3.

BAGGAGE.

See Carriers, 20.

BANKS.

Interest on deposits on bank which stops payment, see Interest, 2, 3.

Inconsistency between general and special findings in action by depositor to recover amount of check, see Trial, 21.

1. It is not negligence for a bank to pay a check in excess of a letter of credit issued to a depositor for the purpose of making his checks good anywhere, the amount of the check being less than the actual deposit. *Vogeli v. First State Bank*, 19: 402, 96 Pac. 490, — Kan. —.

2. It is not negligence for a bank to pay a check written on the blank of another bank without making inquiry. *Vogeli v. First State Bank*, 19: 402, 96 Pac. 490, — Kan. —. (Annotated)

3. Neither any rule of law nor the ordinary course of business renders it a matter of suspicion that the body of a check is not written in the handwriting of the maker. *Vogeli v. First State Bank*, 19: 402, 96 Pac. 490, — Kan. —.

BASEBALL.

Injury by playing of, to patron at place of amusement, see Amusements, 1.

BATHING RESORT.

Liability of married woman for negligence in conducting, see Husband and Wife, 1.

BAWDY HOUSE.

See Disorderly Houses.

BIAS.

Sufficiency to disqualify judge, see Judges, 2.

BILL OF EXCEPTIONS.

See Appeal and Error, 8.

BILLS AND NOTES.

Conflict of laws as to, see Conflict of Laws; Courts, 10.

Consideration for agreement to pay past due note of another, see Contracts, 2.

Estoppel to treat note as existing for purpose of upholding mortgage and repudiate it for other purposes, see Estoppel.

Parol evidence to show relation of parties to, see Evidence, 32.

Sufficiency of complaint upon bill or note, see Pleading, 4.

Power of agent to receive property in satisfaction of note, see Principal and Agent, 1.

Rights of bona fide holders.

1. The indorsement by the payee of a.

note, of his name under a guaranty of payment combined with a waiver of demand, notice, and protest, constitutes a blank indorsement, so as to pass title to one who takes the paper in due course for value. *Voss v. Chamberlain*, 19: 106, 117 N. W. 269, — Iowa, —.

2. A transferee of negotiable paper need not show that he paid for it in order to hold it against the payee, from whom it was obtained by fraud, under a statute providing that a bona fide holder for value may not recover against the maker a greater sum than he paid for the paper if it was procured by fraud upon the maker. *Voss v. Chamberlain*, 19: 106, 117 N. W. 269, — Iowa, —.

3. The return by a bank officer to the private receptacle of a customer, of negotiable paper indorsed in blank which such official had wrongfully taken from such receptacle and pledged for his own indebtedness, and had recovered from the pledgee ostensibly for collection, does not render the owner a new holder for value, which will render his rights superior to those of the pledgee. *Voss v. Chamberlain*, 19: 106, 117 N. W. 269, — Iowa, —.

4. The rights of the owner of negotiable paper which is indorsed in blank and deposited in a receptacle in a bank for safe-keeping are inferior to those of a transferee for value without notice in due course of business, from a bank official who wrongfully misappropriates the paper and uses it for purposes of his own. *Voss v. Chamberlain*, 19: 106, 117 N. W. 269, — Iowa, —. (Annotated)

Who are bona fide holders.

5. The word "trustee," added to the payee's name in a written instrument, is sufficient to put a purchaser upon inquiry as to all the terms and conditions under which it may have been executed, and, in the absence of such inquiry, knowledge thereof will be presumed. *McLeod v. Despain*, 19: 276, 90 Pac. 492, 49 Or. 536.

6. One taking a pledge of negotiable paper from a bank official as collateral for his own debt is not bound to show diligence in ascertaining the official's right to the paper as against the payee who has indorsed it in blank and left it in a receptacle in the bank for safe-keeping, under a statute providing that the rule that, when it is shown that the title of any person who has negotiated such paper was defective, the burden is on the holder to prove title acquired in due course, does not apply in favor of a person who became bound on the instrument prior to the acquisition of defective title. *Voss v. Chamberlain*, 19: 106, 117 N. W. 269, — Iowa, —.

7. One taking negotiable paper as a substitute for other securities held as collateral for a debt which he surrenders at the time is a holder for value. *Voss v. Chamberlain*, 19: 106, 117 N. W. 269, — Iowa, —.

BILLS OF EXCHANGE.

Parol evidence to show relation of parties to, see Evidence, 32.

BILLS OF LADING.

Construction of, see Carriers, 21.

Parol evidence to vary terms of, see Evidence, 30.

BLASTING.

Duty of master to warn of danger in connection with, see Master and Servant, 5.

BOARDS.

Of health, see Health.

BONA FIDE HOLDER.

Of note, see Bills and Notes, 1, 2, 4-7.

Of county bonds issued in aid of railroad, see Bonds, 4; Evidence, 18; Trial, 19.

Rights of one purchasing property for value from cotenant who has purchased outstanding encumbrance, see Limitation of Actions, 1.

BONDS.

Interest on, see Interest, 1.

Presumption as to validity of railroad aid bonds, see Evidence, 17.

Presumption as to bona fide character of holder of railroad aid bond, see Evidence, 18.

Findings by court in suit on county aid bonds, see Trial, 19.

1. Mere fear or suspicion on the part of the lessor that a lessee intends to sell intoxicating liquor on the leased premises without authority of law will not avoid a bond by which the lessee undertakes to hold the lessor harmless from any expenditure or costs because of the unlawful sale of liquor upon the premises. *Harbison v. Shirley*, 19: 662, 117 N. W. 963, — Iowa, —. (Annotated)

Municipal bonds.

2. The exoneration of a county from its former subscription to the stock of another corporation is a condition precedent to the issuance of bonds in aid of a subscription to railroad stock, where the order for the election contained the condition that bonds in aid of the subscription should not be issued until the county was fully and completely exonerated from the payment of the capital stock voted and authorized to be issued to the former company. *Quinlan v. Green County*, 19: 849, 157 Fed. 33, 84 C. C. A. 537.

3. The construction of the road upon a certain route through the county, and the expenditure of the subscription therein, is not a condition precedent to the issuance of county bonds in aid of a railroad under a vote upon a submission of the question whether or not bonds in aid of the subscription should be issued upon condition that the company so locate and construct the road and expend the money. *Quinlan*

v. Green County, 19: 849, 157 Fed. 33, 84 C. C. A. 537.

4. Bonds issued by a county in aid of a railroad company are not invalidated in the hands of a bona fide holder for value by the failure of the company to comply with a condition on which they were issued, that the road should be located and constructed upon a certain route through the county, and that the money received from the bonds should be expended therein. *Quinlan v. Green County, 19: 849, 157 Fed. 33, 84 C. C. A. 537.* (Annotated)

BONUS.

Effect of agent's bonus to render loan usurious, see *Usury*.

BOUNDARIES.

Adverse possession on, see *Adverse Possession, 1*.

A railroad company is presumed, after the lapse of twenty years, to have acquiesced in the fact that a fence placed along land dedicated for depot purposes, but not in fact needed for public use, represents the true boundary line, although neither it nor the adjoining owner is required by law to maintain the fence. *Chicago, M. & St. P. R. Co. v. Hanken, 19: 216, 118 N. W. 527, — Iowa, —.*

BRIDGES.

Injury to passenger through fall of, see *Carriers, 10; Evidence, 8*.

Variance in action against city for injury by negligence of bridge tender, see *Evidence, 54*.

Liability of municipality for negligent operation of, see *Master and Servant, 38; Municipal Corporations, 22*.

City employee sent to take measurements of bridge as fellow servant of bridge tender, see *Trial, 6*.

BROKERS.

Effect of failure to obtain license on validity of contracts, see *Contracts, 10*.

Construction of ordinance imposing license tax on real-estate agents, see *License, 2*.

1. A real-estate agent employed to find a purchaser for land is not deprived of his right to compensation by the fact that the contract of sale entered into between the purchaser and seller could not be specifically enforced because some of its provisions were contrary to law. *Manker v. Tough, 19: 675, 98 Pac. 792, — Kan. —.*

2. An agent employed to sell land for another, upon whom no authority to execute a contract of sale or to execute an instrument of conveyance is conferred, is required merely, in order to entitle him to compensation, to find a purchaser ready, willing, and able to make the purchase at the price and on the terms prescribed by the seller to the agent. *Manker v. Tough, 19: 675, 98 Pac. 792, — Kan. —.*

3. A broker receiving exclusive author-

ity to sell real estate by a writing which he does not sign cannot recover commissions in case the property is sold by the owner without aid from him, if he fails to show that, prior to the sale, he had used ordinary diligence in endeavoring to make a sale of the property, resulting in the expenditure of time, money, or effort under the contract. *Schoenmann v. Whitt, 19: 598, 117 N. W. 851, — Wis. —.* (Annotated)

4. A contract between a real-estate agent and a landowner, that, if the agent should find a purchaser for the land, he should have, as compensation for his services, the amount the land might sell for above a certain price, is not a joint venture, in which neither may profit to the exclusion of the other, but is a contract of agency merely, and the agent is entitled to his compensation where he finds a satisfactory purchaser for the land, although the contract is subsequently canceled by the mutual agreement of the seller and purchaser, without the consent of the agent. *Manker v. Tough, 19: 675, 98 Pac. 792, — Kan. —.*

BUILDING AND LOAN ASSOCIATIONS.

1. A receiver appointed after insolvency of a building and loan association proceeds in like manner as the directors thereof might have done if insolvency had not supervened as to mortgage debts that become due and payable, not by the insolvency of the association, but according to the terms of such mortgages and under the by-laws of the association, by the default of the borrower himself, prior to the insolvency of the association. *Re State Mut. Bldg. & Loan Assn. (N. J. Err. & App.) 19: 588, 71 Atl. 251, — N. J. —.*

2. The rule that the mortgagor, in the computation of the amount payable upon a mortgage made to a building and loan association by one of its members, and which has become due by reason of the insolvency of the association, is entitled to have credited upon the principal of the mortgage, all sums paid by him as premiums for the loan, does not apply to mortgage debts that become due, not by the insolvency of the association, but according to the terms of such mortgages and under the by-laws of the association, by the default of the borrower himself prior to the insolvency of the association, since, in the latter case, the mere breach of the legal contract gives rise to no equitable considerations. *Re State Mut. Bldg. & Loan Assn. (N. J. Err. & App.) 19: 588, 71 Atl. 251, — N. J. —.*

BUILDINGS.

Evidence as to safety of chimneys left standing during demolition of, see *Evidence, 40*.

Mandatory injunction to compel alteration of, to make building comply with contract, see *Injunction, 1*.

Injury by tearing down and removal of, see *Master and Servant, 2, 42*.

Injury to children by fall of, see *Negligence, 1*.

BURDEN OF PROOF.

See Evidence, 2-22.

CANCELATION OF INSTRUMENTS.

Cancellation of subscription to corporate stock, see Corporations, 4.

Necessity of restitution by infant seeking to cancel deed, see Infants.

CARE.

Presumption of exercise of, by person killed at railroad crossing, see Evidence, 16.

CARRIERS.

Damages for mental anguish for breach of contract to transport corpse, see Damages, 10.

Recovery for mental anguish of passenger caused by carrier's negligence toward other person, see Damages, 16.

Sufficiency of complaint in suit for carrying corpse beyond proper point of delivery, see Pleading, 14.

1. A failure to exercise the care and diligence due from railroad companies as common carriers is negligence, without any legal distinction as being gross or ordinary. *Summerlin v. Seaboard Air Line R. Co.* 19: 191, 47 So. 557, — Fla. —.

2. A ferry company which maintains a pleasure resort on its own property for a particular class of persons whose patronage it invites and for whose accommodation it runs a boat devoted exclusively to their transportation is not, so far as that enterprise is concerned, a common carrier; and it may exclude from the boat persons who will be undesirable to its patrons, or destroy the success of its undertaking. *Meisner v. Detroit, B. I. & W. Ferry Co.* 19: 872, 118 N. W. 14, — Mich. —.

Who are passengers.

3. The rights of a section man on a street railway, who is injured while riding to his work from his home, on the company's car, without paying fare, in accordance with a custom of the company to carry such employees free upon their displaying badges furnished to them, are not those of a passenger, but merely of an employee. *Birmingham R. L. & P. Co. v. Sawyer*, 19: 717, 47 So. 67, — Ala. —. (Annotated)

4. A passenger who boards a train after telegraphing for a reservation on a certain Pullman car which is not attached to that train, but will be picked up a few miles down the road, and is allowed to remain in a Pullman car pending the arrival of the one on which his reservation is, is not a passenger of the Pullman company, and it is not liable for negligence of its conductor which results in his missing his car. *Cincinnati, N. O. & T. P. R. Co. v. Raine*, 19: 753, 113 S. W. 495, — Ky. —.

5. Neither the conductor nor the engineer of a train, nor the master mechanic of a railroad, has the implied authority to

invite a person to ride in the cab of a locomotive without paying fare. *Clark v. Colorado & N. W. R. Co.* 19: 988, 165 Fed. 408, — C. C. A. —.

Duty to passenger; negligence.

Damages for negligently causing passenger to miss train on connecting road, see Damages, 4.

Burden of proof in case of injury to passenger, see Evidence, 8.

Setting aside verdict for passenger injured by fall of carrier's bridge, see New Trial, 3.

Failure to warn passengers as proximate cause of injury, see Proximate Cause, 1.

Instruction as to liability of carrier for injury to passenger, see Trial, 17.

6. Where a sleeping car conductor undertakes, in the presence of the train conductor, to put a lady holding a railroad ticket on the right Pullman car, and tells her to remain in his car until the desired car arrives, the railroad company is liable for his neglect to do so. *Cincinnati, N. O. & T. P. R. Co. v. Raine*, 19: 753, 113 S. W. 495, — Ky. —.

7. A switching crew is not guilty of wantonness or recklessness towards a passenger riding in an engine cab because it leaves a car on a switch, which does not clear the main track, where it does not know of its presence in the cab; nor are those in charge of the engine guilty of such negligence toward him when they do not know that the car does not clear the track. —so as to render the railroad company liable in case he is injured by the engine coming in contact with the car. *Clark v. Colorado & N. W. R. Co.* 19: 988, 165 Fed. 408, — C. C. A. —.

8. A passenger on a railroad train may recover damages for inconvenience and injury suffered by failure of the carrier to exercise toward her that degree of care which is due to a passenger. *Gulf, C. & S. F. R. Co. v. Overton*, 19: 500, 110 S. W. 736, — Tex. —.

9. A street railway company is negligent in maintaining the tracks used by cars running in opposite directions so close together that the natural sway of the cars in motion, emphasized by an uneven condition of the track which it permits to exist, brings passing cars within 3 to 6 inches of each other, without taking any precautions to prevent injury to passengers who, because of the crowded condition of the cars, may project some portion of the body beyond the sides of the cars. *La Barge v. Union Electric Co.* 19: 213, 116 N. W. 816, 138 Iowa, 691.

10. A carrier is not liable for injury to a passenger through the fall of a bridge caused by the breaking of an imperfect weld in a cord, which could not have been detected by the utmost scrutiny, where the bridge was constructed by a thoroughly reputable competent, and reliable builder.

Roanoke R. & E. Co. v. Sterrett, 19: 316, 62 S. E. 385, 108 Va. 533.

Assault on passenger.

11. A street car company is liable for the act of one employed to care for its cars, who unlawfully assaults a passenger while attempting to eject him from the car at the express or implied request of the conductor, but not if his act is of his own volition, and beyond the scope of his employment. *Mills v. Seattle, R. & S. R. Co.* 19: 704, 96 Pac. 520, 50 Wash. 20.

Negligence of passenger.

See also *supra*, 8.

Negligence of person riding on running board, see Trial, 7.

12. A passenger on a open street car cannot be said, as matter of law, to be negligent if, when compelled to stand because of the crowded condition of the car, he leans against a side post, and in the act of laughing throws his head back a few inches beyond the post, so that it comes in contact with a car passing in the opposite direction. *La Barge v. Union Electric Co.* 19: 213, 116 N. W. 816, 138 Iowa, 691.

13. One who, without paying fare, voluntarily attempts to ride in the cab of a locomotive at the invitation of those in charge of the train, assumes the known hazards incident to such exposed position, and cannot hold the railroad company liable for injuries caused by the collision of the cab with a car negligently left on a side track so as not to clear the main track, where the negligence was not wanton, and no injury occurred to anyone else on the train. *Clark v. Colorado & N. W. R. Co.* 19: 988, 165 Fed. 408, — C. C. A. —.

14. A passenger on a mixed train is negligent, as matter of law, in riding upon the platform when there is plenty of room in the car, merely because the weather is warm and he prefers to ride there. *Wagner v. Atlantic Coast Line R. Co.* 19: 1028, 61 S. E. 171, 147 N. C. 315.

Ejection.

See also *supra*, 11.

15. One holding a street car ticket entitling him to transportation to any one of several points at different distances along the line from the starting point, who boards a car plainly marked as going only as far as the nearest stop to which the ticket entitles him to ride, is not entitled to damages in case the car stops at that point and goes back, and he is ejected therefrom without undue force after being refused a transfer to another car. *Mills v. Seattle, R. & S. R. Co.* 19: 704, 96 Pac. 520, 50 Wash. 20. (Annotated)

16. A street car company cannot eject a trespasser from its car while the car is in motion, so as to endanger life or limb, or wilfully or unnecessarily assault him. *Mills v. Seattle, R. & S. R. Co.* 19: 704, 96 Pac. 520, 50 Wash. 20.
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Injuries in getting on and off.

Injury to child attempting to board train, see Negligence, 2.

17. A railroad company is not required to maintain in populous communities a lookout for children who are in the habit of jumping on and off its cars while in motion, and provide against injuries to them. *Swartwood v. Louisville & N. R. Co.* 19: 1112, 111 S. W. 305, — Ky. —

Fares; transfers.

18. Entirely distinct lines of street railway originally constructed and operated by different companies and brought into physical relation to each other by a third line connecting them do not, although the three lines have by leases and contracts come into possession of one company, which is operating them as a single system, constitute a road and connecting branches thereof, or a main line of road and any branch or extension thereof, within the meaning of a statute requiring a street railway company to charge only one fare for transporting a passenger over such road and branch within a city. *Bull v. New York C. R. Co.* 19: 778, 85 N. E. 385, 192 N. Y. 361.

19. An attorney traveling over a street railway simply for the purpose of ascertaining whether or not a transfer will be given him at a certain point as required by statute, which information he desires for the benefit of suits already commenced on behalf of clients for the statutory penalty for refusal to give them transfers, is not entitled to bring an action for the statutory penalty because of the refusal to give him one, where the statute requires the carrying of passengers desiring to make a continuous trip between certain points for one fare, and imposes a forfeiture to the person aggrieved by refusal to issue the necessary transfer. *Bull v. New York C. R. Co.* 19: 778, 85 N. E. 385, 192 N. Y. 361.

Baggage.

Proximate cause of loss of baggage, see Proximate Cause, 2.

20. A provision on a transportation ticket that the carrier is not to be responsible for the destruction of baggage by fire is binding on the passenger in its application to fires not caused by the carrier's negligence, although it is in print so fine that the passenger cannot, because of defective sight, read it, if the printed provisions on the ticket are sufficiently conspicuous to charge him with notice that they contain a contract. *French v. Merchants & M. Transp. Co.* 19: 1006, 85 N. E. 424, 199 Mass. 433. (Annotated)

Of freight; generally.

Parol evidence to vary terms of bill of lading, see Evidence, 30.

Presumption of negligence in case of loss of or damage to goods in hands of carrier, see Evidence, 9-11.

Direction of verdict in action against carrier for loss of property in transit, see Trial, 13.

21. While a bill of lading is to be construed as a whole, invalid conditions will not necessarily render the contract invalid, it being enforceable as far as valid. *Whitnack v. Chicago, B. & Q. R. Co.* 19: 1011, 118 N. W. 67, — Neb. —.

22. The common-law duty of express companies to make free deliveries of parcels committed to their care is not such as to preclude them from fixing charges for transportation which will not include such deliveries, and requiring consignees to pay for making a personal delivery to them. *State ex rel. Railroad Commission v. Adams Exp. Co.* 19: 93, 85 N. E. 337, — Ind. —.

23. A common-law exception relieving a carrier from loss occasioned by an act of the shipper or owner of goods will not be read into a statute imposing liability of an insurer upon an inland common carrier for loss of property consigned to it for carriage when unaccompanied by the consignor, except for loss resulting from certain specified causes. *Duncan v. Great Northern R. Co.* 19: 902, 118 N. W. 826, — N. D. —.

24. A carrier is liable for the loss, through leakage, of flax carried by it, even though the shipper may not have fastened properly inside doors furnished by the carrier for the purpose of retaining the flax, where, after these doors were inserted, the car was receipted for and the outside doors closed and sealed by the carrier's agent, who had full opportunity to observe, while closing the outside doors, whether the inside doors were properly fastened. *Duncan v. Great Northern R. Co.* 19: 952, 118 N. W. 826, — N. D. —. (Annotated)

Carrying live stock.

25. The liability of a common carrier as an insurer does not extend to any damage resulting from an intrinsic cause against which care and foresight could not provide, such as damage resulting from the nature, disposition, or viciousness of live stock, undertaken to be transported, as such cause is within the principle which excuses common carriers from loss or damage resulting from the act of God. *Summerlin v. Seaboard Air Line R. Co.* 19: 191, 47 So. 557, — Fla. —.

26. A railroad company, by receiving live stock and undertaking to transport the same for hire, assumes the relation of a common carrier, and becomes chargeable with the duties and obligations incident to that relation, except so far as such duties and responsibilities may legally be modified by special contract. *Summerlin v. Seaboard Air Line R. Co.* 19: 191, 47 So. 557, — Fla. —.

Limitation of liability.

As to limitation of liability for loss of baggage, see *supra*, 20.

27. A common-law doctrine holding a common carrier to the liability of an insurer does not preclude the parties to the shipment from entering into a contract referring to the carrier's liability. *Summerlin v. Seaboard Air Line R. Co.* 19: 191, 47 So. 557, — Fla. —.

lin v. Seaboard Air Line R. Co. 19: 191, 47 So. 557, — Fla. —.

28. A common carrier of goods cannot legally stipulate for exemption from liability for losses occasioned by its own negligence of that of its agents or servants, and all stipulations for exemption from negligence, whether gross or ordinary, are ineffectual. *Summerlin v. Seaboard Air Line R. Co.* 19: 191, 47 So. 557, — Fla. —.

Connecting carriers.

29. A railroad company receiving a sleeping car from another company upon which is a passenger for a car on its train whom the conductor of the former car has undertaken to put on the right car is not liable for sending that car forward in the first section of the train, so that the passenger does not get it, where it had no notice of her desire until after the train had been separated, and its conductor did all he could to rectify the mistake after learning of it. *Cincinnati, N. O. & T. P. R. Co. v. Raine*, 19: 753, 113 S. W. 495, — Ky. —.

30. A common carrier who undertakes, during extreme cold weather, to carry two car loads of potatoes and deliver them to a connecting carrier, the contract providing that the shipper should furnish a care taker to accompany the shipment, and keep fires in the cars, to prevent freezing, is liable for loss of potatoes which became frozen by reason of the cars becoming separated in transit on its lines, whereby the care taker is prevented from attending to one car of the potatoes, even though they may not have become frozen until after they were delivered to the second carrier. *Whitnack v. Chicago, B. & Q. R. Co.* 19: 1011, 118 N. W. 67, — Neb. —.

31. A common carrier who accepts goods for shipment to be delivered to a connecting carrier will be liable for any damages to the goods resulting directly from its negligence, although the loss may not actually occur until after the goods are delivered to the second carrier. *Whitnack v. Chicago, B. & Q. R. Co.* 19: 1011, 118 N. W. 67, — Neb. —. (Annotated)

Governmental control; discrimination.

State statute requiring express company to make free deliveries, see *Commerce*, 1-3.

32. A state cannot compel an express company to make free delivery of parcels committed to its care, in violation of contracts made at the place where the parcels are received in another state, that delivery charges shall be paid by the consignee. *State ex rel. Railroad Commission v. Adams Exp. Co.* 19: 93, 85 N. E. 337, — Ind. —.

Discrimination between hackmen.

33. A railroad company cannot give to one hackman the right to occupy such a position on its grounds as necessarily to result in his securing by far the larger share of the business, and a contract by which it attempts to do so is void. *Anderson v. Palmer Transfer Co.* 19: 756, 115 S. W. 182, — Ky. —.

CASE.

Sufficiency of complaint in action for causing breach of contract, see Pleading, 9.

1. To render one liable for preventing the performance of a contract he must have had knowledge of it. *McGurk v. Cronenwett*, 19: 561, 85 N. E. 576, 199 Mass. 457.

2. An officer of a corporation may be liable for maliciously inducing it to break its contract with its employee and discharge him from his employment. *McGurk v. Cronenwett*, 19: 561, 85 N. E. 576, 199 Mass. 457. (Annotated)

CAVEAT.

Right of caveator to dismiss issues framed for purpose of filing new caveat, see Wills, 1.

CERTIORARI.

See also Appeal and Error, 6.

1. The owner of property adjoining that on which is maintained a liquor nuisance has sufficient interest to be entitled to seek a writ of certiorari to review a consent decree in a suit by a citizen to enjoin the maintenance of the nuisance, which permits acts contrary to the statute and prejudicial to the community. *Hemmer v. Bonson*, 19: 610, 117 N. W. 257, — Iowa —.

2. A consent decree in an action under the statute by a citizen to enjoin the maintenance of a liquor nuisance, which permits acts contrary to the statute and prejudicial to the community, of which he fails or refuses to seek correction by appeal, may be reviewed under a writ of certiorari at the suit of any citizen, upon a proper showing of his qualifications. *Hemmer v. Bonson*, 19: 610, 117 N. W. 257, — Iowa. —.

(Annotated)

3. That the real motive of an interested person in applying for a writ of certiorari to review a decree in a suit to enjoin the maintenance of a liquor nuisance, which permits acts contrary to the statute and prejudicial to the community, is to compel the purchase of his property at an exorbitant price, cannot be considered by the court as a reason for denying the relief. *Hemmer v. Bonson*, 19: 610, 117 N. W. 257, — Iowa, —.

4. Neither the oral statements of a judge in entering a decree enjoining the maintenance of a liquor nuisance, which, by its terms, permits acts contrary to the statute and prejudicial to the community, nor the interpretation which the parties have put upon the decree, can be considered upon a petition for a writ of certiorari to correct the decree. *Hemmer v. Bonson*, 19: 610, 117 N. W. 257, — Iowa, —.

CHANCERY.

See Equity.
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CHARTER.

Acquiescence by stockholders in amendment of charter increasing their liability, see Corporations, 10.

CHATTEL MORTGAGE.

1. A mortgage by a renter of crops to be grown during the year, and also of crops to be raised "each successive year," until the debt is paid, will not attach to crops grown in a subsequent year on land rented by him from a different landlord, in which he had no interest when the mortgage was executed. *Windham v. Stephenson*, 19: 910, 47 So. 280, — Ala. —. (Annotated)

2. It is immaterial whether the mortgagee has good cause to believe that he is insecure if he in fact deemed himself to be so, under a clause in a chattel mortgage providing that he may take possession of the property if he deem himself insecure. *Fleming v. Thorp*, 19: 915, 96 Pac. 470, — Kan. —. (Annotated)

CHECKS.

As to duties and liability of bank with respect to, see Banks.

CHILDREN.

See Infants.

CINDERS.

Injunction against, see Nuisance, 3.

CIVIL RIGHTS.

Statute as to penalty and costs for excluding negro from place of amusement, see Costs.

A roller skating rink which the public is invited to patronize for an admission fee is within the terms of a statute imposing a penalty for exclusion on account of color of any person from the privilege of inns, restaurants, saloons, barber shops, eating houses, public conveyances on land or water, or any other place of public accommodation or amusement. *Jones v. Broadway Roller Rink Co.* 19: 907, 118 N. W. 170, — Wis. —. (Annotated)

CLOUD ON TITLE.

Suit to determine rights of appropriators of water as one to quiet title, see Action on Suit.

Necessity of restitution by infant seeking cancelation of deed as cloud on title, see Equity, 2.

Sufficiency of service to sustain judgment quieting title, see Judgments, 1.

Sufficiency of process to secure jurisdiction in action to quiet title, see Writ and Process.

An action to quiet title to real estate must be prosecuted and maintained in the jurisdiction in which the *res* or subject-matter is situated. *Taylor v. Hulet*, 19: 535, 97 Pac. 37, — Idaho, —.

COLLATERAL ATTACK.

On judgment, see Judgment, 3.

COMBINATIONS.

See Monopoly and Combinations.

COMMERCE.**Express companies.**

Power of state to compel express company to make free deliveries, see Carriers, 32.

1. A state statute requiring express companies to make free deliveries of parcels committed to them for transportation is, as applied to interstate shipments, invalid as an attempted regulation of interstate commerce. State ex rel. Railroad Commission v. Adams Exp. Co. 19: 93, 85 N. E. 337, — Ind. —. (Annotated)

2. A state statute requiring express companies to make free delivery of parcels committed to their custody for transportation is not in aid of the common law to such an extent that it cannot be said to be in conflict with the Federal statutes governing the regulation of rates of interstate shipments. State ex rel. Railroad Commission v. Adams Exp. Co. 19: 93, 85 N. E. 337, — Ind. —.

3. A state cannot compel express companies to make free deliveries, within cities of a certain class, of interstate shipments committed to their care, in view of the railroad rate law of Congress requiring the filing by transportation companies with the Interstate Commerce Commission of schedules of rates for transportation or any service connected therewith, and empowering the commission to determine what regulations in respect to transportation are reasonable, and to require the carrier to conform to such regulations. State ex rel. Railroad Commission v. Adams Exp. Co. 19: 93, 85 N. E. 337, — Ind. —.

Railroads.

State statute restricting hours of labor of railroad employees, see Statutes, 1.

4. A regulation by Congress of the number of hours per day for which telegraph operators and train despatchers on interstate railroads may be employed inhibits state legislation upon the same subject, especially such as limits such employment to fewer hours per day than allowed by Congress, and puts the regulation in force sooner than the time provided by the congressional act. State v. Chicago, M. & St. P. R. Co. 19: 326, 117 N. W. 686, — Wis. —.

5. An act of Congress regulating the hours of labor of railroad employees engaged strictly in the business of interstate commerce cannot be annulled because not within its constitutional powers. State v. Chicago, M. & St. P. R. Co. 19: 326, 117 N. W. 686, — Wis. —.

Regulating and licensing sales.

Presumption as to when sale by agent in one state for merchant in another is completed, see Evidence, 21.

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6. The right of a merchant of one state to sell his goods in another state carries with it the right to deliver them, and to employ for that purpose any agency he may deem proper, providing that at no time before the delivery the goods become so mingled with the common mass of property in such other state as to deprive the transaction of its interstate features. Kinsley v. Dyerly, 19: 405, 98 Pac. 228, — Kan. —.

7. A statute forbidding without license, the canvassing for or selling by sample of goods made in another state, after they have been shipped into the state passing the statute, while permitting such canvassing for domestic goods, violates the commerce clause of the Federal Constitution. State v. Bayer, 19: 297, 97 Pac. 129, — Utah, —. (Annotated)

8. The state may make the license tax on the right to sell certain classes of goods by sample to consumers by canvassing from house to house apply to goods shipped from foreign states, when it applies equally to those of domestic origin. State v. Bayer, 19: 297, 97 Pac. 129, — Utah, —.

9. An agent who solicits orders for a merchant of another state may be made agent to deliver and collect without destroying the interstate character of the transaction. Kinsley v. Dyerly, 19: 405, 98 Pac. 228, — Kan. —.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONS.

Of brokers, see Brokers.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

Common-law exception as to carrier's liability, see Carriers, 23.

Determining common law of other state, see Courts, 9, 10.

Presumption as to common law of other state, see Evidence, 3.

COMPENSATION.

Of attorneys, see Attorneys, 3.

Of brokers, see Brokers.

Of insurance agent, see Constitutional Law, 4, 5; Corporations, 1; Insurance, 1-3.

COMPLAINT.

Sufficiency of declaration or complaint, see Pleading, 1-9.

CONCLUSIVENESS.

Of judgment, see Judgment, 3-5.

CONDEMNATION PROCEEDINGS.

See Eminent Domain.

CONDITIONAL SALE.

See Trespass, 1.

CONFESSIONS.

Sufficiency of corroboration of, see Evidence, 52, 53.

CONFLICT OF LAWS.

How common law of other state determined, see Courts, 9, 10.

Presumption as to foreign law, see Evidence, 2, 3.

In the absence of stipulation evincing a different intention, the negotiable quality of a promissory note made in one state and payable in another will be determined by the laws of the latter. *Sykes v. Citizens' Nat. Bank*, 19: 665, 98 Pac. 206, — Kan. —. (Annotated)

CONNECTING CARRIERS.

See Carriers, 29-31.

CONSIDERATION.

Of contracts, see Contracts, 1, 2.

CONSPIRACY.

Monopolistic combination, see Monopoly and Combinations.

CONSTITUTIONAL LAW.

Taking of private property without compensation, see Eminent Domain, 2-4.

Infringement of rights to private property and individual liberty by health regulations, see Health, 2.

Statute denying appeal in local-option election contest as special legislation, see Statutes, 4.

Equal protection and privileges.

Equality and uniformity of taxes, see Taxes, 5, 6.

1. Regulating or prohibiting the cutting of trees on wild or uncultivated lands for the purpose of protecting the water supply of the state is not a denial of the equal protection of the laws, since the classification is based on real differences in the nature, situation, and condition of things. *Opinion of Justices*, 19: 422, 69 Atl. 627, — Me. —. (Annotated)

2. A state statute imposing a heavy license tax upon the right to canvass from house to house for a certain limited number of articles not produced or manufactured within the state, and not injurious to health or morals, for the apparent purpose of favoring resident merchants with established places of business, violates the provisions of the Federal Constitution against abridging the privileges or immunities of citizens of the United States, and denying equal protection of the laws. *State v. Bayer*, 19: 297, 97 Pac. 129, — Utah, —.

3. A statute denying an appeal in proceedings to contest a local-option election does not unconstitutionally deprive contestants of the privileges and immunities of citizens, nor of property without due process of law, nor of the equal protection of the laws. *Saylor v. Duel*, 19: 377, 86 N. E. 119, 236 Ill. 429.
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Police power.

Drainage of lands as exercise of police power, see Drainage Districts, 1.

Regulation of cutting of trees on wild land as exercise of police power, see Eminent Domain, 3.

4. The police power of the state does not extend to reducing the compensation of general agents of insurance companies under existing contracts. *Boswell v. Security Mut. L. Ins. Co.* 19: 946, 86 N. E. 532, 193 N. Y. 465.

Impairing contract obligations.

5. The legislature cannot require the reduction of the compensation of general insurance agents under existing contracts in view of the provision of the Federal Constitution forbidding the impairment of the obligation of contracts. *Boswell v. Security Mut. L. Ins. Co.* 19: 946, 86 N. E. 532, 193 N. Y. 465.

CONSTRUCTION.

Of contracts, see Contracts, 9.

Of guaranty, see Guaranty.

Of wills, see Wills, 2-5.

CONSTRUCTION CONTRACT.

Effect of absence of final estimate by engineer on completion of work, see Contracts, 14.

CONTAGIOUS DISEASES.

Regulations to prevent spread of, see Health.

Liability of health officers for acts in abating cause of disease, see Trial, 5.

CONTEMPT.

Effect of inability of court to punish for contempt in disobeying injunction on validity of decree, see Judgments, 6.

Statutory authority to punish by imprisonment disobedience of and order for payment of alimony, made in any suit for divorce, does not extend to the authorization of such punishment for noncompliance with a decree directing payment of money due under a foreign decree for alimony. *Mayer v. Mayer*, 19: 245, 117 N. W. 890, — Mich. —.

CONTEST.

Of will, see Wills, 1.

CONTINGENT REMAINDER.

See Remainders; Wills, 5.

CONTINUANCE.

Refusal to continue case to permit taking of plaintiff's deposition, see Appeal and Error, 20.

CONTRACTS.

Liability for preventing performance of, see Case.

Impairing obligation of, see Constitutional Law, 5.

Of corporations, see Corporations, 2, 3

Damages for breach of, see Damages.
 Admissibility of evidence on question of damages for breach of, see Evidence, 37, 38.
 Effect of action upon express contract to preclude action upon *quantum meruit*, see Election of Remedies.
 Of infant, see Infants.
 Mandatory injunction to compel alteration of completed building to make it comply with contract, see Injunction, 1.
 Injunction to prevent violation of, see Injunction, 2.
 Injunction against performance of contract, see Injunction, 6, 7.
 Judgment in action on contract as bar to action on *quantum meruit* see Judgment, 5.
 What constitutes performance by landlord of agreement to furnish water for irrigation, see Landlord & Tenant, 2.
 Of municipality, see Municipal Corporations, 16, 17.
 Breach of physician's contract, see Physicians and Surgeons.
 Sufficiency of averment of damages for breach, see Pleading, 2.
 Assigning breach in negative of words of contract, see Pleading, 3.
 Sufficiency of complaint in action for causing breach of contract, see Pleading, 9.
 Sufficiency of complaint in action for breach of contract to sell shares of stock, see Pleading, 5.
 Complaint in suit against carrier for breach of contract, see Pleading, 14.
 Pleading in action for damages for breach of contract to sell stock, see Pleading, 11.
 Specific performance of, see Specific Performance.
Consideration.
 Sufficiency of allegations to show inadequacy of consideration, see Pleading, 13.
 Sufficiency of consideration for contract to sustain right to specific performance of, see Specific Performance 3.
 Failure of declaration to show whether contract was obnoxious to statute of frauds, see Pleading, 5.
 1. The personal knowledge of a sales agent located at a commercial center, acquired in the sale of his line there, his experience in the business, his acquaintance with available salesmen and to probable customers, and his ability to secure a similar agency in a rival house, may be found to constitute what the parties refer to as good will which his principal purchases from him when placing another person in charge of the agency, so as to form a consideration for the amount agreed to be paid therefor. *Gordon v. Knott*, 19: 762, 85 N. E. 184, 190 Mass. 173.
 2. An agreement in writing by one to take up a past due note of another if it

remains unpaid at a certain future date, without additional consideration to support it, is without consideration, and unenforceable, where the promisor makes no request for forbearance of suit against the maker of the note, and the promisee does not agree to forbear suit; and the mere fact that he does so forbear is not sufficient to establish either such promise or request. *J. H. Queal & Co. v. Peterson*, 19: 842, 116 N. W. 593, 138 Iowa, 514. (Annotated)

Definiteness.

3. A contract to support a woman in consideration of a release from a promise to marry her is not too indefinite and uncertain to be enforceable. *Henderson v. Spratlen*, 19: 655, 98 Pac. 14, — Colo. —.

Statute of frauds.

Burden of proving contract valid under statute of frauds, see Pleading, 11.

4. Issued shares in a corporation are good within the meaning of the statute of frauds, and oral contracts for their sale which do not comply with the terms of that statute are invalid. *Sprague v. Hosie*, 19: 874, 118 N. W. 497, — Mich. —.

(Annotated)

5. Shipping a display cabinet which an hotel proprietor has contracted in writing to place on the counter does not make the contract mutual, so that it can be enforced against him, when not signed by the other party, where it was to run for six years, with a change of cabinet every two years, since the undertaking of the shipper is void under the statute of frauds. *Adams v. Harrington Hotel Co.* 19: 919, 117 N. W. 551, — Mich. —.

6. Delivery of a power of attorney and the land contract to which it related, by the one upon whom it is conferred, to the intended assignee of the contract without executing it, is not sufficient to transfer the contract. *Flinner v. McVay*, 19: 879, 96 Pac. 340, 37 Mont. 306.

7. An assignment of a land contract must be evidenced by writing where a writing is necessary to transfer an interest in real estate. *Flinner v. McVay*, 19: 879, 96 Pac. 340, 37 Mont. 306. (Annotated)

8. Absence of writing will not defeat, under the statute of frauds, an agreement between mortgagor, the purchaser of the mortgage, and a trustee, to hold it and collect the rents and payments of principal and make application thereof, after the agreement has been performed. *McLeod v. Despain*, 19: 276, 90 Pac. 492, 49 Or. 536.

Construction.

Construction of contract of insurance agent, see Insurance, 2.

Law authorizing regulation of public service as part of contracts therefor, see Public Service Corporations, 2.

9. A custom which contravenes a positive statute is invalid, and does not become a part of a contract. *Deadwyler v. Karow*, 19: 197, 62 S. E. 172, — Ga. —.

Validity; public policy.

Effect of partial invalidity of bill of lading, see Carriers, 21.

Validity of carrier's contract limiting liability, see Carriers, 28.

10. The business of a real-estate agent is not within the letter of an ordinance imposing a license tax upon the business of "real estate," which was passed under statutory authority to impose a license tax upon real-estate agents, and therefore the contract of an agent to find a purchaser for real estate will not be held void and unenforceable because of his failure to obtain a license. *Manker v. Tough*, 19: 675, 98 Pac. 792, — Kan. —.

11. A contract by one, who, after agreeing to marry a woman, induces her to submit to surgical operations which render her unable to support herself, to support her in consideration of release from his engagement is valid and enforceable. *Henderson v. Spratlen*, 19: 655, 98 Pac. 14, — Colo. —.

12. A sale of the good will of an established business in connection with a sale of the business is not, if reasonable in other respects, void because unlimited as to time. *Southworth v. Davison*, 19: 769, 118 N. W. 363, — Minn. —.

Remedies; contracts against public policy.

13. Jobbers who are compelled to become parties to a general undertaking between manufacturers of a household necessity for the creation of a corporation to act as their sales agent for the purpose of stifling competition between them, which is void under the Federal anti-trust act, cannot be compelled by the sales agent to pay for goods purchased under and in accordance with the agreement. *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* 19: 143, 148 Fed. 939, 78 C. C. A. 567.

Condition; certificate of performance.

14. Absence of a final estimate by the engineer upon completion of the work will prevent a recovery by the subcontractor against the contractor for the performance of certain work of the amount alleged to be due, where, by the terms of the contract by which the parties are bound, the procuring of such estimate is to constitute a condition precedent to the right to recover for the work done. *Johnston & Grommett Bros. v. Bunn*, 19: 1064, 62 S. E. 341, 108 Va. 490.

Termination.

15. One who is released from his promise to marry a woman, whom he has induced to submit to surgical operations to such an extent that she is unable to support herself, upon consideration that he will support her during life, is not absolved from his promise by her marriage to another person, after the latter's obligation to support her is terminated. *Henderson v. Spratlen*, 19: 655, 98 Pac. 14, — Colo. —. (Annotated)

CONTRIBUTION.

Residuary legatees who, after the special legacies have been substantially paid, 19 L.R.A. (N.S.)

submit to the imposition of an illegal succession tax upon the property, cannot compel the remaining unpaid legatees to share the burden equally with them. *Re Shoenberger*, 19: 290, 70 Atl. 579, 221 Pa. 112.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

CONVERSION.

As to equitable conversion, see Equitable Conversion.

Liability for, see Trover, 2, 3.

CORPORATIONS.

Right of assignor for creditors to complain of sale of property to corporation in exchange for stock, see Assignment for Creditors.

Liability of officer for inducing discharge of employee of corporation, see Case, 2.

Oral contracts for sale of shares of stock, see Contracts, 4.

Parol evidence to show formal action by directors upon proposition, see Evidence, 28.

Conclusiveness of judgment discharging subscriber to stock of a corporation as garnishee for its debt, see Judgment, 4.

Libel in publication of report of meeting of private corporation, see Libel and Slander, 1, 2.

Pleading in action for damages for breach of contract to sell stock, see Pleading, 5, 11.

Power of agent of, to receive property in satisfaction of notes, see Principal and Agent, 1.

Succession tax on stock of domestic corporation owned by testator domiciled in foreign country, see Taxes, 11.

See also Public Service Corporations.

1. A general agent of an insurance company taking charge of its business in another state does not become such a factor in its domestic affairs, mechanism, internal organization or policy, that his contract for compensation is subject to reduction by the legislature under its reserve power over corporations. *Boswell v. Security Mut. L. Ins. Co.* 19: 946, 86 N. E. 532, 193 N. Y. 465.

Contracts.

2. Communication by one employed as manager of a corporation, to its directors, of acceptance of a proposition contained in its duly adopted resolution, that, in case of his inability to dispose of his private business, the corporation purchase it for a certain sum at any time before a certain date, is sufficient to constitute a sale without the necessity of entering the fact of the acceptance in the records of the corporation. *Iowa Drug Co. v. Souers*, 19: 115, 117 N. W. 300, — Iowa, —.

3. A corporation organized to transact a wholesale drug business, with power to purchase such personal property as may

be deemed advisable in the conduct of said business, cannot repudiate a consummated purchase by its directors of the retail drug business of a person whose services they desired to secure as manager, after the value of such business has been destroyed. *Iowa Drug Co. v. Souers*, 19: 115, 117 N. W. 300, — Iowa, —.

Subscriptions to stock; cancellation:
Presumption that obligation to subscribe to stock was terminated, see Evidence, 20.

4. An action by a corporation to cancel stock on account of overvaluation of the property for which it was issued is not for the benefit of other stockholders, so as to permit an adjustment in it of their grievances for being induced to invest money in the enterprise through fraud. *Iowa Drug Co. v. Souers*, 19: 115, 117 N. W. 300, — Iowa, —.

5. The trust-fund doctrine, requiring one paying for corporate stock in property to show that the property was actually worth the value of the stock, has no application as between the corporation itself and the stockholder who has received his stock in exchange for property surrendered at an agreed valuation. *Iowa Drug Co. v. Souers*, 19: 115, 117 N. W. 300, — Iowa, —.

(Annotated)

Liability of stockholders.

When statute of limitations begins to run against stockholder's liability, see Limitation of Actions, 4.

6. The shareholders of a corporation, and not its creditors, must bear the loss occasioned by loss of assets due to the misconduct of the receiver. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

7. Stockholders of a corporation which, having guaranteed payment of principal and interest on mortgages sold by it, became insolvent, after which defaulted mortgages were returned to and collected by the receiver, cannot object to his placing the proceeds in the general funds of the corporation, rather than applying them to the individual claims of the purchasers of the mortgages, for the first time after the money has been paid out and the proceeding closed. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

8. One cannot avoid his statutory liability for the debts of the corporation by adding the word "trustee" to his name as it stands upon the stock books. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

9. The statutory liability of a stockholder for the debts of a corporation is not affected by whether he purchased his stock before or after the incurring of the debt. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

10. Permitting a corporation to continue in business and exercise powers conferred by an amendment to its charter imposing an additional liability on stockholders is sufficient L.R.A. (N.S.)

cient to establish their acceptance of the amendment after contracts have been made for the performance of which their liability is sought to be enforced. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

11. The fact that the principal of the debt of a corporation has been paid by its receiver out of its assets does not prevent the maintenance of an action against the stockholders for unpaid interest, under a statute making them individually liable for the debts of the corporation, where the payments by the receiver were not accepted in full payment of the corporate debts, but merely as dividends thereon. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

12. Voluntary stopping of payment by a corporation which has sold mortgages with a guaranty of principal and interest and the sequestration of its assets deprives it of the right to insist on a demand upon it for payment of defaulted mortgages to charge it with interest on the demand; and therefore stockholders cannot avoid liability for such interest in actions to enforce their statutory liability for the corporate debts because no demand was made upon the corporation for payment. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

13. The statutory liability of stockholders for debts of the corporation extends to interest on claims beyond the time the affairs of the corporation are placed in the hands of a receiver, although the commissioner appointed to determine the claims in the receivership proceedings was instructed to allow interest to the date of the receivership. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —. (Annotated)

14. A creditor of a corporation cannot be deprived of the right to enforce interest on his claim against stockholders under their statutory liability for the corporate debts, for the period covering the time the affairs of the corporation are being wound up by the receiver, on the ground that it would be a hardship on them to hold them liable for interest during the delays of administration of the estate. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

15. The statutory liability of stockholders of a corporation rests upon persons holding the stock as collateral security for loans to the real owners, where they appear upon the stock books as owners. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

16. One to whom corporate stock has been transferred as collateral security, but who appears upon the books of the corporation as the general owner thereof, is liable as a stockholder for the debts of the corporation. *Marshall Field & Co. v. Evans, Johnson, Sloan Co.* 19: 249, 118 N. W. 55, — Minn. —.

17. One to whom corporate stock has been transferred as collateral security, the stock being so registered in the corporation

record, thereby showing his true relation thereto, is not liable as a stockholder for the debts of the corporation. *Marshall Field & Co. v. Evans, Johnson, Sloan Co.* 19: 249, 118 N. W. 55, — Minn. — (Annotated)

18. The words, "issued for collateral security for note of even date," written upon the printed stub of a certificate of stock in the stock book of the corporation, sufficiently advise creditors of the conditions and terms upon which the stock is held. *Marshall Field & Co. v. Evans, Johnson, Sloan Co.* 19: 249, 118 N. W. 55, — Minn. —

19. A decree declaring the assets of a corporation to be exhausted leaving debts unpaid is not necessary to justify a creditors' suit to enforce the statutory liability of stockholders, if the report of the commissioner on claims and that of the receiver have been allowed, which show that fact. *Flynn v. American Banking & T. Co.* 19: 423, 69 Atl. 771, — Me. —

CORPSE.

Damages for mental anguish for breach of contract to transport, see Damages, 10.

Failure to transmit telegram as to shipment of corpse, see Damages, 3; Telegraphs, 3.

Negligence of telegraph company in failing to transmit money to secure forwarding of, see Damages, 15; Telegraphs, 4.

CORROBORATION.

Of confession, see Evidence, 52, 53.

COSTS.

Right to review order as to, see Appeal and Error, 8.

A statute providing a penalty of \$5 and costs for excluding a person of color from a place of amusement prevails over a prior general statute governing the matter of costs. *Jones v. Broadway Roller Rink Co.* 19: 907, 118 N. W. 170, — Wis. —

COTENANCY.

Laches of joint tenant in claiming right to share in benefit of purchase by cotenant, see Appeal and Error, 13.

Delay of joint tenant in demanding right to share in purchase of property by cotenant, see Limitation of Actions, 1.

One heir of a mortgagor may secure title through the foreclosure sale to the exclusion of his coheirs. *Jackson v. Baird*, 19: 591, 61 S. E. 632, 148 N. C. 29.

(Annotated)

COUNTIES.

Issuance of bonds in aid of subscription to railroad stock, see Bonds, 2-4; Evidence 17, 18.

COURTS.

Effect of agreement for arbitration on right to resort to courts, see Arbitration, 1.

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Inherent power to disbar attorney, see Attorneys, 2.

Where action to quiet title must be prosecuted, see Cloud on Title.

Contempt of, see Contempt.

Judicial notice, see Evidence, 1.

Inquiry into legal existence of, in habeas corpus proceeding, see Habeas Corpus.

Sufficiency of indictment presented by private person to give court jurisdiction, see Indictment.

Publication of report of judicial proceeding as libel, see Libel and Slander, 3.

Inquiry by, into reasonableness of ordinance, see Municipal Corporations, 13.

Use of initials of name in court proceedings, see Name.

As to removal of causes, see Removal of Causes.

Effect of resort to, by legatee to resist deduction of succession tax from legacy, see Taxes, 9.

1. Even though defectively organized, a municipal court authorized by law is at least a *de facto* court, and the officers thereof *de facto* officers, and the right of the court to exercise judicial functions can be inquired into only at the instance of the state in direct proceedings brought for that purpose. *State ex rel. Bales v. Bailey*, 19: 775, 118 N. W. 676, — Minn. —

2. A court which has jurisdiction of the subject-matter, and which acquires jurisdiction of the person of the defendant by service of process, is vested with full power and authority to hear and determine all questions that occur in the case and are essential to determine the merits of the issues raised, and it likewise has authority and jurisdiction to make such orders and issue such writs and process as may be necessary and essential to carry the decree into effect and render it binding and operative. *Taylor v. Hulett*, 19: 535, 97 Pac. 37, — Idaho, —

3. The courts of one state, in ascertaining, decreeing, and protecting property rights in water appropriations within the jurisdiction of the state, may, at the same time and for the same purpose, inquire into and determine rights and priorities that are located and situated higher up the stream and beyond the state line, in order fairly and finally to determine judicially the relative rights of the parties, and decree the extent of title and right of possession of the subject-matter located and situated within the state. *Taylor v. Hulett*, 19: 535, 97 Pac. 37, — Idaho, — (Annotated)

4. A state court which has jurisdiction of both the subject-matter and of the person of the defendants, in an action by a resident of the state against nonresidents, to determine their respective rights in an interstate stream, has jurisdiction to grant an injunction to prevent the diversion, in another state, of the waters of the stream by the

nonresident defendants, to the detriment of the plaintiff, the injunction being merely ancillary to, and in aid of, a decree establishing and quieting the latter's title, and being a remedy in *personam*, acting only upon the person of the party enjoined. Taylor v. Hulett, 19: 535, 97 Pac. 37, — Idaho, —.

5. The jurisdiction of the courts of one state to ascertain and determine water appropriations within the state is not ousted or defeated by the fact that a defendant sets up in his answer that he has an appropriation of the waters of the stream in controversy, and that he diverts the waters from such stream in another state for use and application in irrigating lands situated within that state. Taylor v. Hulett, 19: 535, 97 Pac. 37, — Idaho, —.

Relation to other departments of government.

6. Requiring the judges of the district court to appoint park commissioners, whose duties are wholly administrative and executive, and over whom the judges are given no supervision or control, the power of supervision being expressly and exclusively delegated to the mayor and city council, violates the provision of the Constitution dividing the government into three departments, and prohibiting persons of one department from exercising powers properly belonging to either of the others. State ex rel. Thompson v. Neble, 19: 578, 117 N. W. 723, — Neb. —. (Annotated)

7. The power to appoint to a public office is not the exercise of a judicial function, but is executive or administrative in its nature. State ex rel. Thompson v. Neble, 19: 578, 117 N. W. 723, — Neb. —.

8. Requiring a police judge to notify the county attorney of violations of the prohibitory liquor law that come to his notice, and to furnish him with the names of the witnesses by whom such violations may be proved, under penalty of a fine and forfeiture of his office, does not violate the constitutional provision as to the separation of the departments of government, since the police judge, although exercising judicial functions, is not a repository of judicial power, within the meaning of the constitutional provision vesting the judicial power in a supreme court, district court, etc., and "such other courts, inferior to the supreme court, as may be provided by law," to which courts alone the constitutional doctrine of the separation of powers applies. State v. Keener, 19: 615, 97 Pac. 860, — Kan. —. (Annotated)

Rules of decision.

9. In determining the common law of another state, the decisions of the courts of final resort of that state will be followed, regardless of precedents to the contrary, in the state where the trial is held; and this rule applies to the law merchant as well as to other branches of the common law. Sykes v. Citizens' Nat. Bank, 19: 665, 98 Pac. 206, — Kan. —.

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10. A decision of a foreign state holding a promissory note which is uncertain and indefinite as to time, negotiable at common law, will not be accepted as determining the law of that state where the decision was rendered by an intermediate court, and is in conflict with the well-settled common law doctrine of the state in which the action arises. Sykes v. Citizens' Nat. Bank, 19: 665, 98 Pac. 206, — Kan. —.

COVENANTS AND CONDITIONS.

Condition precedent to issuance of county bonds for subscription to railroad stock, see Bonds, 2, 3.

Condition in insurance policy, see Insurance.

CREDITORS' BILL.

To enforce statutory liability of stock holders, see Corporations, 19.

CREDITS.

Exemption of, from taxation, see Statutes, 2; Taxes, 5, 6.

CRIMINAL LAW.

Malicious killing of dog, see Animals, 1, 2.

Prejudicial error in conduct of trial, see Appeal and Error, 25.

Sufficiency of corroboration of confession, see Evidence, 52, 53.

Habeas corpus by person convicted of crime, see Habeas Corpus.

Sufficiency of indictment presented by private person, see Indictment, etc.

Prohibition to restrain action upon invalid information, see Prohibition.

Instruction as to credibility of testimony of accused, see Trial, 18.

See also Adultery; Embezzlement; False Pretenses; Malicious Mischief.

1. An original prosecution cannot be instituted in a court of record except by presentment of indictment by a grand jury, or by an information exhibited by the county attorney or some other officer thereto authorized by law. Evans v. Willis, 19: 1050, 97 Pac. 1047, — Okla. —.

2. A court which has imposed a judgment of imprisonment on plea of guilty or conviction, which is not stayed as provided by law, should forthwith commit the defendant to the proper officer for incarceration; but, where this is not done, and an order is made under which the defendant is discharged from custody, the court has no power or jurisdiction after the lapse of the time involved in the sentence, and after the term, to issue commitment on such judgment. Ex parte Clendenning, 19: 1041, 97 Pac. 650, — Okla. —. (Annotated)

CROP.

Breach of contract to furnish water to irrigate crops, see Damages, 1; Evidence, 38; Landlord and Tenant, 2. Mortgage on, see Chattel Mortgage, 1. Lien upon, for wages of farm laborers see Liens.

Conversion by purchaser of crop upon which another has a lien, see *Trover*, 3.

CUSTOM.

As part of contract, see *Contracts*, 9.
Failure of employer to comply with, as negligence, see *Master and Servant*, 17.

Exclusion of evidence of custom in negligence action, see *Trial*, 2.

If a part of a custom would be valid if it stood alone as a separate and independent custom, such part would be invalid when another part of the entire custom of which it forms a part was invalid, unless it were reasonably certain that to enforce the former as a separate and independent custom would correspond with the intent and purpose with which the custom, as a whole, was established and used. *Deadwyler v. Karow*, 19: 197, 62 S. E. 172, — Ga. —.

DAMAGES.

Sufficiency of averment of, see *Pleading*, 2.

Evidence on measure of damages for failure to furnish water for irrigation, see *Evidence*, 38.

1. The measure of damages for breach of contract to furnish water to irrigate growing crops so that they become worthless is the value of the crops on the market at maturity, less the cost necessary to put them in condition for and upon the closest market. *Smith v. Hicks*, 19: 938, 98 Pac. 138, — N. M. —. (Annotated)

Sales of personality.

2. The rental value of a cotton gin is the measure of damages for delay in complying with a contract to furnish machinery for the establishment of a new plant, where the operation of the gin depends on the machinery, which fact is fully explained to the seller when the contract is made, and the failure to comply with the contract prevents the operation of the gin. *Standard Supply Co. v. Carter*, 19: 155, 62 S. E. 150, 81 S. C. 181. (Annotated)

Telegrams.

See also *infra*, 11-15.

3. Compensation for loss of time and for money expended in fruitlessly meeting trains to receive a corpse for burial may be recovered against a telegraph company whose negligence in failing to transmit a telegram was responsible therefor. *Cumberland Teleph. & Teleg. Co. v. Quigley*, 19: 575, 112 S. W. 897, — Ky. —.

Failure in duty to passenger.

See also *infra*, 16.

4. A railroad company which negligently causes a passenger to miss a train on a connecting road so that she is compelled to stop over at a way station and return home is not liable for injury to her through going into a cold room of a hotel and sitting up all night, or for vexation or personal inconvenience because of the delay, but may 19 L.R.A. (N.S.)

be chargeable for hotel bills and lost time. *Cincinnati, N. O. & T. P. R. Co. v. Raine*, 19: 753, 113 S. W. 495, — Ky. —.

Personal injuries.

5. Direct evidence of the value of a physician's services in treating one injured by another's negligence is not necessary to authorize an allowance therefor against the person responsible for the injury, where the fact of his employment and the nature and extent of the treatment are shown, but the jury may fix the value from their own knowledge and experience. *Moran v. Dover*, S. & R. Street R. Co. 19: 920, 69 Atl. 884, 74 N. H. 500. (Annotated)

6. A verdict of \$15,000 for injury to the driver of a fire wagon, thirty-eight years old, which requires him to submit to several surgical operations, causes him much physical and mental suffering, and leaves him a cripple for life, will be reduced to \$7,500. *Dole v. New Orleans R. & L. Co.* 19: 623, 46 So. 929, 121 La. 945.

7. The reviewing court will not interfere with a verdict for \$1,200 in favor of a man sixty-three years of age who was knocked down by an automobile, rendered unconscious, and suffered a contusion of the head and hip, and who at the time of the injury was earning \$1.50 per day, and at the time of the trial, six months later, was unable to work, and for three weeks after the accident did not rest well where at the later date the tenderness in the wounds had not disappeared, and in the opinion of a doctor was permanent. *Hiroux v. Baum*, 19: 332, 118 N. W. 533, — Wis. —.

Mental anguish.

Sufficiency of complaint to entitle one to recovery of damages for mental anguish, see *Pleading*, 14.

Right to damages for mental suffering for failure to deliver telegram announcing death of relative by affinity, see *Evidence*, 22.

What evidence admissible to show mental anguish, see *Evidence*, 37.

Mental anguish because of failure promptly to transmit telegram to secure forwarding of corpse, see *Telegraphs*, 3.

Sufficiency of findings to support judgment for mental anguish, see *Trial*, 20.

8. Damages for mental pain and anguish, illness, threatened miscarriage, and possibly permanent injuries, due to fright resulting from an assault committed by a stranger in the hearing of a pregnant woman, are too remote to form a basis of action on her behalf against the assailant. *Reed v. Ford*, 19: 225, 112 S. W. 600, — Ky. —.

9. Damages for mental anguish can be recovered in an action for breach of contract only where the breach amounts to an independent, wilful tort. *Beaulieu v. Great Northern R. Co.* 19: 564, 114 N. W. 353, 103 Minn. 47.

10. Damages for mental anguish cannot be recovered for breach of a contract by a

railway company to transport a corpse over its line to a particular point, and to deliver it there to an intersecting carrier, to be conveyed to its place of destination, where the breach consists in the negligence of the company in carrying the corpse beyond the connecting point, thus causing a delay in the funeral arrangements, in the absence of wilful or malicious misconduct on the part of the company or its agents. *Beaulieu v. Great Northern R. Co.* 19: 564, 114 N. W. 353, 103 Minn. 47. (Annotated)

11. A telegraph company cannot escape liability for damages for mental suffering of a man because, through its failure to deliver a telegram to his father announcing the death of his wife, he is deprived of the presence of the father at the funeral, on the ground that it was not informed that its failure would cause such suffering. *Foreman v. Western U. Teleg. Co.* 19: 374, 116 N. W. 724, — Iowa, —.

12. The relationship of the parties need not appear on the face of the telegram announcing a death, to render the company liable for damages for mental suffering in case it fails to deliver it, if it had knowledge of such relationship. *Foreman v. Western U. Teleg. Co.* 19: 374, 116 N. W. 724, — Iowa, —.

13. The mere fact that the wife of the addressee of a telegram was the sister of the one whose death the message announced is not sufficient to entitle her to recover damages for mental anguish for its non-delivery. *Holler v. Western U. Teleg. Co.* 19: 475, 63 S. E. 92, — N. C. —. (Annotated)

14. Damages for mental anguish cannot be recovered by the undisclosed principal for delay in transmitting and delivering a telegram announcing death, although both the sender and sendee are his agents. *Western U. Teleg. Co. v. Potts*, 19: 479, 113 S. W. 789, — Tenn. —.

15. A telegraph company which fails promptly to transmit money sent by a father to secure the forwarding of the corpse of his daughter for burial is liable to him for mental pain and anguish by reason of the delay in shipment of the corpse, and for loss of time and expenditure of money thereby caused. *Cumberland Teleph. & Teleg. Co. v. Quigley*, 19: 575, 112 S. W. 897, — Ky. —. (Annotated)

16. One accompanying her invalid sister on a railroad journey, who does not make the contract for the transportation, cannot recover damages for mental suffering due to the physical suffering of the invalid because of the wrongful acts of the carrier in its manner of placing her on the train and neglecting to assist her off. *Gulf, C. & S. F. R. Co. v. Overton*, 19: 500, 110 S. W. 736, — Tex. —. (Annotated)

Loss of profits.

17. The damages to be allowed for breach of contract to furnish machinery for the establishment of a cotton gin, whereby the operation of the gin for a season is prevented, cannot be based upon the anticipated profits for that season, nor the advantage which the owner hoped to obtain because of the aid afforded by the gin in collecting his accounts. *Standard Supply Co. v. Carter*, 19: 155, 62 S. E. 150, 81 S. C. 181.

Aggravation.

18. That one who wrongfully enters upon property occupied by another as a residence attempts to seduce his wife may be considered in aggravation of damages for trespass, notwithstanding statutes enlarging the rights of married women and permitting them to sue alone for injuries to their persons. *Brame v. Clark*, 19: 1033, 62 S. E. 418, 148 N. C. 364. (Annotated)

DEATH.

Negligence in transmission of telegram announcing death, see *Damages*, 11-14; *Evidence*, 22.

Of trespasser from electric shock, see *Electricity*.

Resulting from negligence of physician, see *Physicians and Surgeons*.

1. An action may be maintained, under a statute permitting the administrator of the mother to recover for the benefit of the children the damages occasioned by the deprivation of the expectation of pecuniary advantage which would have resulted by a continuation of the mother's life, where the mother, who has performed ordinary household duties, including such care of the children as a mother usually takes, has lost her life through the wrongful act of another, notwithstanding the children have been supported in a home maintained with the earnings of the father. *Carter v. West Jersey & S. R. Co.* (N. J. Err. & App.) 19: 128, 71 Atl. 253, — N. J. —.

2. A statute permitting the personal representative of a deceased person to recover for the benefit of the children the damages occasioned by the deprivation of the expectation of pecuniary advantage which would have resulted by a continuance of the parent's life, does not require the plaintiff to show that the children would probably have received from the deceased contributions of money or of things purchased with money. *Carter v. West Jersey & S. R. Co.* (N. J. Err. & App.) 19: 128, 71 Atl. 253, — N. J. —. (Annotated)

DEBTOR AND CREDITOR.

As to assignment for creditors, see *Assignment for Creditors*.

DECLARATION OR COMPLAINT.

See *Pleading*.

DEEDS.

Presumption of existence of a duly executed and delivered deed, see *Evidence*, 19.

Admissibility in evidence of record of deed, see *Evidence*, 23.

Avoidance of deed by incompetent persons, see *Incompetent Persons*.

1. A grant to one, his heirs and assigns, habendum to him during the term of his natural life, remainder to such of his children as shall arrive at the age of twenty-one years, their heirs and assigns, creates a fee in the first taker to hold for his use during life and then for the use of such of his children as shall attain majority, whether they do so before or after his death. *Simonds v. Simonds*, 19: 686, 85 N. E. 860, 199 Mass. 552.

2. The rule that a limitation, if it can so operate, is to be construed as a remainder, and not as an executory devise, even if applicable to springing and shifting uses, will not be applied if the effect will be to thwart the intent of the maker and defeat the terms of the instrument. *Simonds v. Simonds*, 19: 686, 85 N. E. 860, 199 Mass. 552.

3. A fee will pass by a deed from a man who, having received an absolute conveyance of real estate from his wife, recites in the deed that he is entitled to a life estate in the property by right of survivorship under the laws of the state, which interest he has agreed to sell, and grants to his grantee, his heirs and assigns, forever, all the right he has in the property, to have and to hold he life estate and interest which the grantor has, and no more. *Dickson v. Van Hoose*, 9: 719, 47 So. 718, — Ala. —.

DE FACTO COURTS.

See Courts, 1.

DEFENSE.

In action by abandoned wife for support, see Husband and Wife, 2, 3.
In suit to abate nuisance, see Nuisance, 4-6.

DELAY.

Of joint tenant in demanding right to share in purchase of property by cotenant, see Limitation of Actions, 1.
Of taxpayers in complaining of expenditure of public money for sectarian instruction in schools, see Limitation of Actions, 2.

DEMAND.

Necessity of demand to entitle one to interest, see Corporations, 12; Interest, 2.
Necessity of demand for return of property taken by sheriff from prisoner as condition precedent to right to maintain trover, see Trover, 2.

DEMONSTRATIVE EVIDENCE.

See Evidence, 26, 27.

DEMURRER.

See Pleading, 12-14.

DENTISTS.

A person who is licensed to 'practise medicine and surgery' cannot, by virtue thereof, 'practise dentistry' without securing a license as a dentist, where the legislature has defined both the practice of medicine and the practice of dentistry, and made of them two distinct professions, with prescribed requirements for each. *State v. Taylor*, 19: 877, 118 N. W. 1012, — Minn. —.

DEPOSITIONS.

Refusal to continue case to permit taking of plaintiff's deposition, see Appeal and Error, 20.

A defendant has the right to take plaintiff's deposition before trial, under a statute providing that a party may be examined at the instance of the adverse party by deposition, as any other witness, where the circumstances are such as to entitle him to take the deposition of a witness other than a party to the suit. *Western U. Teleg. Co. v. Williams*, 19: 409, 112 S. W. 651, — Ky. —.

DEPOT GROUNDS.

Acquiring title to portion of, by adverse possession, see Adverse Possession, 2.

DESCENT AND DISTRIBUTION.

Descent of reversion to child as heir under devise to child for life and, in case of his death without children, to testator's next of kin, see Wills, 5.

DEVICE.

Pool table as gaming device, see Gaming, 2.

DEVISE.

See Wills.

DIRECTION OF VERDICT.

See Trial, 13, 14.

DISBARMENT.

Of attorney, see Attorneys, 1, 2.

DISCRETION.

Review of, on appeal, see Appeal and Error, 13-15.

DISCRIMINATION.

By carrier between hackmen, see Carriers, 33.
In license tax, see Commerce, 7; Constitutional Law, 2; License, 3.

DISORDERLY HOUSES.

Injunction against maintenance of, see Nuisance, 2, 4-6.

DIVORCE AND SEPARATION.

Punishing by imprisonment disobedience of order for payment of alimony, see Contempt.
Effect of, on dower right, see Dower.
Enforcing foreign decree for alimony, see Judgment, 7, 8.
Sufficiency of services to support judgment *in personam* for alimony and attorney's fees, see Judgment, 2.

DOCUMENTARY EVIDENCE.

See Evidence, 23-25.

DOGS.

See Animals.

DOWER.

Acceptance, by a wife, of a sum allowed her by a decree of divorce in lieu of dower, bars her rights under an antenuptial contract which provides for payment to her, at her husband's death, of a certain sum of money in lieu of dower. *Long v. Barton*, 19: 384, 86 N. E. 127, 236 Ill. 551.

DRAINAGE DISTRICTS.

Liability for flooding of lands by obstruction of water, see Eminent Domain, 4.

1. The drainage of lands to improve them for agricultural purposes cannot be regarded as an exercise of the police power, so as to exempt the land so drained from liability for injury caused by the improvement to other land not within the district. *Bradbury v. Vandalia Levee & Drainage Dist.* 19: 991, 86 N. E. 163, 236 Ill. 36.

2. A drainage district cannot escape liability for injury done by its improvements, to lands lying out of its limits, on the theory that it is an involuntary quasi public corporation not liable to respond in damages for any of its acts, where its organization depends upon a petition of those living within its limits, and the statute provides that lands lying within the district shall be liable for any and all damages which shall be sustained by any lands lying above such district by the construction of its works. *Bradbury v. Vandalia Levee & Drainage Dist.* 19: 991, 86 N. E. 163, 236 Ill. 36.

DRAINS AND SEWERS.

As to drainage district, see Drainage Districts.

DROWNING.

Of trespassing child, see Negligence, 10.

DRUNKENNESS.

Liability for injury resulting from fright caused by assault by intoxicated person on third person, see Fright.

EASEMENTS.

Agreement for erection of telephone poles on land as, see License, 1.

As to rights in party wall, see Party Wall.

1. The right of an owner of an estate to erect and maintain, or to cause to be erected and maintained, a line of telephone poles over the estate of another, for the benefit of the former, is an easement. *Yeager v. Tuning*, 19: 700, 86 N. E. 657, — Ohio, —.

2. An easement can be created only by deed or by prescription. *Yeager v. Tuning*, 19: 700, 86 N. E. 657, — Ohio, —.
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EJECTION.

Of passenger, see Carriers, 11, 15, 16.

ELECTION.

Discretion as to granting or overruling motion to require election between counts, see Appeal and Error, 15.

ELECTION OF REMEDIES.

Bringing an action upon express contract for electric light furnished a city is not an election which will preclude an action upon *quantum meruit* in case the first action is dismissed for failure to prove compliance with the contract. *Water, Light, & Gas Co. v. Hutchinson*, 19: 219, 160 Fed. 41, — C. C. A. —.

ELECTIONS.

Appeal in contest of local-option election, see Appeal and Error, 1, 2.

Statute denying appeal in proceedings to contest local-option election, see Constitutional Law, 3; Statutes, 4.

Disqualification of judge to try election contest, see Judges.

1. The object of requiring the voter to have resided for a time at the place where he offers to vote is that he may be afforded an opportunity to acquire the information necessary for an intelligent vote, and become identified with the interests of the locality, and also to prevent the colonization of voters. *Estopinal v. Michel*, 19: 759, 46 So. 907, 121 La. 879.

2. The term "residence," used by the Constitution in fixing the qualification of voters, does not mean domicil. *Estopinal v. Michel*, 19: 759, 46 So. 907, 121 La. 879.

(Annotated.)

3. In the absence of proof that a person otherwise qualified has acquired a residence elsewhere, he must be considered to be a resident of the parish where his work requires him to stay, where he was born, and where he has always lived and voted; and it makes no difference that he has never had in said parish any other home than a boarding house, while he has had in another parish a home, where he has kept his wife and children, whom he has visited as often as he could. *Estopinal v. Michel*, 19: 759, 46 So. 907, 121 La. 879.

ELECTRICITY.

Action for electric light furnished to city, see Election of Remedies.

Exercise of eminent domain for generating, see Eminent Domain, 1.

An electric company which maintains defectively insulated wires over another's roof for violation of a penal ordinance of the municipal corporation is not liable for the death of a boy who, in trespassing upon the roof, comes in contact with the wires and is killed. *Burnett v. Fort Worth Light & P. Co.* 19: 504, 112 S. W. 1040, — Tex. —.

ELECTRIC LIGHTS.

See Electricity.

EMBEZZLEMENT.

Evidence that a laundress, upon discovering in a clothes basket committed to her a bag of money belonging to her employer, accidentally placed therein, recognized her duty to return the bag to its owner, but subsequently, and before so returning it, fraudulently converted the money, will support a conviction of embezzlement under Gen. Stat. 1906, § 3311, providing that, if any servant embezzles or fraudulently converts to his own use anything of value which has been intrusted to him, or which has come into his possession, care, custody, or control by reason of his employment, he shall be punished as if he had been convicted of larceny. *Neal v. State*, 19: 371, 46 So. 845, 55 Fla. 140. (Annotated)

EMINENT DOMAIN.

Pleading in eminent domain proceedings, see Pleading, 10.

For what purpose.

1. That a corporation seeking by right of eminent domain property necessary to enable it to generate a supply of electricity has power to serve a private use will not defeat its application for property which it proposes and proves shall be used exclusively for public service. *Walker v. Shasto Power Co.* 19: 725, 160 Fed. 856, 87 C. C. A. 660. (Annotated)

What constitutes a taking.

2. Private property is not taken, so as to require compensation, by regulating the cutting of trees on wild and uncultivated land to protect the public water supply, and, for the same purpose, prohibiting the cutting of small trees on such property, the value of which standing is equal to or greater than when cut, and regulating the cutting of small trees on such land to enhance the value of such land and the trees thereon, and promote the interests of the owners and the common welfare of the public. *Opinion of Justices*, 19: 422, 69 Atl. 627, — Me. —.

3. Regulation by the state of the cutting or destruction of trees growing on wild and uncultivated land, or prohibition of the wanton cutting of small trees on such lands which are of equal or greater value standing than cut, for the purpose of protecting the water supply of the state, is not a taking of property for which compensation must be made under the 14th Amendment of the Federal Constitution, since that amendment was not intended to interfere with the police power of the state. *Opinion of Justices*, 19: 422, 69 Atl. 627, — Me. — (Annotated)

Compensation.

4. A drainage district which constructs a levee along a river and from the river to the highlands, in such a way as to obstruct the natural flow of the flood water of the river and cast it back on property farther up the stream, is liable for the injury thereby caused, where the Constitution provides that private property shall not be taken or damaged for public use without compensation. *L.R.A. (N.S.)*

sation. *Bradbury v. Vandalia Levee & Drainage Dist.* 19: 991, 86 N. E. 163, 236 Ill. 36. (Annotated)

EMPLOYERS' LIABILITY ACT.

See Master and Servant, 16.

ENTIRETIES.

Right of wife holding land by entireties to partition of trees cut by husband, see Partition.

EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law, 1-3.

EQUITABLE CONVERSION.

The surplus arising from a foreclosure sale of decedent's real estate after his death is not to be regarded as personality within the operation of a statute allowing the widow and minor children a certain sum out of personality left by him. *Kitchens v. Jones*, 19: 723, 113 S. W. 29, 87 Ark. 502. (Annotated)

EQUITABLE MORTGAGE.

See Mortgage.

EQUITY.

Necessity of restitution by infant seeking to cancel deed, see Infants.
See also Injunction; Specific Performance.

1. A court of chancery will refuse to entertain a bill merely to construe a will in which no trust is involved. *Frank v. Frank*, 19: 176, 113 S. W. 640, — Ark. —.

Retaining jurisdiction.

2. Upon refusal of specific performance of a contract to sell real estate because of inequitable conduct on the part of complainant, the bill need not be retained for the assessment of damages, but may be dismissed, and complainant left to his remedy at law. *Banaghan v. Malaney*, 19: 871, 85 N. E. 839, 200 Mass. 46.

3. A bill for specific performance of a contract will not be retained for the assessment of damages where a case is not made for specific performance, and no other special equity is shown which will support jurisdiction of the court. *Bromberg v. Eugentotto Construction Co.* 19: 1175, 48 So. 60, — Ala. —.

4. The nonestablishment of the right to a lien in a bona fide proceeding by a subcontractor to enforce a lien against the property of the owner for work performed for the contractor does not defeat the jurisdiction of the court to render a personal decree against the contractor for the amount found due by him. *Johnston & Grommett Bros. v. Bunn*, 19: 1064, 62 S. E. 341, 108 Va. 490. (Annotated)

Equity principles.

5. Equity will refuse its aid to one guilty of any unlawful conduct in the matter with relation to which he seeks equity. *International Land Co. v. Marshall*, 19: 1056, 98 Pac. 951, — Okla. —.

ESTOPPEL.

Effect of estoppel in favor of or against administrators appointed in one state on administrator in other state, see *Executors and Administrators*, 2.

Of insurer, see *Insurance*, 13-15.

To complain that facts were not submitted to jury, see *Trial*, 14.

That the holder of one of the new notes representing the respective interests of the purchasers of a mortgage does not originate a suit to foreclose the mortgage to secure its payment, but is made defendant therein, does not prevent the application against him of the rule that he cannot treat the original note as existing for the purpose of upholding the mortgage and repudiate it for other purposes, where he seeks affirmative relief in his answer, by way of foreclosure of the mortgage, to secure the sum due on his note. *McLeod v. Despain*, 19: 276, 90 Pac. 492, 49 Or. 536.

EVIDENCE.**Judicial notice.**

1. A Manhattan cocktail is generally and popularly known as an intoxicating liquor, and no proof of its intoxicating character is necessary, in prosecutions under a prohibitory law. *State v. Pigg*, 19: 848, 97 Pac. 859, — Kan. —. (Annotated)

Presumptions and burden of proof.

See also *infra*, 45.

Presumption of knowledge of purchaser of negotiable paper as to rights of parties, see *Bills and Notes*, 5.

Burden of proving contract valid under statute of frauds, see *Pleading*, 11.

Presumption of acquiescence in placing of boundary fence, see *Boundaries*.

2. In the absence of proof of the law of a foreign country, where a contract for sale of the good will of a business was entered into, the court of the forum will presume that it is the same as its own law; and this presumption cannot be affected by statements in its own opinions, or those of the courts of the foreign country, which are not put in evidence. *Gordon v. Knott*, 19: 762, 85 N. E. 184, 199 Mass. 173.

3. The common law of one state, governing commercial transactions in issue in the courts of another state, in the absence of proof on the subject, will be presumed to conform to the *lex fori*. *Sykes v. Citizens' Nat. Bank*, 19: 665, 98 Pac. 206, — Kan. —.

4. An assignor for creditors has the burden of showing that he is entitled to interest on funds which the assignee kept on deposit in the bank, and the amount of it, at least where the assignor was insolvent, so that the trust was a creditors' trust, and they did not object to such proceeding. *Whitman v. McIntyre*, 19: 682, 85 N. E. 426, 199 Mass. 436.

5. Where an intentional killing by the use of a deadly weapon has been established, accused has the burden of showing that it was in self-defense, by a fair preponderance

of facts. *Com. v. Palmer*, 19: 483, 71 Atl. 100, 222 Pa. 299. (Annotated)

6. There is no conclusive presumption that a mother knew that her son, in investing her money for her without compensation, was securing compensation for his services from the borrower. *Franzen v. Hammond*, 19: 399, 116 N. W. 169, — Wis. —.

7. There is no conclusive presumption of law that a twelve-year-old boy is able to foresee the danger of being crushed by a loaded push car which he and other children are pushing along a track, or that he has sufficient wisdom to avoid it; at least, not in the face of an averment to the contrary in the pleadings. *Cahill v. E. B. & A. L. Stone & Co.* 19: 1094, 96 Pac. 84, 153 Cal. 571.

8. When a passenger shows an injury to himself by the breaking of the carrier's bridge, the burden is cast upon the carrier of establishing by a preponderance of evidence that the accident and resulting injury were caused by inevitable casualty, or by some cause which human care and foresight could not have prevented. *Roanoke R. & E. Co. v. Sterrett*, 19: 316, 62 S. E. 385, 108 Va. 533.

9. The separating of two cars of merchandise which a common carrier's contract contemplated keeping together in transit, whereby the care taker is prevented from attending to one of them, loss thereby ensuing, imports negligence, and the burden of proof is on the common carrier to prove that there was sufficient cause for separating the cars. *Whitnack v. Chicago, B. & Q. R. Co.* 19: 1011, 118 N. W. 67, — Neb. —.

10. The burden of proof is upon the carrier to exempt himself from liability in case of loss or damage to goods consigned to it for carriage by showing that it was occasioned either by an inherent defect, vice, or weakness, or spontaneous action of the property itself, by the act of a public enemy of the United States or of the state, by act of law, or any irresistible superhuman cause. *Duncan v. Great Northern R. Co.* 19: 962, 118 N. W. 826, — N. D. —.

11. Proof of the delivery of property to a carrier in sound condition, and of its redelivery at the end of the route in damaged condition, or of a failure to redeliver it, makes a sufficient case to sustain a recovery for the damage or loss sustained by the shipper. *Duncan v. Great Northern R. Co.* 19: 952, 118 N. W. 826, — N. D. —.

12. The fact that the setting of a fire by a railroad locomotive has been proved by circumstantial evidence does not prevent the presumption of negligence on the part of the defendant, arising under the rule casting the burden of rebutting that presumption on the defendant. *Osburn v. Oregon R. & Nav. Co.* 19: 742, 98 Pac. 627, — Idaho, —.

13. In an action against a railroad company for the destruction of property by fire set by sparks from the company's locomotive, proof of actual negligence or want

of ordinary care must be made by complainant. when the presumption of negligence which arises upon the establishment of the fact that the fire was communicated from the engine to the property destroyed is rebutted by proof of proper appliances and careful management and operation. *Osburn v. Oregon R. & Nav. Co.* 19: 742, 98 Pac. 627, — Idaho, —.

14. A prima facie case is established against a railroad company for the destruction of property by fire set by sparks from a locomotive, by proof that fire has been communicated from the company's engine to the property, which resulted in its destruction, since such proof raises a presumption of negligence either in construction and equipment, or in management and operation of its engine, which it is necessary for the defendant to rebut. *Osburn v. Oregon R. & Nav. Co.* 19: 742, 98 Pac. 627, — Idaho, —.

15. The derailment and overturning of a freight car in a train is not such evidence of negligence on the part of the railroad company towards its brakeman as to cast upon it the burden of exonerating itself from the charge of negligence to absolve itself from liability for injury to him thereby. *Henson v. Lehigh Valley R. Co.* 19: 790, 87 N. E. 85, — N. Y. —.

16. One killed at a railroad crossing under circumstances of which there was no witness cannot be presumed to have been in the exercise of due care in an action to hold the railroad company liable for his death, where the burden of showing due care is on the plaintiff. *Shum v. Rutland R. Co.* 19: 973, 69 Atl. 945, — Vt. —.

17. Railroad aid bonds issued by a corporation, which contain no recitals as to compliance with the conditions upon which they are to be issued, are entitled to the same presumption, in the hands of bona fide holders for value, as to compliance with such conditions, where proof is made that the proceedings were in fact regular, as though the recitals had been incorporated in them. *Quinlan v. Green County*, 19: 849, 157 Fed. 33, 84 C. C. A. 537.

18. The holder of negotiable county aid bonds lawfully issued is, by presumption, clothed with the character of a bona fide holder for value. *Quinlan v. Green County*, 19: 849, 157 Fed. 33, 84 C. C. A. 537.

19. The existence of the record of a deed for more than fifty years, together with the occupation of the land by the grantee for a time subsequently to the date of the record, without anything to show that he claimed under the deed, is not sufficient to raise a presumption of the existence of a duly executed and delivered original. *McClerry v. Lewis*, 19: 438, 70 Atl. 540, — Me. —.

20. The fact that several times the length of time required by the statute or limitations to bar an obligation on a contract to subscribe to the stock of a railroad company has elapsed since the contract was

made, without any step being taken to perfect the subscription, may be considered in support of the presumption raised by other facts in the case, that the obligation to subscribe for the stock has been terminated. *Quinlan v. Green County*, 19: 849, 157 Fed. 33, 84 C. C. A. 537.

21. If there be a doubt as to whether a sale made by an agent in one state for a merchant in another was completed by the acceptance of the orders by the principal and his shipping of the goods, the contrary cannot be assumed in order to sustain a conviction for the violation of a city ordinance imposing a license tax upon persons soliciting orders for the sale of goods, but the prosecution must establish its case. *Kinsley v. Dyerly*, 19: 405, 98 Pac. 228, — Kan. —.

22. No presumption of mental suffering will arise in case of failure to deliver a telegram announcing the death of a relative by affinity only, such as a son's wife; and therefore to recover damage for such suffering in such cases facts must be pleaded and proved showing special friendship or affection, although it is not necessary to show that the telegraph company had notice of such facts. *Foreman v. Western U. Teleg. Co.* 19: 374, 116 N. W. 724, — Iowa, —.

(Annotated)

Documentary evidence.

23. The record of a deed is not admissible to prove its existence, on behalf of the grantee claiming under it. *McClerry v. Lewis*, 19: 438, 70 Atl. 540, — Me. —.

(Annotated)

24. Entries in a trustee's account showing payments on indebtedness due the beneficiaries are admissions against interest, which are proper evidence to show that the payments were made, in a controversy between the mortgagor and the beneficiaries of the trust. *McLeod v. Despain*, 19: 276, 90 Pac. 492, 49 Or. 536.

25. The proofs of death are admissible in evidence in an action upon a mutual-benefit certificate. *Beard v. Royal Neighbors of America*, 19: 798, 90 Pac. 83, — Or. —.

Demonstrative.

Error in refusing to receive photograph in evidence, see Appeal and Error, 11.

New trial because of misconduct of jury sent to view *locus in quo*, see New Trial, 4.

26. Failure to appoint a person to show to the jury the place they are sent to view is unimportant if they find and inspect the right place. *Emporia v. Juengling*, 19: 223, 96 Pac. 850, — Kan. —.

27. An additional oath need not be administered to the officer in charge of the jury sent to view the *locus in quo*, unless required by statute. *Emporia v. Juengling*, 19: 223, 96 Pac. 850, — Kan. —.

Parol and extrinsic concerning writings.

See also *infra*, 50.

28. Parol evidence is admissible to show formal action by the directors of a corpo-

ration upon a proposition which came before them. *Iowa Drug Co. v. Souers*, 19: 115, 117 N. W. 300, — Iowa, —.

29. The rule against parol testimony to vary written contracts does not apply to usurious agreements. *France v. Munro*, 19: 391, 115 N. W. 577, 138 Iowa, 1.

30. A bill of lading issued by a common carrier, and signed and accepted by the shipper, constitutes a contract for the shipment of merchandise therein described, the terms of which cannot be varied by parol testimony. *Whitnack v. Chicago, B. & Q. R. Co.*, 19: 1011, 118 N. W. 67, — Neb. —.

31. Liability for breach of warranty that the apparatus installed will produce certain results cannot be established by parol under a written contract to furnish certain electrical apparatus, to be first-class and of latest type, all work to be done in first-class manner. *Electric Storage Battery Co. v. Waterloo C. F. & N. R. Co.*, 19: 1183, 116 N. W. 144, 138 Iowa, 309. (Annotated)

32. Parol evidence is admissible in an action by the drawer of a bill of exchange payable to his own order, against a stranger who placed his name on the back of the instrument before delivery, and above which the drawer's indorsement was placed, to show that he intended to become surety for the acceptor, and assume liability to the drawer, notwithstanding the negotiable-instruments law provides that, if the instrument is payable to the order of the drawer, a person not otherwise a party to the instrument, who places thereon his signature in blank before delivery, is liable to all persons subsequent to the drawer, since, the drawer being in legal effect an indorser, the parties are within the provisions of the section of the statute which declares that, as between indorsers, parol evidence is admissible to show the order in which they agreed to be liable. *Haddock, Blanchard, & Co. v. Haddock*, 19: 136, 85 N. E. 682, 192 N. Y. 499. (Annotated)

Opinions and conclusions.

Error in excluding opinion of witnesses, see Trial, 1.

33. In a prosecution for maliciously killing and wounding dogs which were chasing and worrying defendant's live stock, evidence of experts as to the habits and traits of the particular breed of dogs, to the effect that they would not in fact harm or injure domestic animals, is inadmissible where the evidence as to the occurrence is direct, and not circumstantial, unless it appear that the defendant at the time had knowledge of such habits and traits. *State v. Churchill*, 19: 835, 98 Pac. 853, — Idaho, —.

Admissions.

See also *supra*, 24.

34. The declarations of a minor as to his age are admissible in evidence in an action by him to hold his employer liable for personal injuries because he was employed contrary to the provision of a statute making it a misdemeanor to employ minors of less than a specified age. *Koester v. Rochester* 19 L.R.A. (N.S.)

Candy Works, 19: 783, 87 N. E. 77, — N. Y. —.

Relevancy and materiality.

Exclusion of evidence of custom in negligence action, see Trial, 2.

35. The mere fact that a will, making no reference to real estate, gives legacies in excess of testator's personalty, will not admit evidence that testator meant by the legacies to repay money loaned him for the purchase of the realty, and therefore intended them to be a charge upon it. *Fries v. Osborn*, 19: 457, 82 N. E. 716, 190 N. Y. 35. (Annotated)

36. Upon the question of the rental value of a cotton gin which has been operated during past seasons, evidence may be considered of the physical conditions of the property, the conditions which surround it, including its patronage, the success and hazards in the past, and any change for better or worse. *Standard Supply Co. v. Carter*, 19: 155, 62 S. E. 150, 81 S. C. 181.

37. Upon the question of the damages to be allowed a son for mental anguish in being deprived of the privilege of attending his mother's deathbed, because of neglect to deliver a telegram, evidence is not admissible that he is a physician, and that treatments given by him when she had previously had similar attacks had resulted in recovery, or that she was depressed by his failure to come when expected, which had a tendency to hasten her death. *Western U. Teleg. Co. v. Williams*, 19: 409, 112 S. W. 651, — Ky. —. (Annotated)

38. Upon the question of measure of damages for failure to furnish water to irrigate crops, so that they are lost, evidence is admissible of the value of matured crops of like kind with those planted, in the neighborhood where they were growing. *Smith v. Hicks*, 19: 938, 98 Pac. 138. — N. M. —.

39. A municipal ordinance forbidding any person to permit water from his eaves to be discharged upon the sidewalk, or to permit any conduit upon his land to discharge water upon the sidewalk, is not immaterial upon the question of the negligence of the property owner who cast water from his own roof upon his own walk in such a manner that it flowed naturally upon the sidewalk. *Field v. Gowdy*, 19: 236, 85 N. E. 884, 199 Mass. 508.

40. Upon the question of the safety of chimneys left standing during the demolition of a building, evidence is immaterial that a person, in passing the building, walked on the opposite side of the street because he was afraid the chimney would fall. *Wilmot v. McPadden*, 19: 1107, 65 Atl. 157, 79 Conn. 367.

41. In an action for injury to the driver of a fire wagon by collision with a street car as he leaves the engine house, evidence that the fire captain had complained to the street railway company about the manner in which the street cars were run by the engine house, and that the street railway officials told him the motormen were instructed to keep

the cars under control when passing the house, for the reason that a hose wagon or other apparatus might come out on the track, is admissible as emphasizing the fact that an employee at the engine house who signaled the street car just before the wagon left the house was authorized to assume that the car was under control, and would therefore be stopped in time to avoid collision with the outcoming wagon. *Dole v. New Orleans R. & L. Co.* 19: 623, 46 So. 929, 121 La. 945.

42. Where evidence introduced shows that the particular engine which is identified as having set a fire for the loss occasioned by which damages are sought is no better than any of defendant's other engines, evidence of the setting of other fires a short time previous to the destruction of plaintiff's property is admissible, since, under such conditions and circumstances, the reasonable inference of fact would be that the identified engine would be as likely to throw igniting sparks and live coals and set the fire as was any of the other of the company's engines that are shown to have emitted sparks and fire about the same time. *Osburn v. Oregon R. & Nav. Co.* 19: 742, 98 Pac. 627, — Idaho, —.

43. The fact that the space between a main and repair track of a railroad company is at times obstructed so that it cannot be used by conductors in checking their trains is not admissible to show that it was obstructed at the time a particular conductor was injured while attempting to use the main track for that purpose. *Neary v. Northern P. R. Co.* 19: 446, 97 Pac. 944, 37 Mont. 461.

44. The rule applicable to civil actions for damages for killing dogs, allowing the introduction of evidence showing the pedigree, traits, habits, and reputation of a particular dog which is killed, is not applicable in a criminal prosecution for the malicious killing of the dogs, unless knowledge of the dogs' pedigree, etc., is brought home to the defendant. *State v. Churchill*, 19: 835, 98 Pac. 853, — Idaho, —.

45. Upon trial of a proceeding to procure a right of way for a ditch to conduct water the right to which petitioner claims by right of appropriation, evidence is not admissible as to the rights of other alleged appropriators from the same stream, who are not made parties to the proceeding. *Walker v. Shasta Power Co.* 19: 725, 160 Fed. 856, 87 C. C. A. 660.

46. The homogeneous business of a master in dismantling machinery in the different buildings of a World's Fair cannot be divided into distinct and separate departments, so as to bring it within a rule to the effect that the superintendent of a distinct department of a vast, diversified business may be a vice principal, by the testimony to that effect of his servants, and such testimony is incompetent for that purpose, as the nature of the business alone can separate it into departments. *Westinghouse, C. K. & 19 L.R.A. (N.S.)*

Co. v. Callaghan, 19: 361, 83 C. C. A. 609, 155, Fed. 397.

Weight and sufficiency.

Sufficiency of evidence to establish perjury in suit for injunction to restrain enforcement of judgment because of perjury, see Injunction, 3. Setting aside verdict as contrary to evidence, see New Trial, 3.

Sufficiency of, to carry case to jury, see Trial, 3.

See also *supra*, 19.

47. That, upon examination of the place at which an employee stumbled and fell into a machine to his injury, a nail was found projecting from the floor, will justify a finding that a proper inspection before the accident would have disclosed its presence to the employer. *Young v. Snell*, 19: 242, 86 N. E. 282, 200 Mass. 242.

48. Evidence that a bolt was missing from a car which had been in a wreck, after it had been removed to the railroad yards, is not sufficient to charge the railroad company with negligence which would render it liable for injuries growing out of the wreck, although the absence of such a bolt might be found to increase the chance of the accident which occurred. *Henson v. Lehigh Valley R. Co.* 19: 790, 87 N. E. 85, — N. Y. —.

49. A cause of action against a railroad company for injuries to a brakeman by the derailment of a train is not established by evidence that one of the trucks under the car was defective, without showing which one, and that a defective forward truck might have caused the accident without showing that it was so caused. *Henson v. Lehigh Valley R. Co.* 19: 790, 87 N. E. 85, — N. Y. —.

50. Proof of the existence of a nail projecting from the floor near a machine a week after an employee stumbles over something at that point and falls into the machine to his injury will justify a finding that it was there at the time of, and was the cause of, the accident. *Young v. Snell*, 19: 242, 86 N. E. 282, 200 Mass. 242.

51. Proof that a father owned and kept an automobile upon his premises, and that his daughter, aged nineteen, was accustomed to and did drive it, sometimes without permission, there being no proof that the daughter was actually employed by the father to operate the machine, is not sufficient to constitute the daughter the servant of the master, so as to charge him with liability where the daughter, in using the machine without permission, and for her own pleasure in driving her personal friends, negligently injured a person in the highway. *Doran v. Thomsen* (N. J. Err. & App.) 19: 335, 71 Atl. 296, — N. J. —.

52. The confession of one charged with obtaining money by false pretenses by means of a worthless check, that the check was, and was known by him to be, worthless, upon which a conviction cannot be had without corroboration, is sufficiently

corroborated by evidence that the check was forwarded through the regular channels for collection, and was returned unpaid. *People v. Ranney*, 19: 443, 116 N. W. 999, 153 Mich. 293.

53. Evidence corroborating facts stated in a confession, which is necessary to uphold a conviction on the confession, is that which not merely tends to produce confidence in the truth of the confession, but which refers to facts which concern the *corpus delicti*. *People v. Ranney*, 19: 443, 116 N. W. 999, 153 Mich. 293.

(Annotated)

Variance.

54. There is no variance between a declaration charging a city for negligent injury by the act of its bridge tender, and evidence showing that the injury was caused by persons who, to the knowledge of the city, were employed by its appointee to do the actual work of operating the bridge. *Gathman v. Chicago*, 19: 1178, 86 N. E. 152, 236 Ill. 9.

EXCEPTIONS.

Bill of, see Appeal and Error, 8.

Objections and exceptions generally, see Appeal and Error, 9.

EXECUTORS AND ADMINISTRATORS.

1. Presentation of a claim as a creditor of the estate is not a condition to the maintenance of an action to compel a conveyance by the executor of one holding a legal title of land, the title to which, in equity and good conscience, should be conveyed to complainant. *Brown v. Sebastopol*, 19: 178, 96 Pac. 363, 153 Cal. 704.

2. Estoppels in favor of or against the administrators of a will appointed in one state, by judgments or by the statutes of limitation of that state, do not bind or affect the administrator with the will annexed, or an administrator of an intestate, appointed in another state, or a claimant against such representatives. *Wilson v. Hartford F. Ins. Co.* 19: 553, 164 Fed. 817, — C. C. A. —.

3. No privity exists between the executors of the will of a deceased appointed in one state and an administrator with the same will annexed appointed in another state, nor between the administrators of the estate of an intestate appointed in different states. *Wilson v. Hartford F. Ins. Co.* 19: 553, 164 Fed. 817, — C. C. A. —.

4. Administration in the state of the domicile of the decedent does not govern the administration of the property of a decedent in any other state. *Wilson v. Hartford F. Ins. Co.* 19: 553, 164 Fed. 817, — C. C. A. —.

5. A claim against the estate of a decedent in the hands of an administrator with the will annexed in one state is not barred because it was not presented to the domiciliary executors of the same will in another state, and has become barred in that state. *Wilson v. Hartford F. Ins. Co.* 19: 553, 164 Fed. 817, — C. C. A. —. (Annotated) 19 L.R.A. (N.S.)

EXEMPTIONS.

From taxations, see Taxes, 4-6.

EXPERTS.

Admissibility of opinions of, in evidence, see Evidence, 33.

EXPRESS COMPANIES.

Duty to make free delivery, see Carriers, 22.

Power of state to compel express company to make free deliveries, see Carriers, 32; Commerce, 1-3.

FALSE PRETENSES.

Review of conviction for obtaining money by, see Appeal and Error, 24.

Sufficiency of corroboration of confession of obtaining money by, see Evidence, 52.

FARM LABORERS.

Lien on crops for wages of, see Liens.

FELLOW SERVANTS.

See Master and Servant, 27-36.

FENCES.

Presumption of acquiescence in placing of boundary fence, see Boundaries.

FERRIES.

Ferry company as common carrier, see Carriers, 2.

FINALITY.

Of decision for purpose of appeal, see Appeal and Error, 3.

FINDER.

As to treasure-trove, see Treasure-Trove.

Right of joint finder of property to maintain trover against his cofinder, see Trover, 1.

FINDINGS.

By court, see Trial, 19.

Of jury, see Trial, 20, 21.

FIRE DEPARTMENT.

Injury to driver of fire wagon by collision with street car, see Damages, 6; Evidence, 41; Street Railways, 3, 4.

FIRE INSURANCE.

See Insurance.

FIRES.

Setting out of fire by railroad locomotive, see Evidence, 12-14, 42; Railroads, 4, 5.

Destruction by, of property preventing completion of sale, see Sale, 1.

FOOD.

Sufficiency of declaration against manufacturer of unwholesome canned meats, see Pleading, 7.

A manufacture of canned goods is

under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer, to exercise care that the goods which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers as food, are not tainted with poison, irrespective of the presence or absence of contractual obligations arising out of the dealings between manufacturer and dealer and between retailer and consumer. *Tomlinson v. Armour & Co.* (N. J. Err. & App.) 19: 923, 70 Atl. 314, 75 N. J. 748. (Annotated)

FOREIGN EXECUTORS AND ADMINISTRATORS.

See Executors and Administrators, 2-5.

FOREIGN JUDGMENT.

See Judgments, 6-8.

FOREIGN LAW.

Presumption as to foreign law, see Evidence, 2.

FORFEITURE.

Of insurance policy, see Insurance.

FRANCHISE.

Right of public service corporation to exercise, see Public Service Corporations, 1.

FRAUD AND DECEIT.

Rights of bona fide holder of negotiable paper obtained by fraud, see Bills and Notes, 2-4.

Effect of fraudulent misrepresentations by infant as agent, see Infants.

Sufficiency of allegations as to, see Pleading, 8.

FREEZING.

Loss by, of property in hands of common carriers, see Carriers, 30.

FREIGHT CARRIERS.

See Carriers.

FRIGHT.

Damages for injuries resulting from, see Damages, 8.

The assault by an intoxicated person upon, and his use of abusive language toward, another in a house where he is not shown to be a trespasser, gives no right of action against him to a pregnant woman in the house, not related to the person assaulted, who is out of sight although within hearing of the assault, and whose presence is not known to the assailant, for injuries resulting to her from fright causing mental pain and agony, illness, threatened miscarriage, and possibly permanent impairment of health, since, not knowing of her presence, the assailant cannot reasonably have anticipated injury to her from his conduct. *Reed v. Ford*, 19: 225, 112 S. W. 600, — Ky. —.

GAMING.

1. A pool game in which a certain price 19 L.R.A. (N.S.)

per cue is charged for the use of the table, all of which is to be paid by the loser of the game, is within the statute against gambling. *State v. Sanders*, 19: 913, 111 S. W. 454, 86 Ark. 353. (Annotated)

2. A pool table for the use of which the loser of the game is, to the knowledge of the keeper, to pay, is a gambling device within the meaning of statutes providing punishment for one who exhibits such devices. *State v. Sanders*, 19: 913, 111 S. W. 454, 86 Ark. 353.

GARNISHMENT.

Conclusiveness of judgment discharging subscriber to stock of a corporation as garnishee for its debt, see Judgment, 4.

GAS.

Taxation of oil and gas lease, see Taxes, 1-3, 7.

GIFT.

By town council to judgment debtor, see Towns.

GOOD WILL.

Sale of, see also Contracts, 1, 12; Evidence, 2.

1. A sale by a copartnership of the good will of an established business in connection with a sale of the business binds the members thereof individually as well as copartners. *Southworth v. Davison*, 19: 769, 118 N. W. 363, — Minn. —. (Annotated)

2. A sales agent located in a commercial center, who, upon surrendering the agency, sells to his principal the good will of the business, cannot derogate from his grant by engaging in a competing business and endeavor to sell similar goods to his old customers. *Gordon v. Knott*, 19: 762, 85 N. E. 184, 190 Mass. 173.

3. Even though one selling the good will of a business cannot be restrained from engaging in a competing business, he will not be permitted to solicit orders from his former customers. *Gordon v. Knott*, 19: 762, 85 N. E. 184, 190 Mass. 173. (Annotated)

GOVERNMENTAL CONTROL.

Of carrier, see Carriers, 32.

GROSS NEGLIGENCE.

Of telegraph company, see Telegraphs, 2.

GUARANTY.

Of principal and interest by corporation selling mortgage, see Corporations, 12.

1. In construing a written guaranty for the purpose of determining the intention of the parties, it should be construed most strongly against the guarantor, and in favor of the party parting with his property upon the faith of the interpretation most favorable to his rights. *Lamm v. Colcord*, 19: 901, 98 Pac. 355, — Okla. —.

ICE.

Liability of abutting owner for injury from ice on sidewalk, see Highways, 10.

Injury to employee slipping on, see Master and Servant, 12.

IMPAIRMENT OF OBLIGATION OF CONTRACTS.

See Constitutional Law, 5.

IMPEACHMENT.

Of witness, see Witnesses.

IMPLIED DEVISE.

See Wills, 2.

IMPRISONMENT.

For disobedience of order as to payment of alimony, see Contempt.

IMPUTED NEGLIGENCE.

See Negligence, 14, 15.

IMPUTED NOTICE.

Of rights of person in party wall, see Notice.

INCOMPETENT PERSONS.

A deed by an incompetent person may be avoided in an action at law to recover possession of the granted premises, since, being incapable of giving assent, no valid contract has been effected. *Smith v. Ryan*, 19: 461, 84 N. E. 402, 191 N. Y. 452.

(Annotated)

INCONSISTENCY.

Estoppel by, see Estoppel.

INDEFINITENESS.

Of contract, see Contracts, 3.

Of municipal ordinance as to lights at railroad crossings, see Municipal Corporations, 11.

INDEMNITY INSURANCE.

See Insurance, 19, 20.

INDEPENDENT CONTRACTORS.

Liability of master for acts of, see Master and Servant, 42.

INDICTMENT, INFORMATION, AND COMPLAINT.

Necessity of, see Criminal Law, 1.

Prohibition to restrain action upon invalid information, see Prohibition.

A court of record does not acquire jurisdiction of criminal proceedings where the writing purporting to be an information is not presented by the county attorney or someone authorized by law, but by a private person, as in such case it is invalid and incapable of amendment. *Evans v. Willis*, 19: 1050, 97 Pac. 1047, — Okla. —. (Annotated)

INDORSEMENT.

Of note, see Bills and Notes, 1.
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INFANTS.

Duty of railroad company to children jumping on and off cars in motion, see Carriers, 17.

Employment of, in violation of statute, see Evidence, 34; Master and Servant, 3, 4.

Negligence toward, see Negligence, 1-10.

1. An infant who, in conveying property, fraudulently represents that he is over twenty-one years of age, cannot invoke the aid of equity to cancel the deed, though it may be absolutely void, unless he offers to refund the consideration given in reliance upon the truth of such representations, although the grantee may have had prior notice that the grantor was under age, and may not have exercised reasonable care. *International Land Co. v. Marshall*, 19: 1056, 98 Pac. 951, — Okla. —.

2. An infant who, in conveying property, fraudulently represents that he is over twenty-one years of age, cannot, while in possession of the property, have the deed canceled in equity as a cloud on title, although it may be absolutely void, without offering to refund the consideration obtained by such fraudulent representations, which, in view of his appearance and size, were believed by the grantee. *International Land Co. v. Marshall*, 19: 1056, 98 Pac. 951, — Okla. —.

INFECTIOUS DISEASES.

Regulations to prevent spread of, see Health.

Liability of health officers for acts in abating cause of disease, see Trial, 5.

INFORMATION.

See Indictment, etc.

INITIAL.

Use of, instead of given name in court proceedings, see Name.

INJUNCTION.

Jurisdiction to grant injunction to prevent diversion in other state of waters of stream, see Courts, 4.

To restrain one selling goodwill of the business from engaging in competing business, see Goodwill, 3.

Effect of inability of court to punish for contempt in disobeying injunction on validity of decree, see Judgment, 6.

Against nuisance, see Nuisance, 2-5.

Against maintenance of public school in parochial school building, see Schools.

Mandatory Injunction.

1. The court will not grant a mandatory injunction to compel the alteration of a completed building to make it comply with the terms of a contract executed before its construction, for the lease of a certain floor space therein. *Bromberg v. Eugenetto Construction Co.* 19: 1175, 48 So. 60, — Ala. —.

Contract rights.

2. Injunction will not lie to prevent violation of a contract to lease a certain floor space in a building to be constructed after the construction of the building is completed with a provision for less floor space than called for by the contract. *Bromberg v. Eugenotto Construction Co.* 19: 1175, 48 So. 60, — Ala. —.

Legal proceedings.

3. Equity will not restrain the enforcement of a judgment on the ground that it was secured by perjury unless the perjury is established beyond all reasonable controversy by evidence clear, convincing, and satisfactory. *Boring v. Ott*, 19: 1080, 119 N. W. 865, — Wis. —.

4. Equity will enjoin the enforcement of a judgment secured by perjury where the judgment debtor used diligence, but failed to discover the perjury in time to be available at the trial, or to secure the relief provided by statute in such cases. *Boring v. Ott*, 19: 1080, 119 N. W. 865, — Wis. —.

Procedure; parties.

5. Publishers of school books cannot enjoin discontinuance in a particular school of the books published by them because the school board has not complied with the provisions of the statute in making the change, where they have no contract with the patrons of such school to furnish it with their books. *Allyn v. Louisville School Board*, 19: 1003, 115 S. W. 206, — Ky. —.

(Annotated)

6. Upon a petition to enjoin a town from carrying out an illegal contract consisting of the satisfaction without consideration of a judgment recovered by it, which has in fact been done, a court of equity may set aside the satisfaction and restrain the parties from carrying out the agreement. *Farnsworth v. Wilbur*, 19: 320, 95 Pac. 642, 49 Wash. 416.

7. A judgment enjoining the performance of a contract which has already been performed is irregular. *Farnsworth v. Wilbur*, 19: 320, 95 Pac. 642, 49 Wash. 416.

INSOLVENCY.

Of loan association, see *Building and Loan Associations*.

Effect on rights of policy holder of insolvency of title insurance company, see *Insurance*, 19, 20.

INSTRUCTIONS.

See *Trial*, 15–18.

INSURABLE INTEREST.

See *Insurance*, 4.

INSURANCE.

Admissibility in evidence of proofs of death, see *Evidence*, 25.

Agents.

Right of state to reduce compensation of insurance agent, see *Constitutional Law*, 4, 5; *Corporations*, 1.

1. A statute limiting the amounts which insurance companies may expend for secur-

ing new business does not apply to an existing long-term contract with a general agent, so as to reduce the amounts to be paid him under his contract. *Boswell v. Security Mut. L. Ins. Co.* 19: 946, 86 N. E. 532, 193 N. Y. 465. (Annotated)

2. A provision in a contract by a general agent of an insurance company placed in charge of the business in another state, that the contract is subject to the condition that the company continue to be legally authorized to transact business in said district, does not make the provisions of the contract as to compensation subject to future legislation of the state where the company is incorporated. *Boswell v. Security Mut. L. Ins. Co.* 19: 946, 86 N. E. 532, 193 N. Y. 465.

3. Changes in premium rates or clauses in present forms of life-insurance policies are not to be construed as new forms, within the meaning of a provision in an agent's contract that the commissions specified in the contract shall not apply to any new forms of policies hereafter adopted. *Boswell v. Security Mut. L. Ins. Co.* 19: 946, 86 N. E. 532, 193 N. Y. 465.

Insurable interest.

4. An adult son has an insurable interest in the life of his mother although he is not dependent upon her for support and has no direct pecuniary interest in her life. *Woods v. Riner*, 19: 233, 113 S. W. 79, — Ky. —.

(Annotated)

Validity of policy.

5. That a son, in taking insurance on the life of his mother, contracts with a cousin to pay a portion of the premiums and share in the proceeds of the policy, does not invalidate the policy so far as the rights of the son are concerned. *Woods v. Riner*, 19: 233, 113 S. W. 79, — Ky. —.

Conditions; warranties; representations.

Truth or falsity of warranties by applicant for insurance as question for court, see *Trial*, 11.

Materiality of statement of age by applicant for insurance, see *Trial*, 12.

6. The appointment of a receiver and the taking of actual possession by him in a suit to take possession and control of certain personal property prevents recovery of loss sustained under a fire insurance policy on the property, which provides that, if any change take place in the interest, title, or possession of the property, "whether by legal process of judgment, or otherwise," the policy shall be wholly void. *Bronson v. New York F. Ins. Co.* 19: 643, 63 S. E. 283, — W. Va. —.

(Annotated)

7. Courts will never construe a statement by an applicant for insurance as a warranty unless the language of the policy is so clear as to preclude any other construction. *Spence v. Central Acci. Ins. Co.* 19: 88, 86 N. E. 104, 236 Ill. 444.

8. To constitute a warranty a representation by an applicant for insurance must appear in the contract itself. *Spence v. Cen-*

tral Acci. Ins. Co. 19: 88, 86 N. E. 104, 233 Ill. 444.

9. An insurance company is not precluded from relying on breach by the insured of conditions and warranties inserted in the policy by failure to attach to it a copy of the application, which is not referred to in the policy, although they are similar to those contained in the application, under a statute providing that omission to attach a copy of the application to the policy will preclude the company from alleging or proving any such application or representations, or falsity thereof or any parts thereof, in an action on the policy, but permits the insured to plead or prove the application or representation at his pleasure. *Kirkpatrick v. London Guarantee & Acci. Co.* 19: 102, 115 N. W. 1107, — Iowa, —.

(Annotated)

10. A statement in an accident insurance policy that, in consideration of the warranties and agreements in the application, the applicant is insured, does not make the application a part of the contract, so as to render a statement in it as to the age of the applicant a warranty. *Spence v. Central Acci. Ins. Co.* 19: 88, 86 N. E. 104, 236 Ill. 444.

(Annotated)

11. Consultation by an applicant for insurance with a physician, within the meaning of a question in the application, is shown by the fact that her husband notified the physician that she was indisposed and asked him to attend her, and that, upon his arrival at the house, she advised him of her symptoms and received aid from him. *Beard v. Royal Neighbors of America*, 19: 798, 99 Pac. 83, — Or. —.

12. A negative answer to a question in an application for insurance the answers in which are made warranties, as to having had la grippe, will avoid the policy where it appears that the applicant had had such disease, although it was a very light attack and may have had nothing to do with his death. *Beard v. Royal Neighbors of America*, 19: 798, 99 Pac. 83, — Or. —.

Waiver and estoppel.

See also *infra*, 18.

13. That a letter from an insurer waiving a forfeiture for nonpayment of a premium note is not received or read by the insured before his death does not destroy its effect as a waiver. *New England Mut. L. Ins. Co. v. Springgate*, 18: 227, 112 S. W. 681, — Ky. —.

14. An insurance company is estopped to deny the effect of a demand by its general state agent for payment of a past-due premium note as a waiver of the forfeiture caused by such nonpayment although the policy provides that no waiver of conditions shall be valid unless in writing, signed by an officer of the company. *New England Mut. L. Ins. Co. v. Springgate*, 19: 227, 112 S. W. 681, — Ky. —.

15. Notification of a policy holder by an insurer after his premium note is overdue that, unless the note is paid at once, it

will be compelled to return the note, which will cancel the policy, is a waiver of the forfeiture for nonpayment of the note when due; and the insurer cannot thereafter insist upon the forfeiture upon learning that the insured was in a dying condition when the notification was mailed. *New England Mut. L. Ins. Co. v. Springgate*, 19: 227, 112 S. W. 681, — Ky. —.

Risks and causes of loss or injury.

16. A fire burning an automobile originates within the vehicle, within the meaning of an exception of fires so originating in a policy of insurance on it, where, in consequence of the machine's running into a ditch, gasoline leaks from the tank, and the vapor penetrates the lamp forming the headlight and explodes, causing the fire. *Preston v. Etna Ins. Co.* 19: 133, 85 N. E. 1006, 193 N. Y. 142.

17. Recovery for loss of a barn by being knocked down by lightning, but not burned, cannot be had under a policy in a mutual company insuring against loss by fire, although the custom has been to pay such losses and to levy assessments therefor on the policy holders, since such payments were merely misappropriations of funds by the company. *Sleet v. Farmers' Mut. F. Ins. Co.* 19: 421, 113 S. W. 515, — Ky. —.

(Annotated)

18. Rupture of the heart, which is in a state of fatty degeneration, by assisting in carrying a door weighing 86 pounds, or by filling the lungs with air by drawing a long breath after putting it down, causing death, is not within the provisions of a policy insuring against death from bodily injuries sustained through external, violent, and accidental means. *Shanberg v. Fidelity & C. Co.* 19: 1206, 158 Fed. 1, 85 C. C. A. 343.

(Annotated)

Indemnity insurance.

19. A policy holder in a title insurance company which has been judicially declared insolvent is not entitled to the return of that part of the unearned premium upon the winding up of such company's affairs which the application for insurance stipulated might be retained by the company for its services in investigating the title insured. *State ex rel. Schaefer v. Minnesota Title Ins. & T. Co.* 19: 639, 116 N. W. 944, 104 Minn. 447.

20. The holder of a policy of insurance issued by a real estate title insurance company is, upon a cancellation or annulment of the policy by a judicial decree declaring the company insolvent and appointing a receiver to wind up its affairs, entitled to a return of a proportionate part of the premium paid therefor, measured by the time elapsing between the date of the policy and the date on which the company was so adjudged insolvent. *State ex rel. Schaefer v. Minnesota Title Ins. & T. Co.* 19: 639, 116 N. W. 944, 104 Minn. 447.

(Annotated)

INTENT.

Evidence to show intent of testator, see Evidence, 35.

INTEREST.

Liability of stockholders for interest on corporate debts, see Corporations, 11-14.

Duty of assignor to show that he is entitled to interest on funds kept by assignee in bank, see Evidence, 4.

As to usury, see Usury.

1. Interest may be added to the amount of recovery on a bond, although the total sum is thereby made to exceed the penalty of the bond. *American Surety Co. v. Pacific Surety Co.* 19: 83, 70 Atl. 584, 81 Conn. 252. (Annotated)

2. Demand for payment of deposits from a bank which stops payment and the assets of which are sequestered by the court is not necessary to entitle them to bear interest from the time of such stoppage. *Flynn v. American Banking & T. Co.* 19: 428, 69 Atl. 771, — Me. —.

3. Interest on a bond to indemnify a surety on a contractor's bond accrues not from the time the surety's liability accrues on the contractor's default, but from the time the duty of the second obligor arises to indemnify the first one for loss suffered because of his undertaking, which, in case he contests liability for the alleged breach of the contractor's duty, is at the time judgment is rendered fixing such liability. *American Surety Co. v. Pacific Surety Co.* 19: 83, 70 Atl. 584, 81 Conn. 252.

INTERMEDIATE ORDERS.

Right to review of, see Appeal and Error, 8.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUOR.

Appeal in action to contest local-option election, see Appeal and Error, 1, 2; Constitutional Law, 3; Statutes, 4.

Bond by lessee to hold lessor harmless from liability for unlawful sale of liquor on premises, see Bonds, 1.

Who may maintain writ of certiorari to review decree in suit to enjoin liquor nuisance, see Certiorari.

Judicial notice of intoxicating character of Manhattan cocktail, see Evidence, 1.

Effect upon lease of property for saloon of passage of prohibitory liquor laws, see Landlord and Tenant, 1, 3.

Forfeiture of office by mayor by failure to enforce laws against sale of, see Officers, 2.

INTOXICATION.

See Drunkenness.

JOINT CREDITORS AND DEBTORS.

1. An acknowledgment by the plaintiff of satisfaction against two of several defendants who are sued as joint wrongdoers will not release the others, where the instrument

offered to show such release shows that it was not intended to have such effect. *Edens v. Fletcher*, 19: 618, 98 Pac. 784, — Kan. —.

2. Where an acknowledgment of satisfaction against two of several defendants who are sued as joint wrongdoers contains an express reservation of the right to proceed against the other wrongdoers, and other expressions in the instrument are not inconsistent with the retention of such right, the intention of the parties that the instrument should not operate as a release of such co-defendants sufficiently appears. *Edens v. Fletcher*, 19: 618, 98 Pac. 784, — Kan. —. (Annotated)

JOINT TORT FEASORS.

See Joint Creditors and Debtors.

JUDGES.

Right of regular judge to assume jurisdiction of cause begun before special judge, see Appeal and Error, 28.

1. That a judge is an active partisan does not disqualify him to try a contested election one of the parties to which is a member of his political party. *Fulton v. Longshore*, 19: 602, 46 So. 989, — Ala. —. (Annotated)

2. The mere fact that a judge expressed his opinion on election day that a challenged voter had a right to vote is not sufficient to show bias sufficient to disqualify him to sit in a contest between candidates at such election, as to which was entitled to the office. *Fulton v. Longshore*, 19: 602, 46 So. 989, — Ala. —.

JUDGMENT.

Right to complain of favorable amendment of judgment pending appeal, see Appeal and Error, 12.

Who may maintain writ of certiorari to review decree in suit to enjoin liquor nuisance, see Certiorari.

Injunction against enforcement of judgment secured by perjury, see Injunction, 3, 4.

Irregularity of judgment enjoining performance of contract already performed, see Injunction, 7.

New trial where issues submitted are not sufficient to support judgment, see New Trial, 2.

Satisfaction by town council of judgment in favor of town upon payment of costs, see Towns.

Sufficiency of findings to support judgment, see Trial, 20.

Jurisdiction.

1. A judgment quieting title to real estate against a married woman is valid although she was sued in her maiden name, in which stood the title to the property.—especially where, for the purposes of the marriage contract, she had changed the form of her Christian name so that there was nothing of record to indicate that she

had married or changed her name. *Emery v. Kipp*, 19: 983, 97 Pac. 17, — Cal. —.

2. A judgment *in personam* for temporary alimony and attorney's fees cannot be lawfully rendered in a divorce suit brought against a nonresident husband who is only constructively served by publication, and who does not appear in the case. *Hood v. Hood*, 19: 193, 61 S. E. 471, 130 Ga. 610.

Conclusiveness; collateral attack.

3. One made a party to a suit by substituted service of process, who, after judgment, appears and moves to set aside the judgment for lack of jurisdiction, which motion is denied, cannot raise such question in a collateral proceeding to quiet title to property involved in that suit. *Emery v. Kipp*, 19: 983, 97 Pac. 17, — Cal. —.

4. A judgment discharging a subscriber to the stock of a corporation as garnishee for its debt upon failure of the plaintiff to contest his answer denying indebtedness is *res judicata* of the question of indebtedness in a subsequent direct proceeding by the creditor against him to apply his individual stock subscription to the payment of the corporate indebtedness. *Roman v. Montgomery Iron Works*, 19: 604, 47 So. 136, — Ala. —. (Annotated)

5. A judgment in favor of defendant in an action to recover the contract price of light furnished a municipal corporation is no bar to a subsequent action to recover the value of the light upon *quantum meruit*. *Water, Light, & Gas Co. v. Hutchinson*, 19: 219, 160 Fed. 41, — C. C. A. —.

Foreign judgments.

Imprisonment for disobedience of order to pay alimony due under foreign decree, see Contempt.

6. The fact that persons against whom an injunction has been granted may go beyond the jurisdiction of the court, so that it cannot reach them to punish them for contempt in case they disobey the injunction, does not avoid the decree, since, being entitled to full faith and credit in every other state, it may be enforced against them wherever they are found and may be served with personal process. *Taylor v. Hulett*, 19: 535, 97 Pac. 37, — Idaho, —.

7. The courts of one state may enforce a decree of another state for alimony payable in instalments where no power to change the decree is reserved by the court or conferred by statute. *Mayer v. Mayer*, 19: 245, 117 N. W. 890, — Mich. —.

8. The courts of one state may not enforce payment of arrears under a decree of another state directing one party to a divorce suit to pay the other a certain amount per month for support of the children where the court reserved the right to modify the order in regard to the children at any time. *Mayer v. Mayer*, 19: 245, 117 N. W. 890, — Mich. —.

JUDICIAL NOTICE.

See Evidence, 1.

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JURY.

Exception to charge to, see Appeal and Error, 9.

Setting aside verdict because of treating of jurors, see Appeal and Error, 27.

View by, see Evidence, 26, 27.

New trial because of misconduct of jury sent to view *locus in quo*, see New Trial, 4.

Questions for, see Trial, 4-14.

KNOWLEDGE.

Of purchaser of negotiable paper, see Bills and Notes, 5.

LABORERS.

Lien on crops for wages of, see Lien.

LACHES.

See Limitation of Actions, 1, 2.

LANDLORD AND TENANT.

Agreement in lease for arbitration of differences, see Arbitration, 1.

Bond by lessee to hold lessor harmless from liability for unlawful sale of liquor on premises, see Bonds, 1.

Imputed negligence of landlord to tenant, see Negligence, 15.

1. A lease for years of property to be used for the sale of intoxicating liquor is terminated by the adoption, during the term, of a law making the sale of liquor illegal. *Heart v. East Tennessee Brewing Co.*, 19: 964, 113 S. W. 384, — Tenn. —. (Annotated)

2. A landlord does not comply with his agreement to furnish water to irrigate the crops to be grown on the land, from an artesian well on the property, by completing through a contractor whose contract antedated the lease a well sufficient to furnish the water, if the contractor, for the purpose of securing his compensation, immediately caps and locks the well to that to procure the water the tenant would be compelled to break the lock. *Smith v. Hicks*, 19: 938, 98 Pac. 138, — N. M. —.

3. The enactment during the term of a lease of a hotel including a barroom, of a law prohibiting the sale of intoxicating liquors, does not entitle the lessee, in the absence of a provision therefor in the contract, to a reduction or proportional abatement of the agreed rental, since the lessee is not deprived of the beneficial use of the premises, as he can still use them for other purposes not prohibited by law or the contract. *Lawrence v. White*, 19: 966, 63 S. E. 631, — Ga. —.

LAST CLEAR CHANCE.

Question for jury as to last clear chance in action for injury to railroad employee, see Trial, 9.

LATERAL SUPPORT.

Right of tenant to recover for injury to, see Negligence, 15.

LAW MERCHANT.

Determining law merchant of other state, see Courts, 9.

LEVEES.

Flooding of land by construction of, see Eminent Domain, 4; Pleading, 12.

LEVY AND SEIZURE.

Levy on property devised to person where he has renounced devise, see Wills, 6.

LIBEL AND SLANDER.

1. The publication by a newspaper of a report of a meeting of a private corporation, which contains libelous statements made by stockholders against the officers, is not privileged. *Kimball v. Post Pub. Co.* 19: 862, 85 N. E. 103, 199 Mass. 248.

(Annotated)

2. The one publishing in a newspaper a report of a meeting of a private corporation and of a bill in equity, in each of which the same libelous matter appears, cannot avoid liability for the former publication on the theory that the latter is privileged, and that it is impossible to separate the injury done by one publication from that done by the other. *Kimball v. Post Pub. Co.* 19: 862, 85 N. E. 103, 199 Mass. 248.

3. The publication of a fair report of a judicial proceeding without malice is privileged if the court has acted upon the bill so far as to make a special order that defendant appear and show cause why an injunction should not be issued against him. *Kimball v. Post Pub. Co.* 19: 862, 85 N. E. 103, 199 Mass. 248.

LICENSE.

Right to practise dentistry under license to practise medicine and surgery, see Dentists.

For sale of goods, see Commerce, 7, 8; Evidence, 21.

Discrimination against goods made in other state, see Commerce, 7.

Discrimination against nonresidents in license tax, see Constitutional Law, 2.

Effect of failure to obtain license on validity of contracts, see Contracts, 10.

1. A parol agreement by several adjoining landowners to erect and maintain telephone poles on their respective lands, and to contribute equally to the expense of stringing wires thereon, and of operating a telephone line, does not create an easement, but is merely a parol license, and is revocable by any one of such owners, although, in reliance thereon, the poles have been erected and the line constructed. *Yeager v. Tuning*, 19: 700, 86 N. E. 657, — Ohio, —.

(Annotated)

2. An ordinance imposing a license tax upon "real-estate agents" will be strictly construed in a civil action to which the city is not a party, where a breach of the ordi-

nance is invoked for the purpose of avoiding a contract between the parties to the action. *Manker v. Tough*, 19: 675, 98 Pac. 792, — Kan. —.

3. A state cannot impose a tax on the right to sell to users and consumers by sample goods shipped into the state, and permit sales of such goods to merchants and persons not users and consumers without license. *State v. Bayer*, 19: 297, 97 Pac. 129, — Utah, —.

LICENSEES.

Person on railroad track as, see Railroads, 2.

LIENS.

Conversion by purchaser of crop upon which another has a lien, see Trover, 3.

Equitable lien, see Mortgage.

A woman employed in ordinary housework upon a farm, and who assists in cooking meals for laborers doing the farm work, is not a "farm laborer" within the meaning of a statute giving a lien upon crops for the wages of farm laborers, since the legislative intent was to secure only those persons whose work is directly connected with the raising of the crops. *Lowe v. Abrahamson*, 19: 1039, 119 N. W. 241, — N. D. —.

(Annotated)

LIFE TENANTS.

The conveyance by a life tenant, in whom the reversion in fee has vested as heir, of the life estate and the reversion, will merge the life estate in the fee and cut off contingent remainders limited upon the life estate. *Bond v. Moore*, 19: 540, 86 N. E. 386, 236 Ill. 576.

LIGHTNING.

Recovery for loss caused by, on insurance policy against loss by fire, see Insurance, 17.

LIMITATION OF ACTIONS.**Laches.**

Review of determination as to effect of laches, see Appeal and Error, 13.

Laches of stockholders in complaining of conduct of receiver, see Corporations, 7.

Effect on right to enjoin maintenance of house of ill fame, see Nuisance, 6.

1. A delay for four years before demanding a right to share in a purchase of the property by a cotenant under an outstanding encumbrance, and until the property has more than doubled in value, is such laches that equity will refuse to enforce it as against one who purchased the property for value from the purchasing tenant. *Stevenson v. Boyd*, 19: 525, 96 Pa. 284, 153 Cal. 630.

(Annotated)

2. Taxpayers of a school district who for a long series of years, permit the school moneys to be expended in sectarian instruction in the schools, will not be permitted

to maintain a suit to compel reimbursement to the district by the school officers and the recipients, of the money so expended. *Dorner v. School Dist.* No. 5, 19: 171, 118 N. W. 353, — Wis. —. (Annotated)

When statute runs.

3. A single transaction on an account which has been dormant less than the statutory period, consisting of the debit of a small item and the credit of the amount necessary to cancel it a short time afterwards, is sufficient to bring the account within the operation of a statute providing that the cause of action in mutual accounts shall be deemed to accrue at the time of the last item proved in such account. *Rogers v. Davis*, 19: 126, 69 Atl. 618, 103 Me. 405. (Annotated)

4. The statute of limitations begins to run against the statutory liability of stockholders for debts of the corporation when the creditors' remedies against the corporation, and its assets have been exhausted. *Flynn v. American Banking & T. Co.* 19: 428, 60 Atl. 771, — Me. —.

LIMITATION OF LIABILITY.

For loss of passenger's baggage, see Carriers, 20, 27, 28.

For mistake in unrepeatable telegram, see Telegraphs, 5, 6.

LIVE STOCK.

Carriage of, see Carriers, 25, 26.

LOCAL OPTION.

See Intoxicating Liquors.

LOST PROPERTY.

See Treasure Trove; Trover, 1.

MALICE.

As gist of action for maliciously killing dog, see Animals, 1, 2.

As essential ingredient of crime of malicious mischief, see Malicious Mischief, 1, 3, 4.

MALICIOUS MISCHIEF.

1. Malice is an essential ingredient of the crime of malicious mischief, and a conviction cannot be sustained in the absence of any evidence disclosing such malice. *State v. Minor*, 19: 273, 117 N. W. 528, — N. D. —.

2. "Maliciously," as used in a statute relating to the crime of "malicious mischief," while implying an intent to vex and annoy the owner of the property injured, must be given a restricted meaning, and imports that the act to which it relates must have resulted from actual ill-will or revenge. *State v. Minor*, 19: 273, 117 N. W. 528, — N. D. —. (Annotated)

3. A person who purchases a lot upon which a building of another stands, under a verbal license from the vendor, in the honest belief that by such purchase he acquires the building, and who, after learning of the claimed ownership, notifies such person to

vacate, and when this is not done, enters the building, and removes certain property of such other person into the street, and then moves the building to another lot owned by him, is not, by reason thereof, guilty of malicious mischief, as in such case there is nothing from which the necessary element of malice may be inferred. *State v. Minor*, 19: 273, 117 N. W. 528, — N. D. —.

4. A person cannot be held criminally liable for malicious mischief in wounding and killing dogs while chasing and worrying his live stock, when it clearly appears that he was not acquainted with the owner of the dogs, and in the wounding and killing was not actuated by malice or a wanton or reckless spirit, but acted solely through a desire to remove the dogs, to prevent injury to his property. *State v. Churchill*, 19: 835, 98 Pac. 853, — Idaho, —.

MANDAMUS.

Mandamus is the proper remedy to restore a party to the possession of an office from which he has been illegally removed. *State ex rel. Moyer v. Baldwin*, 19: 49, 83 N. E. 907, 77 Ohio St. 532. (Annotated)

MANDATORY INJUNCTION.

See Injunction, 1.

MANHATTAN COCKTAIL.

Judicial notice of intoxicating nature of, see Evidence, 1.

MARRIAGE.

Contract to support woman in consideration of release of promise of marriage, see Contracts, 3, 11, 15.

MARRIED WOMAN.

See Husband and Wife.

MASTER AND SERVANT.

Employee riding on street car as passenger, see Carriers, 3.

Liability for inducing discharge of employee, see Case, 2.

Regulation of hours of labor of railroad employees, see Commerce, 4, 5; Statutes 1.

Embezzlement by servant, see Embezzlement.

Admission in evidence of declarations of minor as to his age in action against employer for personal injuries, see Evidence, 34.

Liability of municipality for injury to employee by negligent operation of bridge, see Municipal Corporations, 22.

When relation exists.

Sufficiency of evidence to show relation of master and servant, see Evidence, 51.

Instruction as to when relation of master and servant exists, see Trial, 16.

1. A boy may be found to be the agent of his father in operating the latter's automobile, where it was purchased mainly at

his solicitation, with the understanding that he was to learn to run it for the benefit of the family, if at the time in question he was operating the car under the instructions of the vendor. *Hiroux v. Baum*, 19: 332, 118 N. W. 533, — Wis. —.

2. Neither one who purchases a building to be torn down and removed from the premises, and who is a suitable person for the purpose, nor his agents, is a servant of the landowner, so as to render him liable for their negligent conduct in the performance of the work. *Wilmot v. McPadden*, 19: 1101, 65 Atl. 157, 79 Conn. 367.

Master's duty generally.

3. A master cannot be charged with negligence in employing a minor to work on dangerous machinery in violation of the terms of a statute making it a misdemeanor to do so, if, in the exercise of proper vigilance and due caution, he was led to believe that the employee was above the statutory age. *Koester v. Rochester Candy Works*, 19: 783, 87 N. E. 77, — N. Y. —.

4. One about to employ a minor cannot rely alone on his own representation or that of his parents as to his age in order to absolve himself from liability for negligence in case the employee is injured in his service and is actually of such an age that the statute makes it a misdemeanor to employ him. *Koester v. Rochester Candy Works*, 19: 783, 87 N. E. 77, — N. Y. —.

Duty to warn or instruct.

See also *infra*, 30.

5. A master is not negligent in failing to warn an adult employee of ordinary intelligence, who has had several months' experience in drilling holes for blasting, and in actually firing the blasts, of the danger of putting powder into a drill hole in which the dynamite has been exploded, before the fire from the fuse and wrappings has had time to burn out. *Hardy v. Chicago, R. I. & P. R. Co.* 19: 997, 115 N. W. 8, — Iowa, —. (Annotated)

Duty as to place and appliances.

As to assumption of risk of unsafe place or appliance, see *infra*, 18-22.

Contributory negligence of servant in working in unsafe place, see *infra*, 24.

Negligence of fellow servants rendering place or appliance unsafe, see *infra*, 27, 28.

Sufficiency of evidence as to cause of injury to servant, see *Evidence*, 50.

Presumption of negligence in case of injury to railroad employee, see *Evidence*, 15.

Sufficiency of evidence to show negligence of master in action for injuries to brakeman by derailment of train, see *Evidence*, 48, 49.

Sufficiency of evidence to justify finding that proper inspection by employer would have disclosed cause of danger, see *Evidence*, 47, 50.

Negligence of master as question for jury, see *Trial*, 8.

6. An employer may be liable for an in-

jury to his employee through his fall into a machine by stumbling over a nail projecting from the floor near the machine, which is concealed by the litter on the floor. *Young v. Snell*, 19: 242, 86 N. E. 282, 200 Mass. 242. (Annotated)

7. The duty of caring for the safety of a place where the work which the servants are employed to do necessarily changes the character thereof as to safety as the work progresses is the duty of the servants to whom the work is intrusted, and is not the duty of the master. *Westinghouse, C. K. & Co. v. Callaghan*, 19: 361, 83 C. C. A. 660, 155 Fed. 397. (Annotated)

8. One employed to assist in unloading a cargo of coal from a vessel after the apparatus for doing the work is set up has no greater rights against the employer with respect to the safety of the manner in which the work is done than though he was employed at the time it was done. *Lond v. Lane & Libby*, 19: 680, 69 Atl. 270, 103 Me. 309.

9. The common-law doctrine of the duty of the master to furnish his servant with a reasonably safe place to work, which cannot be devolved upon a fellow servant so as to relieve the master, does not apply in favor of a member of a gang of workmen whose duty it was to enter a portion of a trench in course of construction after a blast had been fired by a preceding gang, and assist in removing broken stone, who was injured by the fall of some loose earth from the sides of the trench. *Citrone v. O'Rourke Engineering Constr. Co.* 19: 340, 80 N. E. 1092, 188 N. Y. 339. (Annotated)

10. A master cannot be charged with liability for injuries to a servant from the fall of an overhanging ledge, a changing condition in the work of removing a bank of earth and gravel, upon the ground that he did not supply the foreman with explosives for the removal of ledges, where it is not shown that there was any demand for explosives, or that they were deemed by the foreman to be necessary, or that the means at hand were ineffectual for the purpose. *Russell v. Lehigh Valley R. Co.* 19: 344, 81 N. E. 122, 188 N. Y. 344. (Annotated)

11. The common-law doctrine of the duty of the master to furnish his servant with a reasonably safe place to work, which cannot be devolved upon a fellow servant so as to relieve the master, does not apply in favor of an employee injured while engaged with fellow servants under a competent foreman in a detail of the work of removing a bank of earth and gravel, by the fall of an overhanging ledge, which was the condition on the day of the accident, and not a condition that had previously existed. *Russell v. Lehigh Valley R. Co.* 19: 344, 81 N. E. 122, 188 N. Y. 344.

12. An employee injured by slipping upon a platform used as a passageway in going to and from his work cannot hold the master liable for the injury if the slippery condition was caused by ice formed as a necessary result of trucking done over the

platform as part of the regular work of the establishment, or through the negligence of fellow servants, he having long been cognizant of the probability of ice being there in freezing weather. *Omaha Packing Co. v. Sanduski*, 19: 355, 155 Fed. 897, 84 C. C. A. 89. (Annotated)

13. The rule requiring a master to furnish a safe working place for his servant does not apply to a place at which railroad employees are engaged in clearing the tracks of *débris* from a landslide. *Maloney v. Florence & C. C. R. Co.* 19: 348, 89 Pac. 649, 39 Colo. 384. (Annotated)

14. One who puts his servant to work in a ditch is bound, when he takes upon himself the direction and control of the work, to see that the place is reasonably safe when the servant enters it, and is kept reasonably safe so long as the servant is required to stay there. *Hilgar v. Walla Walla*, 19: 367, 97 Pac. 498, 50 Wash. 470. (Annotated)

15. A servant called from other work to assist in a ditch, upon work of the manner of doing which the master assumes direction and control, is not bound to inquire into the safety of the place where he is told to stand while working. *Hilgar v. Walla Walla*, 19: 367, 97 Pac. 498, 50 Wash. 470.

16. A telephone wire stretched over and across the track of a railroad company, not sufficiently high to permit an employee standing on the top of a freight car safely to pass thereunder, does not constitute a "defect in the way or track," within the meaning of the Alabama employers' liability act providing that an employer is liable for a personal injury received by his employee where the injury is caused by any defect in the ways, works, machinery, or plant connected with or used in the business of the employer, where there is nothing to indicate that the wire is not a mere movable object, temporarily placed too near the track. *Hubbard v. Central of Georgia R. Co.* 19: 738, 63 S. E. 19, — Ga. —. (Annotated)

17. It may be found to be negligence for a street car company to fail to take precautions against the forgetting or misunderstanding of an order which requires a regular car to await the arrival of a special one before proceeding out on the track, where the result of its nonobservance may be death; and so, where the custom is to notify the conductor and motorman of the regular car of the order, and to post it on the bulletin, failure to comply with the custom may be found to be negligence. *Fitzgerald v. Worcester & S. Street R. Co.* 19: 239, 85 N. E. 911, 200 Mass. 105. (Annotated)

Assumption of risk.

See also *infra*, 33.

Assumption of risk by servant of dangers of place of work, see Trial, 10.

18. A workman does not assume the risk of injury by being thrown into a machine by falling over a nail projecting from the floor, where it is habitually covered with litter so that the risk from it is not obvious. *L.R.A. (N.S.)*

Young v. Snell, 19: 242, 86 N. E. 282, 200 Mass. 242.

19. A servant sent to take measurements underneath a bridge, who, before going beneath it, has an understanding with the bridge tenders that the bridge shall not be raised without a signal from him, does not assume the risk of their negligent violation of that understanding. *Gathman v. Chicago*, 19: 1178, 86 N. E. 152, 236 Ill. 9.

20. The rule that a direction by the master to continue the use of a defective instrument or tool, coupled with a promise to replace it with one not defective, relieves the servant from the doctrine of assumed risk, if injured during such continued use and because of the defect, does not apply to cases of ordinary labor with a tool of simple construction, with which the servant is entirely familiar, and which he understands, and comprehends as fully as the master. *McGill v. Cleveland & S. W. Traction Co.* 19: 793, 86 N. E. 989, — Ohio, —.

21. An employee whose duties require the use of an ordinary stepladder, who discovers and appreciates that the stepladder furnished is dangerous and unfit to use, cannot recover from the master for injury sustained while using such ladder, although he had notified the master of its defective condition, and had been ordered to continue its use until a proper one could be furnished. *McGill v. Cleveland & S. W. Traction Co.* 19: 793, 86 N. E. 989, — Ohio, —.

22. A miner does not, by continuing his work after the master has refused to comply with its statutory duty to furnish necessary props to make the room in which he is working safe, assume the risk of injury from such breach of duty. *Johnson v. Mammoth Vein Coal Co.* 19: 646, 114 S. W. 722, — Ark. —. (Annotated)

Contributory negligence of servant.

Evidence in action by railroad employee for injury, see Evidence, 43.

Exclusion of evidence of custom in action for injury to servant, see Trial, 2.

Question for jury as to last clear chance in action for injury to railroad employee, see Trial, 9.

23. A workman is not negligent *per se* in walking toward a machine in motion without sweeping the litter from the floor to ascertain if it contains projections which may cause him to stumble and fall into the machine. *Young v. Snell*, 19: 242, 86 N. E. 282, 200 Mass. 242.

24. It is not negligence *per se* for a miner, knowing that a portion of his room is in need of props which the master refuses to furnish, to continue to work in another portion, the roof of which he has tested, where the fall of the unprotected portion of the roof may affect the portion in which he is working, or may not. *Johnson v. Mammoth Vein Coal Co.* 19: 646, 114 S. W. 722, — Ark. —.

25. An experienced freight conductor is negligent in walking along a track in a

yard, on which is momentarily expected a passenger train, to check the cars of his train, which he can do as conveniently after the passenger train arrives, with his back to the expected train, and without paying any attention to its approach, at a time when switch engines are at work, the noise of which will obscure, more or less, the signals and noise of the passenger train. *Neary v. Northern P. R. Co.* 19: 446, 97 Pac. 944, 37 Mont. 461.

26. A freight conductor cannot justify or excuse his negligence in walking along a track on which a train is momentarily expected, to check his train, by showing that the company passively acquiesced in the use of tracks for that purpose. *Neary v. Northern P. R. Co.* 19: 446, 97 Pac. 944, 37 Mont. 461.

Fellow servants.

See also *supra*, 12.

27. An accident to an employee who stumbles over a nail projecting from the floor and falls into a machine cannot be said to have been caused by the negligence of a fellow servant in failing to remove the litter from the floor, where there is nothing to show that he had neglected to remove it when his duty required him to do so. *Young v. Snell*, 19: 242, 86 N. E. 282, 200 Mass. 242.

28. One engaged in discharging coal from vessels, who provides suitable apparatus for the work, is not responsible to an employee for the manner in which it is set up by the men employed in doing the work; and therefore he is not liable for injury to an employee caused by the fall of the apparatus because it was fastened to a decayed cleat on the mast of the vessel, without stays to prevent its falling if the fastenings should give way. *Loud v. Lane & Libby*, 19: 680, 69 Atl. 270, 103 Me. 309.

29. One who enters the employment of another thereby assumes the risk of the negligence of his fellow servants in the performance of all acts which they do while they are not discharging a positive duty of the master. *Westinghouse, C. K. & Co. v. Callaghan*, 19: 361, 83 C. C. A. 669, 155 Fed. 397.

30. Where the method adopted by a salt company for carrying on its business involves the occasional dislodging of masses of salt, thereby covering the floor of a room with fragments moving with such force as to expose to danger employees who are there in the discharge of their duties, and the only adequate way to protect them from such danger is to warn them just before such dislodgment, the giving of such warning is a nondelegable duty of the employer, and its omission imposes a liability for any consequent injury to an employee, regardless of any question of coservice. *Brice-Nash v. Barton Salt Co.* 19: 749, 98 Pac. 768, — Kan.

31. The forgetting by a conductor of a street car of a verbal order to await the arrival of a special car before taking his

car out on the track is not such an immediate and sole cause of an injury resulting from a collision of the two cars as to relieve the company from liability for the death of the motorman on the special car because of its negligence in failing to notify the motorman of the other car of the order, and post it on the bulletin according to custom. *Fitzgerald v. Worcester & S. Street R. Co.* 19: 239, 85 N. E. 911, 200 Mass. 105.

Who are fellow servants.

Sufficiency of evidence to show division of master's business into distinct departments, see *Evidence*, 46.

Question for jury as to who are fellow servants, see *Trial*, 6.

• See also *infra*, 34–36.

32. All who enter the employment of a common master to accomplish a common undertaking are *prima facie* fellow servants, although their grades of service are different, and some direct and supervise the men subject to their command and their work, while others perform the labor. *Westinghouse, C. K. & Co. v. Callaghan*, 19: 361, 83 C. C. A. 669, 155 Fed. 397.

Vice principal.

33. A servant assumes the risk of the negligence of his superior fellow servant in the direction of the men and the work to the same extent that he assumes the risk of the negligence of the fellow laborer by his side, who is engaged in performing the work. *Westinghouse, C. K. & Co. v. Callaghan*, 19: 361, 83 C. C. A. 669, 155 Fed. 397.

34. A foreman employed under a superintendent who was under a manager in dismantling heavy machinery, for which purpose and at his direction a heavy wooden frame had been erected and temporarily fastened in place with guy ropes, is a fellow servant, and not a vice principal, as regards a common laborer whom he had directed to go upon the frame, and who was injured by the falling thereof, caused by the foreman untying one of the temporary guy ropes so that they could use it at another place as a permanent one, as the act of the foreman in untying the rope was the act of a servant in common employment with the injured servant, and is therefore one for which the master is not liable. *Westinghouse, C. K. & Co. v. Callaghan*, 19: 361, 83 C. C. A. 669, 155 Fed. 397.

35. Representations of the foreman in charge of a section of railroad on which a landslide occurs, to the foremen of other sections who have brought their crews to help clear the tracks, that he examined the place before dark and it was safe, are those of a fellow servant of the men engaged in the common enterprise; and the master is not responsible for their inaccuracy. *Maloney v. Florence & C. C. R. Co.* 19: 348, 89 Pac. 649, 39 Colo. 384.

36. A car despatcher to whom is confided the management of cars on a street railway is an employee intrusted with and exercising superintendence, and whose sole and principal duty is that of superintendence, within the meaning of a statute rendering

the employer responsible for the negligence of such person. *Fitzgerald v. Worcester & S. Street R. Co.* 19: 239, 85 N. E. 911, 200 Mass. 105.

Liability to third person.

As to liability of carrier for acts of servant, see Carriers.

37. An automobile which has been purchased with the understanding that the son of the purchaser shall be taught to operate it may be found to be in possession of the son as agent of the purchaser while the instructions are being given, and not in that of the vendor as an independent contractor. *Hiroux v. Baum*, 19: 332, 118 N. W. 533. — Wis. —.

38. A municipal corporation is liable for the negligent operation of a bridge by persons employed with its knowledge by its duly appointed bridge tender to do the actual work required in the operation of the bridge, although they are not in the actual employment of the city. *Gatham v. Chicago*, 19: 1178, 86 N. E. 152, 236 Ill. 9.

39. To render a master liable for the negligence of a servant, the negligent act must be done for the purpose of executing the master's orders, and in doing his work, and while actually engaged in serving the master; and it is not enough to say that the injuries complained of would not have been inflicted without the facilities afforded by the servant's relations to his master. *Doran v. Thomsen* (N. J. Err. & App.) 19: 335, 71 Atl. 296, — N. J. —.

40. A master is not liable for injury sustained by a third person who is kicked by a horse while such horse, which is owned by his servant, who has hired it to another employee of such master, to be used in connection with such employment, is negligently being led through a street, since the horse was not at the time being used in the master's business, or in attempted furtherance thereof, but in the business of the servant who so hired the horse to his coemployee. *Kwiechen v. Holmes & Hallowell Co.* 19: 255, 118 N. W. 608, — Minn. —.

41. A master is responsible for the torts of his servant, done in the course of his employment with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done wilfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of his master. *Kwiechen v. Holmes & Hallowell Co.* 19: 255, 118 N. W. 608, — Minn. —.

42. Whether or not a landowner used due and proper care in selecting one to whom to sell a building to be removed from his land is immaterial if the person is found to have been competent in fact. *Wilmot v. McPad-den*, 19: 1101, 65 Atl. 157, 79 Conn. 367.

MAXIMS.

1. Caveat emptor. *Tomlinson v. Armour & Co.* (N. J. Err. & App.) 19: 923, 70 Atl. 314, 75 N. J. 748.

2. Equity looks upon that as done 19 L.R.A. (N.S.)

which should have been done. *McLeod v. Despain*, 19: 276, 90 Pac. 492, 49 Or. 536.

3. Fraud vitiat everything. *Boring v. Ott*, 19: 1080, 119 N. W. 865, — Wis. —.

4. He that hath committed iniquity shall not have equity. *International Land Co. v. Marshall*, 19: 1056, 98 Pac. 951. — Okla. —.

5. Qui facit per alium facit per se. *Doran v. Thomsen* (N. J. Err. & App.) 19: 335, 71 Atl. 296, — N. J. —.

6. Res ipsa loquitur. *Henson v. Lehigh Valley R. Co.* 19: 790, 87 N. E. 85, — N. Y. —.

7. Respondeat superior. *McGill v. Cleveland & S. W. Traction Co.* 19: 793, 80 N. E. 989, — Ohio, —; *Wilmot v. McPad-den*, 19: 1101, 65 Atl. 157, 79 Conn. 367.

8. Si utere tuo ut alienum non laedas. *Terrell v. Wright*, 19: 174, 112 S. W. 211, 87 Ark. 213; *Graham v. Tucker*, 19: 531, 47 So. 563, — Fla. —; *Briscoe v. Henderson Lighting & P. Co.* 19: 1116, 62 S. E. 600, 148 N. C. 396; *Thompson v. Baltimore & O. R. Co.* 19: 1162, 67 Atl. 768, 218 Pa. 444.

9. So use your own property as not to injure the rights of another. *Briscoe v. Henderson Lighting & P. Co.* 19: 1116, 62 S. E. 600, 148 N. C. 396.

10. There is no wrong without a remedy. *Boring v. Ott*, 19: 1080, 119 N. W. 865. — Wis. —.

11. Ubi jus ibi remedium. *Beaulieu v. Great Northern R. Co.* 19: 564, 114 N. W. 353, 103 Minn. 47.

12. Unusual clauses always excite suspicion. *France v. Munro*, 19: 391, 115 N. W. 577, — Iowa, —.

MAYOR.

Power of, to remove police officer, see Officers, 1.

Forfeiture of office by, see Officers, 2.

MECHANICS' LIEN.

Effect of nonestablishment of right of subcontractor to lien on jurisdiction to render personal decree against contractor, see Equity, 4.

MENTAL ANGUISH.

As element of damages, see Damages, 8-16.

What evidence admissible to show, see Evidence, 37.

Resulting from fright caused by assault on other person, see Fright.

Sufficiency of complaint to entitle one to recovery of damages for, see Pleading, 14.

Sufficiency of findings to support judgment for mental anguish because of nondelivery of telegram, see Trial, 20.

MERGER.

Effect of merger of life estate in fee on contingent remainders, see Life Tenants.

MINES.

Taxation of oil and gas lease, 'see Taxes, 1-3, 7.

MINORS.

See Infants.

MISTAKE.

In telegram, see Telegraphs, 1, 2, 5, 6.

MONEY.

Exemption of. from taxation, see Statutes, 2; Taxes, 4.

MONOPOLY AND COMBINATIONS.

Right of railroad company to give one hackman monopoly, see Carriers, 33.

Right to compel payment for goods purchased in accordance with monopolistic agreement, see Contracts, 13.

Right to monopoly of words used as trade name, see Trade Name.

Right of city to grant exclusive privilege for furnishing water to city and its inhabitants, see Waters, 3.

A contract by all the manufacturers of a necessary household commodity, for the creation of a corporation to sell their entire product at fixed prices, in which they shall be sole stockholders in proportion to their output immediately before its formation, which prevents increase of output by any stockholder and requires makers of the machinery used by them, and the jobbers of their product, who are located in every state, to become parties to the agreement, so as to prevent all competition in the business, violates the anti-trust act of Congress. *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* 19: 143, 148 Fed. 939, 78 C. C. A. 567.

MORTGAGE.

To loan association, see Building and Loan Associations.

Agreement to hold mortgage and collect rents and payments and make application thereof, see Contracts, 8.

Right of heir of mortgagor to secure title through foreclosure sale, see Cotenancy.

Surplus from foreclosure sale of decedent's real estate as personality, see Equitable Conversion.

Estoppel to treat note as existing for purpose of upholding mortgage and repudiate it for other purposes, see Estoppel.

Admissibility of entries in trustee's account showing payments on mortgage indebtedness due beneficiaries, see Evidence, 24.

Guaranty of principle and interest by one selling mortgages, see Guaranty, 4.

Duty of mortgagor to see that payments are properly applied by trustee holding mortgage, see Payment.

Payments by mortgagor to trustee appointed to hold mortgage and note secured thereby, see Principal and Agent, 2, 3.

See also Chattel Mortgage.

Placing in another's hands a deed to real estate together with a written memorandum stating that the property is pledged to secure the one in whose hands it is placed against loss from becoming a surety for the owner will create an equitable lien on the property, enforceable against the owner's assignee for creditors. *Re Snyder*, 19: 206, 114 N. W. 615, 138 Iowa, 553. (Annotated)

MOTIVE.

Effect of motive in applying for writ of certiorari to review decree in suit to enjoin liquor nuisance, see Certiorari, 3.

MUNICIPAL CORPORATIONS.

Bonds of, see Bonds, 2-4.

Action for electric light furnished to city, see Election of Remedies.

Judgment in favor of any action of company for price of electric light as bar to action on *quantum meruit*, see Judgment, 5.

Right of public-service corporation to exercise privileges and franchise within grant of municipality, see Public-Service Corporations, 1.

Power of mayor to remove police officers, see Officers, 1.

Forfeiture of mayor, see Officers, 2.

As to towns, see Towns.

Powers generally.

1. If reasonable doubt exists as to a particular power of a municipality under a grant of general power by a legislature, it should be resolved against the city; but, when the particular power is clearly conferred or is fairly included or inferable from other powers expressly conferred, and is consistent with the purposes of the municipality and the powers expressly conferred, the existence of the power should be resolved in favor of the city, so as to enable it to perform its proper functions of government. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

2. A general grant of power to a municipality by intendment includes all the powers fairly within the terms of the grant that are essential to the purposes of the municipality; but such implied power must not conflict with any expressly conferred power, as the law does not expressly grant certain powers and impliedly grant other powers to conflict therewith. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

3. General powers given a municipal corporation by a legislature are necessarily intended to confer other powers than those specifically enumerated, because of the difficulty of making specific enumerations of all such powers. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

4. Municipalities are subordinate governmental entities, and can exercise only such powers as are legally conferred by express provisions of law, or such as are, by fair implication and intentment, properly incident to, or included in, the powers expressly conferred, for the purpose of carrying out and accomplishing the object of the municipality. State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

5. All doubts as to the propriety of the means used in the exercise of an undoubted municipal power should be resolved in favor of the municipality where there is no abuse of power or discretion. State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

6. A municipal corporation has a discretion in the choice of means and methods for exercising the powers given it for governmental or public purposes unless expressly or impliedly restrained by statute, and the usual limitations upon the actions of municipalities within their legal powers are good faith and reasonableness, not wisdom or perfection. State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

7. The powers, duties, and liabilities of municipal corporations created by legislature as proper and convenient agencies in the work of government, in so far as they relate to governmental matters, are subject to legislative regulation and control. Shigley v. Waseca, 19: 689, 118 N. W. 259, — Minn. —.

Ordinances.

Evidence of ordinance forbidding water to be discharged on sidewalk, on question of negligence of property owner in casting water on walk, see Evidence, 39.

Construction of ordinance imposing license to tax, see License, 2.

8. It cannot be said that a municipal ordinance contract containing invalid provisions for the furnishing of water to a city would not have been passed without the invalid portions, or that an elimination of such portions would cause results not intended by the ordinance, where the expressed purpose thereof was to provide water for the city and its inhabitants, and that can be accomplished by its valid portions. State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

9. A city ordinance containing provisions sufficient of themselves to accomplish an expressed lawful purpose is not rendered void *in toto* by the fact that it also contains separable illegal or improper provisions, when the elimination of the illegal portions will not cause results not intended, or affect the integrity of the remaining portions for the purposes expressed. State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

10. Statutory authority to a municipal corporation to require railroad companies

operating roads across its streets to light the crossings at night, provided that it shall have no authority to require the railroad to maintain any different kind of light at the crossing from that maintained by the municipality at street crossings, refers simply to the kind of light, and does not compel the requirement of a light of the strength of those maintained at street crossings if one of less power will properly light the crossing. Chicago, I. & L. R. Co. v. Salem, 19: 658, 82 N. E. 913, 170 Ind. 153.

(Annotated)

11. A municipal ordinance requiring a railroad company to maintain at places where its tracks cross public streets, during the passage of trains at night, and for not less than thirty minutes prior thereto, except when the moonlight is sufficient, lights of a certain character and power in such manner as to enable persons passing over the crossings to see the tracks and protect themselves from danger of running trains, is not invalid for uncertainty or indefiniteness. Chicago, I. & L. R. Co. v. Salem, 19: 658, 82 N. E. 913, 170 Ind. 153.

12. A statute and ordinance requiring the maintenance by a railroad company at street crossings of lights which are not excessive in foggy or stormy weather are not, because they may be so in clear weather, so unreasonable as to amount to unconstitutional invasion of property rights. Chicago, I. & L. R. Co. v. Salem, 19: 658, 82 N. E. 913, 170 Ind. 153.

13. A court will not inquire as to the reasonableness of a requirement which a municipal corporation makes of a railroad company with respect to the lighting of the places where its tracks cross streets if it is within the authority conferred upon the municipality by the legislature. Chicago, I. & L. R. Co. v. Salem, 19: 658, 82 N. E. 913, 170 Ind. 153.

14. A skating rink is not a nuisance *per se*, and cannot be made so by municipal ordinance. Johnson v. Philadelphia, 19: 637, 47 So. 526, — Miss. —.

15. Charter authority to regulate, suppress, and impose taxes on skating rinks does not empower a municipality to require such rinks as are not in fact nuisances to close at 6 o'clock P. M. Johnson v. Philadelphia, 19: 637, 47 So. 526, — Miss. —.

Contracts generally.

16. Where a municipal contract for the rendering of public service contains provisions that would be unenforceable because unreasonable, and the law provides for the regulation of the service rendered under the contract, such right to regulate may relieve the apparent unreasonable features of the contract. State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

17. Municipal contracts for the rendering of public service will be sustained where the power is given to make the contract, and the terms of it, taken with the law controlling them, are not clearly violative of some pro-

vision or principle of law. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

Water and light.

Supply of water by private corporations and supply by municipality to its inhabitants, see *Waters*, 2-5.

As to rates charged for water, see *Waters*, 5.

See also *supra*, 8.

18. Authority to make provisions, within lawful limitations, for securing or furnishing to a city and its inhabitants an abundant supply of good water for all purposes, is a usual and necessary power of a municipality, and such power may be included in powers given in general terms, where there is nothing in the enumeration of particular powers conferred to limit in this particular the operation of the general powers conferred. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

19. The method used by a city which is authorized to provide for the establishment of waterworks, in providing waterworks therefor, is within its lawful discretion, if no particular method is indicated by the law. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

20. The limitations upon the taxing and bonding powers of the city of Tampa, contained in the charter act and the General Statutes of Florida, do not preclude the city from granting privileges in its streets, or from making valid contracts by ordinance to carry out a lawful purpose of the municipality in procuring for the city and its inhabitants an adequate supply of good water for all purposes. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

21. The authority given a municipality in the general law "to make and sink wells, erect pumps, dig drains," etc., is distinct from, and does not limit or qualify, the express particular authority "to pass all laws necessary to guard against fire," or the charter power "to provide for the establishment of waterworks," nor limit the powers given by the general clauses conferring powers upon the municipality. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

Liability for damages.

Variance in action against city for injury by negligence of bridge tender, see *Evidence*, 54.

As to liability for injuries on highways, see *Highways*.

Liability for negligence of bridge tender, see *Master and Servant*, 38; *Trial*, 6.

22. A municipal corporation is liable for injury through the negligent operation of a bridge maintained as part of its highway system to one sent to take measurements beneath it. *Gathman v. Chicago*, 19: 1178, 86 N. E. 152, 236 Ill. 9. (Annotated)

23. A municipal corporation is not liable for the acts of a board of health created by 19 L.R.A. (N.S.)

public statute for the public benefit, even though its members are appointed by the municipal authorities. *Valentine v. Englewood* (N. J. Err. & App.) 19: 262, 71 Atl. 344, — N. J. —.

NAME.

Effect of use of married woman's maiden name in publication of summons, see *Writ and Process*.

Since the use of initials instead of a given name before a surname has become a common practice, these initials must be all given and correctly given in court proceedings. *Carney v. Bigham*, 19: 905, 99 Pac. 21, — Wash. —.

NEGLIGENCE.

In conducting place of amusement, see *Amusements*.

Of bank in paying check, see *Banks*.

Of carriers, see *Carriers*.

Damages for negligent injuries, see *Damages*.

As to right of action for negligent killing, see *Death*.

Of manufacturer of canned goods, see *Food*.

As to highways, see *Highways*.

Liability of married woman for, see *Husband and Wife*, 1.

Of master toward servant, see *Master and Servant*.

Of servant causing injury to third person, see *Master and Servant*, 37-42.

Of physicians, see *Physicians and Surgeons*.

As to pleadings in negligence cases, see *Pleading*.

As to proximate cause, see *Proximate Cause*.

Of railroad companies, see *Railroads*.

Of street railway company, see *Street Railways*.

Of telegraph company, see *Telegraphs*. Instructions in negligence case, see *Trial*, 15-17.

Question for jury as to last clear chance in action for injury to railroad employee, see *Trial*, 9.

Children: dangerous attractions.

1. Persons engaged in the demolition of a building which is left with standing chimneys on Saturday night are not, although the building is uninclosed, bound to anticipate that children may, during the next day, trespass upon the property, undermine the chimneys, and be injured by their fall, so as to be bound to protect against such an occurrence. *Wilmot v. McPadden*, 19: 1101, 65 Atl. 157, 79 Conn. 367. (Annotated)

2. That a railroad company has left a pile of sand unguarded on a vacant lot adjacent to its tracks, which is attractive to children, will not render it liable to a child who, attracted thereto to play, attempts to board a passing train, to its injury. *Swartwood v. Louisville & N. R. Co.* 19: 1112, 111 S. W. 305, — Ky. —.

(Annotated)

3. It is not the duty of an occupier of land to exercise care to make it safe for infant children who come upon it without invitation, but merely by sufferance. *Wheeling & L. E. R. Co. v. Harvey*, 19: 1136, 83 N. E. 66, 77 Ohio St. 235.

4. The mere maintenance of an insecurely covered well of hot water upon an open space unfenced from the street, near the rear of a theater, will not render the owner liable for injury to a thirteen-year old child of average intelligence, who falls into it, although the child was allured to the place by a desire to see what was going on in the rear part of the theater. *Briscoe v. Henderson Lighting & P. Co.* 19: 1116, 62 S. E. 600, 148 N. C. 396.

5. The mere erection of a building with large windows and doors through which can be seen machinery constantly in motion, upon a lot unfenced from the highway, which is calculated to allure children to see the machinery, does not render the owner liable for injury to a child falling into an insecurely covered well of hot water in an open space some distance from the building, where there is nothing to show that children had ever been allured to the premises by the machinery, or that the injured child was so allured. *Briscoe v. Henderson Lighting & P. Co.* 19: 1116, 62 S. E. 600, 148 N. C. 396. (Annotated)

6. One who, in constructing a railroad in a public street, rightfully leaves a loaded push car standing unfastened and unattended upon the track, may be liable for injury thereby caused to a child not guilty of contributory negligence, who has been permitted to play upon it, where the car is on a grade down which, if it starts, it cannot be readily stopped, and the injury is caused by the child's being caught and crushed while attempting to stop the car after it has been set in motion down the grade. *Cahill v. E. B. & A. L. Stone & Co.* 19: 1094, 96 Pac. 84, 153 Cal. 571.

7. A loaded push car standing upon rails upon which it may be easily moved by children, and of sufficient weight to crush a person over whose body it might pass, is a dangerous thing for children to be allowed to play with. *Cahill v. E. B. & A. L. Stone & Co.* 19: 1094, 96 Pac. 84, 153 Cal. 571. (Annotated)

8. A railroad company owes no duty to a trespassing child to lock or guard its turntables, although such machines are calculated to allure children to them for amusement. *Thompson v. Baltimore & O. R. Co.* 19: 1162, 67 Atl. 768, 218 Pa. 444. (Annotated)

9. A railroad company is not liable to an infant who comes upon its premises without invitation, and who is injured there while playing, without its knowledge, with a turntable. *Wheeling & L. E. R. Co. v. Harvey*, 19: 1136, 83 N. E. 66, 77 Ohio St. 235. (Annotated)

10. A waterworks company is not liable for the death by drowning, of an infant who

comes upon its land without invitation, and there falls into a reservoir or basin of water while playing about it, without the knowledge of the company. *Wheeling & L. E. R. Co. v. Harvey*, 19: 1136, 83 N. E. 66, 77 Ohio St. 235. (Annotated)

On highway.

Injury to person on highway by kick of horse owned by servant but used in employer's business, see *Master and Servant*, 40.

11. It is not *per se* negligence for a man sixty-eight years old to stand up while riding on a dray in a city street. *Emporia v. Juengling*, 19: 223, 96 Pac. 850. — Kan. — (Annotated)

12. One who carelessly ties a horse to a vehicle by a long rope, for the purpose of leading it through a street, is liable in damages for injury sustained by reason of the led horse running upon the sidewalk and kicking a person standing thereon. *Kwischen v. Holmes & Hallowell Co.* 19: 255, 118 N. W. 668, — Minn. —

Contributory.

As to contributory negligence of passenger, see *Carriers*, 12-14.

Presumption of exercise of due care by person killed at railroad crossing, see *Evidence*, 16.

Presumption as to capacity of child to foresee danger, see *Evidence*, 7.

Negligence of teamster using sidewalk as driveway, see *Highways*, 9.

Contributory negligence of servant, see *Master and Servant*, 23-26.

Contributory negligence as matter of defense, see *Pleading*, 1.

Contributory negligence of person struck by train, see *Railroads*, 5, 6.

Sufficiency of evidence to carry question of contributory negligence to jury, see *Trial*, 3.

Contributory negligence of person injured as question for jury, see *Trial*, 7.

13. A pedestrian who, upon stepping from the curb into the street for the purpose of crossing it, sees a delivery wagon apparently traveling near the opposite curb, and then proceeds on his way without paying any attention to his surroundings, is negligent, so that he cannot hold the owner of the wagon liable for injury caused by its collision with him through the horses crossing the street diagonally, because of inattention of the driver, whose view is obstructed by articles piled in front of him. *Borg v. Spokane Toilet Supply Co.* 19: 160, 96 Pac. 1037, 50 Wash. 204. (Annotated)

Imputed.

14. Where a wife may sue in her own name to recover damages for injuries to her person, and her husband has no interest in the recovery, his negligence as driver of the conveyance in which she was riding at the time of the injury will not be imputed to her so as to preclude her recovering against the other negligent person, where, in the particular instance, the relation of principal and agent or master and servant did not

exist between them. *Louisville R. Co. v. McCarthy*, 19: 230, 112 S. W. 925, — Ky. —.

15. Tenants are not precluded from holding one who causes the fall of a wall of the building occupied by them through negligent excavation of the adjoining lot liable for the injury thereby caused to their goods, by the fact that one of the proximate and efficient causes of the falling of the wall was negligence of their landlord. *Contos v. Jamison*, 19: 498, 62 S. E. 867, 81 S. C. 488. (Annotated)

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEGROES.

Exclusion of, from place of amusement, see Civil Rights; Costs.

NEWSPAPER.

Libel by, see Libel and Slander.

NEW TRIAL.

Setting aside verdict because of treating of jurors, see Appeal and Error, 27.

1. Mere refusal to enforce formal rules for the questioning of witnesses is not ground for new trial where no material harm is done to the objecting party. *Willmot v. McPadden*, 19: 1101, 65 Atl. 157, 79 Conn. 367.

2. A new trial will be awarded if the issues submitted in a case are not sufficient to support the judgment rendered. *Holler v. Western U. Teleg. Co.* 19: 475, 63 S. E. 92, — N. C. —.

3. A verdict in favor of a passenger injured by the fall of the carrier's bridge must be set aside when the evidence fails to establish his contention that the cause of the accident was one for which the carrier would be liable, and sustained the theory of the carrier that it was caused by a defect for which it was not responsible. *Roanoke R. & E. Co. v. Sterrett*, 19: 316, 62 S. E. 385, 108 Va. 533.

4. A new trial will not be granted for misconduct of a jury sent to view the *locus in quo* in talking with strangers, taking measurements, and examining the earth, if no substantial prejudice could have resulted therefrom. *Emporia v. Juengling*, 19: 223, 96 Pac. 850, — Kan. —.

NOISE.

Injunction against, see Nuisance, 3.

NONRESIDENTS.

Discrimination against, in imposition of license tax, see Commerce, 7; Constitutional Law, 2.

NOTICE.

To city of defect in street as condition precedent to liability for damage caused thereby, see Highways, 13.
Sufficiency of notice of tax foreclosure proceedings, see Taxes, 8.

The fact that the owner of a build-

ing used a wall upon the land of an adjoining proprietor for the support of his building before the same was destroyed by fire is not such notice as charges a purchaser of the property upon which the wall is situated with knowledge of a stipulation in an unrecorded written contract that the owner of such building might renew the use of such wall in case it should be destroyed and rebuilt. *Bowhay v. Richards*, 19: 883, 116 N. W. 677, — Neb. —.

NUISANCES.

Who may maintain writ of certiorari to review decree in suit to enjoin liquor nuisance, see Certiorari.

Skating rink as, see Municipal Corporations, 14.

1. The state may maintain a bill to abate a nuisance in a city street. *Alabama W. R. Co. v. State ex rel. Garber*, 19: 1173, 46 So. 468, — Ala. —. (Annotated)

Private right of action.

2. A property owner who is compelled, together with his clerks and customers, to witness indecent conduct of the inmates of a bawdyhouse on adjoining property, and to hear loud, boisterous, indecent, and annoying noises made by them and their dissolute companions, suffers a special injury different from that suffered by the general public, entitling him to enjoin the same, notwithstanding the maintenance of such place is a public nuisance. *Seifert v. Dillon*, 19: 1018, 119 N. W. 686, — Neb. —.

Equitable remedies.

3. The operation of a planing mill which is objectionable to the occupants of neighboring houses by reason of its noise, smoke, soot, and cinders will not be perpetually enjoined where the preponderance of the evidence does not show that it is of such a nature as to deprive normal persons living where complainants live of the comforts of a home, or render living in such homes a positive discomfort. *Terrell v. Wright*, 19: 174, 112 S. W. 211, 87 Ark. 213.

Defenses.

4. That municipal authorities tolerate the maintenance of a house of prostitution on certain property, in violation of law, constitutes no defense to a suit by a near-by property owner who shows special damage different from that suffered by the general public, to enjoin such maintenance. *Seifert v. Dillon*, 19: 1018, 119 N. W. 686, — Neb. —.

5. The right of a landowner to restrain an adjoining property owner from using his property as a bawdyhouse, to which persons resort for the purposes of prostitution and lewdness, cannot be defeated by showing that the premises were so used to the knowledge of the plaintiff before he purchased his property. *Seifert v. Dillon*, 19: 1018, 119 N. W. 686, — Neb. —.

6. The illegal use of property as a house of ill fame constitutes a continuing injury to a near-by property owner which is unaffected by lapse of time. *Seifert v. Dillon*, 19: 1018, 119 N. W. 686, — Neb. —.

OATH.

Of officer in charge of jury sent to view
locus in quo, see Evidence, 27.

OBSTRUCTION.

Of highways, see Highways.

OFFICERS.

Imposing on court duty to appoint public officers, see Courts, 6, 7.

Oath of officer in charge of jury sent to view *locus in quo*, see Evidence, 27.

As to health officers, see Health.

Mandamus to restore party to office, see Mandamus.

Conversion by, of property taken from prisoner, see Trover, 2.

1. A mayor has no authority originally to hear charges against a police officer and to remove him, and may act only after the chief of police has suspended the officer and filed written charges with the mayor, under a statute, giving the chief of police exclusive right to suspend members of his department, and providing that upon suspension he shall, in writing, certify such fact, together with the cause thereof, to the mayor, who shall render judgment thereon. State ex rel. Moyer v. Baldwin, 19: 49, 83 N. E. 907, 77 Ohio St. 532.

2. The mayor of a city, who sanctions a system of imposing fines upon places where intoxicating liquor is illegally sold, as a method of obtaining public revenue on the traffic, and who fails to make a bona fide attempt to enforce the law against them, or inform the prosecuting attorney of known violations of the law, forfeits his office. State ex rel. Jackson v. Wilcox, 19: 224, 97 Pac. 372, — Kan. —.

OIL.

Taxation of oil and gas lease, see Taxes, 1-3, 7.

OPINIONS.

Opinion evidence, see Evidence, 33.

ORAL CONTRACT.

Validity of, see Contracts, 4-8.

ORDINANCES.

See Municipal Corporations, 8-15.

PARENT AND CHILD.

Child's right of action for negligent killing of parent, see Death.

Presumption as to mother's knowledge that son in investing her money secured compensation for his services from borrower, see Evidence, 6.

Child as agent of father in operating automobile, see Evidence, 51; Master and Servant, 1, 37.

Child operating automobile as servant of parent, see Trial, 10.

Insurable interest of adult son in life of mother, see Insurance, 4.

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PARKS.

Requiring judges of district court to appoint park commissioners, see Courts, 6.

PAROL CONTRACTS.

Validity of, see Contracts, 4-8.

PAROL EVIDENCE.

See Evidence, 28-32.

PAROL WARRANTY.

Acceptance to preclude reliance on, see Sale, 2.

PARTIES.

Who may maintain writ of certiorari to review decree in suit to enjoin liquor nuisance, see Certiorari.

Who may enjoin discontinuance of certain text-books in school, see Injunction, 5.

Who may maintain suit to abate nuisance, see Nuisances, 1, 2.

Nonjoinder of the husband in a suit against a married woman is waived by her suffering a default judgment to go against her. Emery v. Kipp, 19: 983, 97 Pac. 17, — Cal. —.

PARTITION.

A wife holding land by entireties with her husband is not entitled to partition of trees cut therefrom by him, nor of lumber into which they are converted, since both are seised of the entirety. Jones v. Smith, 19: 1037, 62 S. E. 1092, — N. C. —.

(Annotated)

PARTNERSHIP.

Effect of sale of good will by, on right of individual partners to re-engage in same business, see Good Will, 1.

PARTY WALL.

Notice of rights of person in, see Notice.

The right of an owner of property to have support from a wall entirely upon the property of the adjoining owner, whether derived from contract or acquired by prescription, is in the nature of an easement, which is terminated upon the destruction of the building by fire. Bowhay v. Richards, 19: 883, 116 N. W. 677, — Neb. —.

(Annotated)

PATRON.

Injury to patron at place of amusement, see Amusements.

PAYMENT.

Admissibility of entries in trustee's account showing payments on mortgage indebtedness due beneficiaries, see Evidence, 24.

Payments to agent, see Principal and Agent, 2, 3.

1. That one constituted trustee to hold a mortgage and note secured thereby, col-

lect rents and payments on the indebtedness, and release portions of the property as payments were made, himself purchases a tract of the mortgaged land and credits the trust account with the purchase price, does not throw upon the mortgagor the duty of seeing that the payment is properly applied; but the beneficiaries for whom he holds the mortgage are chargeable with his neglect to apply the proceeds upon the indebtedness. *McLeod v. Despain*, 19: 276, 90 Pac. 492, 40 Or. 536.

2. The mortgagor, in making payments to the trustee, need not see that they are properly applied, where several persons furnish money to purchase a mortgage, which, together with the note which it secures, is assigned to a trustee, who is to collect rents and receive payments on the principal and apply them in satisfaction of the debt, the share of each contributor being shown by a new note executed to the trustee and indorsed with a guaranty to the contributor. *McLeod v. Despain*, 19: 276, 90 Pac. 492, 40 Or. 536.

PENALTY.

Who may bring action for statutory penalty for refusal to give street car transfers, see Carriers, 19.

PERJURY.

Injunction against enforcement of judgment secured by perjury, see Injunction, 3, 4.

PHOTOGRAPHS.

Exclusion of, from evidence, see Appeal and Error, 11.

PHYSICIANS AND SURGEONS.

Right of one injured by another's negligence to recover value of physician's services, see Damages, 5.

Right to practise dentistry under license to practise medicine and surgery, see Dentists.

1. A husband cannot recover damages for the loss of the society, care, and comfort of his wife, due to her death because of the neglect of a physician engaged by him to attend her to perform his contract, unless the action is brought under the statute providing for damages for death caused by negligence. *Sherlag v. Kelley*, 19: 633, 86 N. E. 293, 200 Mass. 232. (Annotated)

2. A husband is not precluded from recovering against a physician for breach of his contract to attend his wife, the additional expenses for nursing, care, and treatment due to such breach, by the fact that failure to perform the duty causes the death of the wife. *Sherlag v. Kelley*, 19: 633, 86 N. E. 293, 200 Mass. 232.

3. The negligent performance by a physician of his contract to a man to furnish medical services to his wife is sufficient to sustain an action against him for breach of the contract. *Sherlag v. Kelley*, 19: 633, 86 N. E. 293, 200 Mass. 232.

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PLATFORM.

Negligence of passenger in riding on, see Carriers, 14.

PLEADING.

Refusal of trial court to strike out portions of, see Appeal and Error, 21.

Discretion as to granting or overruling motion to require election between counts, see Appeal and Error, 15.

Variance between pleading and proof, see Evidence, 54.

Necessity of pleading special friendship or affection to justify recovery for mental suffering for failure to deliver telegram announcing death of relative by affinity, see Evidence, 22.

Declaration or complaint.

1. Contributory negligence is matter of defense where it does not appear upon the face of the complaint or by the evidence of plaintiff. *Cahill v. E. B. & A. L. Stone & Co.* 19: 1094, 96 Pac. 84, 153 Cal. 571.

2. A general averment of damages for breach of contract in the *ad damnum* is sufficient where there are previous averments to show a liability, and no special damages are claimed. *Sherlag v. Kelley*, 19: 633, 86 N. E. 293, 200 Mass. 232.

3. A breach of contract may be assigned in the negative of the words of the contract, unless such negative does not plainly show that there is a breach. *Sherlag v. Kelley*, 19: 633, 86 N. E. 293, 200 Mass. 232.

4. A complaint upon a bill or note, which does not allege a collateral agreement between the parties whose names are on the instrument, but which seeks to recover against a person otherwise than as provided by the negotiable instruments act, states no cause of action. *Haddock, Blanchard & Co. v. Haddock*, 19: 136, 85 N. E. 682, 192 N. Y. 499.

5. A declaration in an action to recover damages for breach of contract to sell shares of stock is not insufficient because it does not allege facts to show whether or not the contract was obnoxious to the statute of frauds, if the existence of a valid contract is asserted. *Sprague v. Hosie*, 19: 874, 118 N. W. 497, — Mich. —.

6. The use of the term "alleyway" in describing the place where a personal injury occurred, does not, of itself, imply that the strip of land was dedicated to public use. *Briscoe v. Henderson Lighting & P. Co.* 19: 1116, 62 S. E. 600, 148 N. C. 396.

7. A declaration against a manufacturer of canned meats for ptomaine poisoning caused by the eating of unwholesome meat alleged to have been negligently canned and placed upon the market by defendant sets forth a good cause of action notwithstanding the absence of a *scienter*. *Tomlinson v. Armour & Co.* (N. J. Err. & App.) 19: 923, 70 Atl. 314, 75 N. J. 748.

8. Where by statute fraud is a fact to be specially pleaded, a complaint is not sufficient to assert passive fraud by concealment,

which sets out misrepresentations of fact, stating that the true fact was wilfully concealed, and concludes that by virtue of said fraudulent misrepresentations and concealments damage was done. *American Surety Co. v. Pacific Surety Co.* 19: 83, 70 Atl. 584, 81 Conn. 252.

9. That one knew of a contract with the performance of which he wrongfully interfered is not shown by an allegation that he maliciously prevented its performance. *McGurk v. Cronenwett*, 19: 561, 85 N. E. 576, 199 Mass. 457.

Pleas and answers.

10. The ownership by a corporation of a certain amount of water for the conveyance of which it is seeking a right of way under the power of eminent domain is not put in issue by a denial that it is the owner or ever was the owner of or entitled to any water which is to be conducted into a certain stream. *Walker v. Shasta Power Co.* 19: 725, 160 Fed. 856, 87 C. C. A. 660.

11. The burden of proving a contract valid under the statute of frauds may be cast on plaintiff by the plea of the general issue, in an action to recover damages for breach of contract to sell shares of stock in which the declaration alleges the existence of a valid contract. *Sprague v. Hosie*, 19: 874, 118 N. W. 497, — Mich. —.

Demurrer.

Right to appeal from judgment on demurrer, see Appeal and Error, 3.

12. A declaration to recover damages for the construction of a levee which causes the water to set back on plaintiff's land is not demurrable because it alleges that the levee caused the water to rise higher than normal on the opposite side of the river from and above the levee, which would show injury to lands of others than plaintiff, where the allegation is made simply to show the injury to plaintiff's land. *Bradbury v. Vandalia Levee & Drainage Dist.* 19: 991, 86 N. E. 163, 236 Ill. 36.

13. A complaint to compel specific performance of a contract to convey land is not demurrable for failure to present facts which will enable the court to say that the consideration is adequate, where it specifically alleges the adequacy of the consideration. *Brown v. Sebastopol*, 19: 178, 96 Pac. 363, 153 Cal. 704. (Annotated)

14. Although a complaint which charges no wilful or intentional misconduct on the part of a railway company in carrying a corpse beyond the contracted point of delivery to an intersecting carrier, whereby the funeral arrangements were delayed, does not state a cause of action for the recovery of damages for mental anguish, it does state a cause of action for nominal damages for breach of the contract of carriage, and a demurrer thereto is properly overruled. *Beaulieu v. Great Northern R. Co.* 19: 564, 114 N. W. 353, 103 Minn. 47.

PLEASURE RESORTS.

See Amusements.

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PLEDGE AND COLLATERAL SECURITY.

Rights of one taking negotiable paper as substitute for other securities held as collateral, see Bills and Notes, 7.

Rights of pledgee of negotiable paper obtained by fraud, see Bills and Notes, 3, 6.

Liability of pledgee of stock, see Corporations, 15-18.

POLES.

Agreement for maintenance of telephones on land, see Easement, 1.

Obstruction of highway by trolley pole, see Highways, 5, 6.

POLICE.

Power of mayor to remove police officers, see Officers, 1.

POLICE MAGISTRATE.

Imposing nonjudicial functions on, see Courts, 8.

POLICE POWER.

See Constitutional Law, 4; Drainage Districts, 1; Eminent Domain, 3.

POOL.

Pool game as gambling, see Gaming.

POWER.

Exercise of eminent domain for generation of electric power, see Eminent Domain, 1.

PREJUDICIAL ERROR.

See Appeal and Error, 19-29.

PREMIUM.

On insurance policy, see Insurance, 16.

PRESCRIPTION.

Prescriptive easement, see Easements, 2.

PRESUMPTIONS.

Of knowledge of purchaser of negotiable paper as to rights of parties, see Bills and Notes, 5.

In general, see Evidence, 2-22.

PRINCIPAL AND AGENT.

As to brokers, see Brokers.

Purchase by principal of good will of agent, see Contracts, 1.

Right of undisclosed principal to recover damages for mental anguish for delay in transmitting telegram, see Damages, 14.

Embezzlement by agent, see Embezzlement.

Presumption that principal knew that agent in investing money received compensation for services from borrower, see Evidence, 6.

As to insurance agent, see Insurance.
Boy as agent of father in operating automobile, see Master and Servant, 1, 37.

Duty of mortgagor to see that payments are properly applied by trustee holding mortgage, see *Payment*.

Effect of agent's bonus to render loan usurious, see *Usury*.

Sale by sales agent to principal of the good will of the business, see *Goodwill*, 2.

1. An agent of a corporation may be found to have had power to receive property in satisfaction of notes issued to the corporation where he sold the machinery for which the notes were issued, received the notes and the mortgage securing them, collected all payments upon them, and conducted the proceedings to foreclose the mortgage, although an officer of the corporation states that his authority was only to collect the notes. *Northwest Thresher Co. v. Dahlgren*, 19: 324, 97 Pac. 228, 50 Wash. 325. (Annotated)

2. Persons furnishing money to purchase a mortgage, which, together with the note which it secures, is assigned to the cashier of a bank as trustee, new notes for the amounts furnished by the respective parties being executed to him and indorsed to them with his guaranty, under the agreement that the trustee shall collect the rents and receive all sums paid on principal, executing releases of the mortgaged property as payments are made, are bound by his act of receiving money; and, in case he becomes insolvent without paying it over, cannot compel a second payment by the mortgagor. *McLeod v. Despain*, 19: 276, 90 Pac. 492, 49 Or. 536.

3. Buyers of a mortgage, who have left it and the notes secured by it in the hands of a trustee to receive the rents on the mortgaged property and payments on the indebtedness, cannot take advantage of his acts so far as they are advantageous to them and repudiate collections made by him which he failed to turn over prior to his insolvency. *McLeod v. Despain*, 19: 276, 90 Pac. 492, 49 Or. 536.

PRINCIPAL AND SURETY.

As to guaranty, see *Guaranty*.

Pledge of property to secure surety against loss, see *Mortgage*.

PRIVILEGED COMMUNICATIONS.

See *Libel and Slander*, 1-3.

PROFITS.

Loss of, as element of damages, see *Damages*, 17.

PROHIBITION.

A writ of prohibition is the proper remedy to restrain action upon an information purporting to have been presented by a private person, where neither the prosecuting attorney for the county nor any other officer thereto authorized exhibited it, since such information is invalid, and no other plain, speedy, and adequate remedy at law 19 L.R.A. (N.S.)

exists. *Evans v. Willis*, 19: 1050, 97 Pac. 1047, — Okla. —.

PROMISSORY NOTES.

See *Bills and Notes*.

PROSECUTING ATTORNEY.

Reversal of conviction because of remarks of, see *Appeal and Error*, 24.

PROSTITUTION.

See *Disorderly Houses*.

PROXIMATE CAUSE.

Of injury to passenger.

1. The failure of the conductor of a train to notify passengers inside the car that the train had not reached the station when it stopped, notwithstanding the announcement of the porter that the stop would be at the station, was not the proximate cause of injury to a passenger who, without necessity, voluntarily rode on the platform and attempted to alight to his injury when the train stopped; where he could not have heard the notice had it been given within the car, and the train men did not know that he intended to alight at that stop. *Wagner v. Atlantic Coast Line R. Co.* 19: 1028, 61 S. E. 171, 147 N. C. 315.

Of loss of baggage.

2. Mere delay in forwarding baggage from an intermediate station is not the proximate cause of its destruction by fire while there, so as to render the carrier liable therefor on the ground of negligence in permitting the delay. *French v. Merchants & M. Transp. Co.* 19: 1006, 85 N. E. 424, 199 Mass. 433.

PUBLIC SERVICE CORPORATIONS.

1. Articles of incorporation obtained under a general law authorizing the corporation to engage in the business of rendering public service in a municipality do not *ipso facto* authorize the corporation to use privileges and franchises that may be conferred by the municipality to render the public service therein. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

2. The law authorizing the regulation of service rendered the public becomes a part of and controls contracts providing for such public service, whether so expressed or referred to in the contract or not. *State ex rel. Ellis v. Tampa Waterworks Co.* 19: 183, 47 So. 358, — Fla. —.

PUBLIC WATER SUPPLY.

See *Waters*, 2-5.

PULLMAN CARS.

When person becomes passenger on, see *Carriers*, 4.

Negligence of conductor of, see *Carriers*, 6.

QUANTUM MERUIT.

Effect of action upon express contract to preclude action upon *quantum meruit*, see *Election of Remedies*.

Judgment in action on contract as bar to action on *quantum meruit*, see Judgment, 5.

QUARANTINE.

See Health, 1.

QUESTION FOR JURY.

See Trial.

QUIETING TITLE.

See Cloud on Title.

RAILROAD COMMISSION.

Making right of street railway company to discontinue use of tracks subject to control by railroad commissioners, see Street Railways, 2.

RAILROADS.

Acquiring title to portion of depot grounds by adverse possession, see Adverse Possession, 2.

As carriers, see Carriers.

Duty of railroad company to children jumping on and off cars in motion, see Carriers, 17.

Railroad aid bonds, see Bonds, 2-4; Evidence, 17, 18.

Presumption of acquiescence in placing of bondary fence, see Boundaries.

Regulation of hours of labor of railroad employees, see Commerce, 4, 5; Statutes, 1.

Presumption of termination of obligation to subscribe to stock of, see Evidence, 20.

Liability of company for injury to servant, see Master and Servant.

Power of municipality as to requiring lights at crossings, see Municipal Corporations, 10-13.

Injury to child playing on turntable, see Negligence, 8, 9.

Statute giving right to resort to courts in case of discontinuance of operation of, see Statutes, 5, 6.

Injury to persons on or near track.

1. One undertaking to cross between freight cars standing on a switch track with only a narrow opening between them, to reach a railroad station as a passenger train is arriving, assumes the risk of injury from the opening being closed in the operation of the road, although the track is between the postoffice and depot, where persons may be expected to cross, if the opening is not a continuation of any traveled path; and the railroad company cannot be held liable for injury due to his being caught between the cars if his danger was not known to the railroad employees in time to avoid the injury. *Brackett v. Louisville & N. R. Co.* 19: 558, 111 S. W. 710, 33 Ky. L. Rep. 921.

(Annotated)

2. One who goes for a purpose of his own upon a portion of a railroad right of way over which the public has been permitted freely to pass, and which is devoted to the storage of lumber, freight, and railroad materials, has the rights of a licensee. *Muse* 19 L.R.A. (N.S.)

v. Seaboard Air Line R. Co. 19: 453, 63 S. E. 102, — N. C. —.

3. A railroad does not lose the right to use a portion of its right of way for railroad purposes, such as the storage of lumber and other freight or railroad supplies, by permitting its use by the public, which passes over it in vehicles and on foot to such an extent that it has been designated a street. *Muse v. Seaboard Air Line R. Co.* 19: 453, 63 S. E. 102, — N. C. —.

Liability for fires.

Presumption of negligence in case of setting out of fire by railroad locomotive, see Evidence, 12-14.

Evidence in action against railroad for setting fires by sparks from locomotive, see Evidence, 42.

4. Negligence is the gist of an action for damages caused by fires set from locomotives of a railroad company. *Osburn v. Oregon R. & Nav. Co.* 19: 742, 98 Pac. 627. — Idaho, —.

Contributory negligence.

Direction of verdict in action for killing of person at crossing, see Appeal and Error, 28.

Presumption of exercise of due care by person killed at railroad crossing, see Evidence, 16.

5. A license upon a portion of a railroad right of way used for the storage of lumber and railroad materials cannot hold the railroad liable for injuries caused by a piece of lumber which, lying too close to the track, is struck by a passing train and hurled against him, if, by the exercise of care which an ordinarily prudent man would have exercised under similar circumstances, he could have discovered the danger from its being so struck in time to have avoided the injury. *Muse v. Seaboard Air Line R. Co.* 19: 453, 63 S. E. 102, — N. C. —.

6. If a pedestrian struck on a railroad crossing by an engine running 60 miles an hour could, in approaching the crossing, have seen 165 feet along the track when 4 feet therefrom, it cannot be said, as matter of law, that any prudence he might have exercised in looking along the track would not have avoided the accident because of the excessive speed of the engine. *Shum v. Rutland R. Co.* 19: 973, 69 Atl. 945, — Vt. —.

RATES.

As to rates charged for water, see Waters, 5.

REAL-ESTATE BROKERS.

See Brokers.

REAL PROPERTY.

Assignment of land contract, see Contracts, 6, 7.

Equitable mortgage on, see Mortgage.

Specific performance of contract for sale of, see Specific Performance, 2-6.

REASONABLENESS.

Of ordinance as to lights at railroad crossings, see Municipal Corporations, 12, 13.

RECEIVERS.

- For building and loan association, see Building and Loan Associations.
- Liability of stockholders for misconduct of receiver, see Corporations, 6.
- Right of stockholders to complain of action of receiver in disposing of funds of corporation, see Corporations, 7.
- Effect of appointment of, on insurance on property, see Insurance, 6.

RECORDING LAWS.

- See Records and Recording Laws.

RECORDS AND RECORDING LAWS.

- Record on appeal, see Appeal and Error, 4-8.
- Necessity of entering in records of corporation agreement to purchase private business of manager, see Corporations, 2.
- Effect of existence of record of deed to raise presumption of existence of duly executed and delivered original, see Evidence, 19.
- Admissibility in evidence of record of deed, see Evidence, 23.
- Copies of books containing abstracts of title to property in the county, which are required to be made by the recorder, and for copies of which made by him he is required to charge a fee, may be made by private abstract companies under a statute providing that all abstract and other books kept in the recorder's office shall be exhibited to those who wish to inspect them, and all persons shall have a right to take abstracts thereof, although the result will be to give such companies the advantage of labor performed by the recorder in competing with him for business. *Chicago Title & T. Co. v. Danforth*, 19: 386, 86 N. E. 364, 236 Ill. 554.

REFERENCE.

- Review of decisions by referee, see Appeal and Error, 18.

RELEASE.

- Of one of several joint wrongdoers, see Joint Creditors and Debtors.

RELIGIOUS TEACHING.

- Right of tax payers to recover back public money appropriated to sectarian instruction, see Limitation of Actions, 2.

REMAINDERS.

- Contingent remainders, see Life Tenants; Wills, 5.

REMOVAL OF CAUSES.

- Objecting for first time on appeal to jurisdiction of Federal court, see Appeal and Error, 16.

RENTAL VALUE.

- Evidence to show, see Evidence, 30.
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- Of devise, see Wills, 6.

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- Of voter, see Elections.

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- See Judgment, 3-5.

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- Validity of contract not to engage in competing business, see Contracts, 12.

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RETAINER.

- Right of attorney retaining fees, see Attorneys, 3.

RETAINING JURISDICTION.

- See Equity, 2-4.

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- See Appeal and Error, 19-29.

SALE.

- State regulation of interstate sales, see Commerce, 6-9.
- Of good will, see Contracts, 1; Good-will.
- Oral contracts for sale of shares of stock, see Contracts, 4.
- Right to show parol warranty in connection with contract for sale of personalty, see Evidence, 31.
- Tax on right to sell by sample goods shipped into state, see License, 3.
- Right of conditional vendor to use force in retaking property, see Trespass, 1.

When title passes.

- Presumption as to when sale by agent in one state for merchant in another is completed, see Evidence, 21.

1. No sale is consummated under a contract for the sale of certain bales of cotton at a specified price per pound, even though there be a constructive delivery to the buyer, if the weights of the cotton be unknown, and such weights, by which the amount of the purchase price is to be determined, are, by the contract, to be ascertained by a subsequent weighing by the buyer when actual delivery to him is made, and the cotton is destroyed by fire before being so delivered and weighed, since the ascertainment of a valuable consideration, which is essential to a sale, thereby becomes impossible. *Deadwyler v. Karow*, 19: 197, 62 S. E. 172, — Ga. — (Annotated)

Acceptance; retention.

2. Acceptance and use for months of electrical apparatus without criticism or complaint will preclude reliance on a defense of breach of parol warranty of results from its use in an action for the purchase price. *Electric Storage Battery Co. v. Waterloo*,

C. F. & N. R. Co. 19: 1183, 116 N. W. 144, 138 Iowa, 369.

Rights and remedies of parties.

3. A merchant who directs another to have shipped to him corn of a certain kind and grade at a certain price, over a certain railroad, the weight and grade of the corn to be evidenced by a certain official certificate, is not excused from payment of the purchase price therefor by the fact that the corn became heated while in transit. *Champlin v. Church* (N. J. Err. & App.) 19: 261, 70 Atl. 138, — N. J. —. (Annotated)

SCHOOLS.

Who may enjoin discontinuance of certain text books in school, see Injunction, 5.

Right of taxpayers to recover back public money appropriated to sectarian instruction, see Limitation of Actions, 2.

A school district having power to rent a building for school purposes will not be enjoined from maintaining a school in a parochial school building, where a building owned by it is wholly inadequate to its needs. *Dorner v. School Dist. No. 5*, 19: 171, 118 N. W. 353, — Wis. —.

SCIENTER.

Necessity of alleging, in action for negligence, see Pleading, 7.

SEDUCTION.

Right to consider attempted seduction in aggravation of damages for trespass, see Damages, 18.

Husband's right of action against one entering upon property and attempting to seduce wife, see Trespass, 2.

SELF-DEFENSE.

See Homicide.

SET-OFF AND COUNTERCLAIM.

Effect of right of subscriber to rural telephone to, on duty to prepay charges according to rule, see Telephones, 1.

SHERIFF.

Conversion by, of property taken from prisoner, see Trover, 2.

SIDEWALKS.

Liability for injuries on, see Highways.

SKATING RINK.

Exclusion of negroes from, see Civil Rights.

Power of municipality to declare a nuisance, see Municipal Corporations, 14.

Power of municipality to require closing of, at 6 P. M., see Municipal Corporations, 15.

SLANDER.

See Libel and Slander.

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SLEEPING CAR COMPANY.

When person becomes passenger on Pullman car, see Carriers, 4.
Negligence of conductor of, see Carriers, 6.

SMOKE.

Injunction against, see Nuisance, 3.

SOOT.

Injunction against, see Nuisance, 3.

SPECIAL LEGISLATION.

See Statutes, 4.

SPECIFIC PERFORMANCE.

Retaining bill on refusal of specific performance for assessment of damages, see Equity, 2, 3.

Sufficiency of complaint in suit to compel, see Pleading, 13.

1. Equity will not enforce performance of a contract to let a certain amount of floor space in a building to be constructed which would require supervision of the method of construction to produce the requisite space. *Bromberg v. Eugenotto Construction Co.* 19: 1175, 48 So. 60. — Ala. —.

Contracts as to real property.

2. Specific performance of a contract for sale of property may be refused where it was obtained by a person of superior mental ability from an aged, inexperienced, and ignorant woman, who was persuaded to refrain from consulting an adviser, and whose racial prejudices were appealed to for present execution of the contract, while circumstances which might enhance the value of the property were not disclosed to her. *Banaghan v. Malaney*, 19: 871, 85 N. E. 839, 200 Mass. 46.

3. Specific performance of a contract to convey land will not be denied because the consideration was services to be rendered by the grantee, if they have been fully performed. *Brown v. Sebastopol*, 19: 178, 96 Pac. 363, 153 Cal. 704.

4. The right of a town to specific performance of a contract to convey land to it in consideration of its opening and constructing a road through other property of the grantor without expense to him is not affected by the fact that some of the money for the construction of the road was gathered by private subscription, and did not all come from the public treasury. *Brown v. Sebastopol*, 19: 178, 96 Pac. 363, 153 Cal. 704.

5. The right of a town to enforce specific performance of a contract to convey property to it in consideration of its opening a street is not affected by a finding that the agreement was made with members of the board of township trustees, if they were acting for the town. *Brown v. Sebastopol*, 19: 178, 96 Pac. 363, 153 Cal. 704.

6. An incorporated town having charter authority to purchase real estate may compel specific performance of a parol agreement to convey to it real estate in con-

sideration of its opening a road through remaining property of the grantor, after it has fully performed its agreement and been let into possession, and the former owner has disclaimed further interest in the property and been relieved from taxation on it on that account. *Brown v. Sebastopol*, 19: 178, 96 Pac. 363, 153 Cal. 704.

STATE.

Right of state to maintain bill to abate nuisance in city street, see Nuisance, 1.

A proceeding to disbar an attorney for unfitness to practise his profession because he has collected money for clients which he has refused upon demand to pay over may be instituted by the commonwealth's attorney in the name of the commonwealth, although a statute permits him to be disbarred for the cause specified upon application of the person whose money is withheld. *Com. v. Roe*, 19: 413, 112 S. W. 683, — Ky. — (Annotated)

STATUTE OF FRAUDS.

See Contracts, 4-8.

STATUTES.

Validity of statute requiring license for sale by sample of goods made in other state, see Commerce, 7.

Validity of statute requiring lights at railroad crossings, see Municipal Corporations, 12.

Partial invalidity.

Partial invalidity of ordinance, see Municipal Corporations, 8, 9.

1. A state statute applicable to every corporation operating a line of railroad wholly or partly within the state, which limits the hours during which its telegraph operators and train despatchers may be allowed to work, and which restricts the employment of all operators, without discrimination as to the character of their services, cannot be upheld as applying only to operators engaged exclusively on business wholly within the state. *State v. Chicago, M. & St. P. R. Co.* 19: 326, 117 N. W. 686, — Wis. —

2. The inclusion of money, which cannot be exempted from taxation, in a provision of a statute exempting credits, which may properly be exempted, does not invalidate the entire exemption. *State ex rel. Wolfe v. Parmenter*, 19: 707, 96 Pac. 1047, 50 Wash. 164.

Title.

3. A provision of a statute exempting certain property from taxation is not insufficiently covered by the title, which states that it relates to revenue and taxation, by the fact that it further states that it is an amendment of a statute, designated by chapter and year of passage, which designation is clearly erroneous, the statute referred to being on an entirely different subject. *State ex rel. Wolfe v. Parmenter*, 19: 707, 96 Pac. 1047, 50 Wash. 164. 19 L.R.A. (N.S.)

Special legislation.

4. A statute denying an appeal in a proceeding to contest a local-option election when an appeal is allowed in a proceeding to contest other elections is not unconstitutional special legislation. *Saylor v. Duell*, 19: 377, 86 N. E. 119, 236 Ill. 420.

(Annotated)

Construction.

Construction of statute as to disbarment of attorneys, see Attorneys, 1.

Reading common law exception into statute as to liability of carriers, see Carriers, 23.

Construction of employer's liability act, see Master and Servant, 16.

Construction of statute imposing succession tax, see Taxes, 11.

5. A statute giving a right to resort to the courts in case of discontinuance of the operation of a railway does not change existing rights, but applies to proceedings begun after its passage, which relate to acts done previously. *Stiles v. Citizens' Electric Street R. Co.* 19: 865, 85 N. E. 419, 199 Mass. 394.

6. A statute giving a right to resort to the courts if a railway discontinues the use of any track applies to past as well as future discontinuances. *Stiles v. Citizens' Electric Street R. Co.* 19: 865, 85 N. E. 419, 199 Mass. 394.

STOCK.

Of corporations, see Corporations.

STOCKHOLDERS.

Liability of, see Corporations, 6-19.

As carriers, see Carriers.

STREET RAILWAYS.

Employee riding on street car as passenger, see Carriers, 3.

Amount of damages for injury by, to driver of fire wagon, see Damages, 6.

Evidence in action for injury to driver of fire wagon by collision with street car, see Evidence, 41.

Obstruction of highway by trolley pole, see Highways, 5, 6.

Liability of, for injury to servant, see Master and Servant.

Statute giving right to resort to courts in case of discontinuance of operation of, see Statutes, 5, 6.

Obligation to operate.

1. A street railway company having only the right or license to operate its tracks in a public street until revoked or terminated by the public authorities may cease to use the permission granted, and discontinue the operation of the whole track covered by a particular location under which it was built, at its pleasure, in the absence of any agreement to the contrary. *Stiles v. Citizens' Electric Street R. Co.* 19: 865, 85 N. E. 419, 199 Mass. 394. (Annotated)

2. The legislature may make the right of a street railway company to discontinue the use of a portion of its tracks subject to

TOWNS.

Right to specific performance of contract for sale of land to, see Specific Performance, 4-6.

A town council has no authority to satisfy a judgment obtained by the town upon payment of the costs of the action, since such satisfaction is in fact a gift to the judgment debtor which the council has no power to make. *Farnsworth v. Wilbur*, 19: 320, 95 Pac. 642, 49 Wash. 416. (Annotated)

TRADENAME.

The one first putting a flaring front on a lamp shell of his design is not entitled to a monopoly on the words "flare front" in connection with lamps, in the absence of anything to show that the words have acquired a secondary meaning. *Rushmore v. Manhattan Screw & S. Works*, 19: 269, 163 Fed. 939, — C. C. A. —.

TRANSFERS.

Street car transfers, see Carriers, 18, 19.

TREASURE-TROVE.

1. A joint finding of treasure-trove may be found from evidence that, while several workmen were engaged in making an excavation, one discovered the top of an old can, and called the attention of the others to it, whereupon all proceeded to get it out of the soil, in doing which it was broken and its contents of coin disclosed, and that, in securing such contents, other cans containing coin were discovered and secured. *Weeks v. Hackett*, 19: 1201, 71 Atl. 858, — Me. —.

2. The owner of the soil in which treasure-trove is found acquires no title to it by virtue of his ownership of the land. *Weeks v. Hackett*, 19: 1201, 71 Atl. 858, — Me. —.

TREES.

Regulating or prohibiting cutting of timber on private land, see Constitutional Law, 1; Eminent Domain, 2, 3.

TRESPASS.

Rights of landowner as against trespassing dog, see Animals, 3, 4.

Ejection of trespasser from moving street car, see Carriers, 16.

Right to consider attempted seduction in aggravation of damages for trespass, see Damages, 18.

Liability for death of trespasser receiving shock from uninsulated wire, see Electricity.

Injuries to trespassing children, see Negligence, 1-10.

1. A conditional vendee of personalty, who, in the contract, agrees that, upon failure to make the requisite payments, the vendor may take possession of the property and remove the same, cannot recover against the vendor in trespass for using only the necessary force in retaking the property. *L.R.A. (N.S.)*

ty, requisite to overcome resistance wrongfully interposed by him. *W. T. Walker Furniture Co. v. Dyson*, 19: 606, 32 App. D. C. 90. (Annotated)

2. One occupying property as a residence may maintain an action for damages against one who wrongfully enters upon the property and attempts to seduce his wife. *Brame v. Clark*, 19: 1033, 62 S. E. 418, 148 N. C. 364.

TRIAL.

Discretion as to granting or overruling motion to require election between counts, see Appeal and Error, 15.
Statements by counsel in argument of facts outside record, see Appeal and Error, 23.

Reception of evidence.

1. It is not error to exclude the opinion of witnesses as to the dangerous character of an obstruction in a street, where it can be easily described, and the question whether or not it was dangerous easily determinable by the jury. *McKim v. Philadelphia*, 19: 506, 66 Atl. 340, 217 Pa. 243.

2. Exclusion, in an action for death of a freight conductor by being run over by train while walking along a track to check his train, of evidence that his act was according to custom in railroad yards generally, is not error where he was negligent in becoming so absorbed in his duties as to fail to observe his surroundings. *Neary v. Northern P. R. Co.* 19: 446, 97 Pac. 944, 37 Mont. 461.

Sufficiency of evidence to go to jury.

3. If, upon plaintiff's evidence in an action to hold another liable for a personal injury, he shows negligence on his part as matter of law, the question of his negligence should not be submitted to the jury. *Wagner v. Atlantic Coast Line R. Co.* 19: 1028, 61 S. E. 171, 147 N. C. 315.

Questions of law and fact.

Question for jury as to contributory negligence of passenger, see Carriers, 14.

Negligence of employees as question for jury, see Master and Servant, 23.

Question for jury as to contributory negligence of person struck by train, see Railroads, 6.

4. The proper disposition of a case upon the evidence, in case of a substantial conflict therein, must be determined by the jury as a question of fact; but where it is undisputed or is so clearly preponderant that it reasonably admits of but one conclusion, it becomes a question of law to be determined by the court. *Bell v. Carter*, 19: 833, 164 Fed. 417, — C. C. A. —.

5. The question of reasonable and probable cause, under a statute forbidding suits against a board of health, its officers or agents for their acts in abating a cause of disease, unless upon proof that the board acted without reasonable and probable cause to believe that the alleged cause of disease was in fact prejudicial and hazardous to the

public health, is for the court. *Valentine v. Engelwood* (N. J. Err. & App.) 19: 262, 71 Atl. 344, — N. J. —.

6. Whether or not a city employee sent by an officer of one department of the government to take measurements of a bridge, and the persons tending the bridge, who are in another department of the government, and under the control of other officers, and whose duties do not bring them into habitual association with the former, are fellow servants, is a question for the jury. *Gathman v. Chicago*, 19: 1178, 86 N. E. 152, 236 Ill. 9.

7. That a person chose to board a street car after it was in motion, and was therefore on the running board looking for a seat when the car reached an obstruction near the track, which was in plain view, when he might have boarded the car before it started and gained a seat inside the car, or might have stopped the car and gained one, was not negligence as matter of law, so as to preclude his holding the person responsible for the obstruction liable for the injury resulting from collision therewith; but the question of his negligence was for the jury. *United States Exp. Co. v. Kraft*, 19: 296, 161 Fed. 300, 88 C. C. A. 346.

8. Whether or not a master, in attempting to remove a tongue of earth from between two ditches, renders the place where the servant is to work unsafe by attempting to throw down too long a section at one time without precautions to prevent accident in case of mistake of judgment, is for the jury, where there is a fair inference from the evidence that such is the fact. *Hilgar v. Walla Walla*, 19: 367, 97 Pac. 498, 50 Wash. 470.

9. Whether or not the negligence of a railroad conductor, who, in his work, negligently placed himself in the way of an expected passenger train, will preclude his holding the railroad company liable for injuries received from the train, is for the jury, where the evidence tends to show that the train was running at an extraordinary and illegal rate of speed, not under full control as required by the company's rule, and might have been stopped before striking him after the engineer discovered that he was so absorbed in his work that he was not conscious of his peril; since these facts, if found to exist, would justify an inference of reckless and wanton negligence, justifying a recovery notwithstanding the negligence of the plaintiff. *Neary v. Northern P. R. Co.* 19: 446, 97 Pac. 944, 37 Mont. 461.

10. Whether the dangers of a place in which a servant is directed to work were so plain and obvious that persons would not differ concerning it, so that the servant assumes the risk of working there over the positive assurance of the master that it is safe, is a question for the jury. *Hilgar v. Walla Walla*, 19: 367, 97 Pac. 498, 50 Wash. 470.

11. The truth or falsity of warranties by 19 L.R.A. (N.S.)

an applicant for insurance may be determined by the court when the beneficiary has confessed upon the witness stand that they were not true. *Beard v. Royal Neighbors of America*, 19: 798, 99 Pac. 83, — Or. —.

12. Whether or not a statement of age by an applicant for accident insurance is material is not a question of law where it was not made in response to a direct inquiry by the insurer, or its materiality had not been settled by agreement of the parties. *Spence v. Central Acci. Ins. Co.* 19: 88, 86 N. E. 104, 236 Ill. 444.

Direction of verdict.

Correctness of directed verdict in negligence case, see Appeal and Error, 28.

13. In an action against a carrier for loss of flax caused by the bursting open of one of the inside doors furnished by the carrier and placed inside the car by the shipper, to retain the flax, the mere fact that the door came open while the car was in transit, without anything else to show the cause of its opening, does not contradict the positive testimony of those who prepared and loaded the car, that the door was properly fastened, so as to create a conflict in the evidence sufficient to render the direction of a verdict for the consignor erroneous, since, without other evidence, and finding of the jury as to what caused the opening of the door could only be arrived at by inference and would have been mere guesswork. *Duncan v. Great Northern R. Co.* 19: 952, 118 N. W. 826, — N. D. —.

14. Motions for a directed verdict by both parties to an action, without requesting the submission of any facts to the jury upon the denial of the motion, waives any right which either party may have otherwise had to an undirected verdict, and estops them from assigning error for not submitting the facts to the jury. *Duncan v. Great Northern R. Co.* 19: 952, 118 N. W. 826, — N. D. —.

Instructions.

Exception to charge to jury, see Appeal and Error, 9.

Reversible error in instructions, see Appeal and Error, 22.

Curing error in instructions, see Appeal and Error, 17.

15. An instruction by the court to the jury, in an action to recover damages for personal injuries which involves a direction to find the issue that plaintiff was injured by defendant's negligence, for plaintiff upon the finding of certain facts, should require a finding on the matters of negligence with which defendant is charged. *Wagner v. Atlantic Coast Line R. Co.* 19: 1028, 61 S. E. 171, 147 N. C. 315.

16. A charge in an action against a man for personal injuries resulting from the negligence of his minor child while driving the father's automobile, which bases the existence of the relation of master and servant between the father and child upon the purpose which the parent had in mind in acquiring the automobile, and its permissive

State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

(Annotated)

3. The power to provide waterworks, conferred upon a city by its charter and the general laws, does not authorize the city to grant an exclusive privilege to use the streets of the city for the purpose of furnishing water to the city and its inhabitants. State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

4. Provisions in a city ordinance relating to the capacity of a waterworks plant, and authorizing use of the streets, should be construed as subject to an increase of capacity when future necessities may require, where the expressed design is to furnish an adequate supply of good water for all purposes. State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

5. Provisions as to rates in a municipal contract for a public water supply are to be constructed as subject to the constitutional power of the legislature to regulate rates. State ex rel. Ellis v. Tampa Waterworks Co. 19: 183, 47 So. 358, — Fla. —.

WELL.

Injury to child by falling into well of hot water, see Negligence, 4, 5.

WIDOW'S ALLOWANCE.

See Equitable Conversion.

WILLS.

Right of residuary legatee paying legal succession tax to compel contribution from other legatees, see Contribution.

Cutting off of contingent remainders by merger of life estate in fee, see Life Tenants.

Contest.

1. After issues have been framed covering all the grounds relied on in a caveat to a will, and sent to a court of law for trial, the caveator should not be permitted to dismiss them for the purpose of filing a new caveat, without the consent of the caveatee. Bennett v. Bennett, 19: 121, 86 Atl. 706, 106 Md. 122. (Annotated)

Construction generally.

Refusal of equity to entertain bill to construe, where no trust is involved, see Equity, 1.

Evidence that testator intended legacies to be a charge upon realty, see Evidence, 35.

2. A devise to the children of the life tenant will not be implied from a gift to 19 L.R.A. (N.S.)

one for life, "but, should he die without children, then" to others. Bond v. Moore, 19: 540, 86 N. E. 358, 236 Ill. 576.

3. A half-brother takes no interest in testator's real estate under a will directing the estate to be divided among testator's heirs according to the intestate laws, where such laws permit persons of half blood to share in personality but not in realty, although the will refers to him as "my brother," and a codicil gives him certain stock in addition to what has been given him as heir or distributee under the will. Re Line, 19: 293, 70 Atl. 791, 221 Pa. 374.

4. The word "heirs" in a will may be held to refer to those who should participate in personality as well as in realty, where the intention was to dispose of the whole property; and an interpretation which would exclude them from sharing in personality would result in intestacy as to the major part of the estate. Re Line, 19: 293, 70 Atl. 791, 221 Pa. 374.

5. Under a devise to testator's only child for life, and, should he die without children, to testator's next of kin, the remainder being contingent during the lifetime of the life tenant, the reversion in fee descends to such child as heir. Bond v. Moore, 19: 540, 86 N. E. 358, 236 Ill. 576.

Renunciation.

6. A written renunciation of a devise of an interest in real estate, made the day the will is admitted to probate, defeats a levy upon the property under execution against the devisee. Bradford v. Calhoun, 19: 595, 109 S. W. 502, — Tenn. —. (Annotated)

WITNESSES.

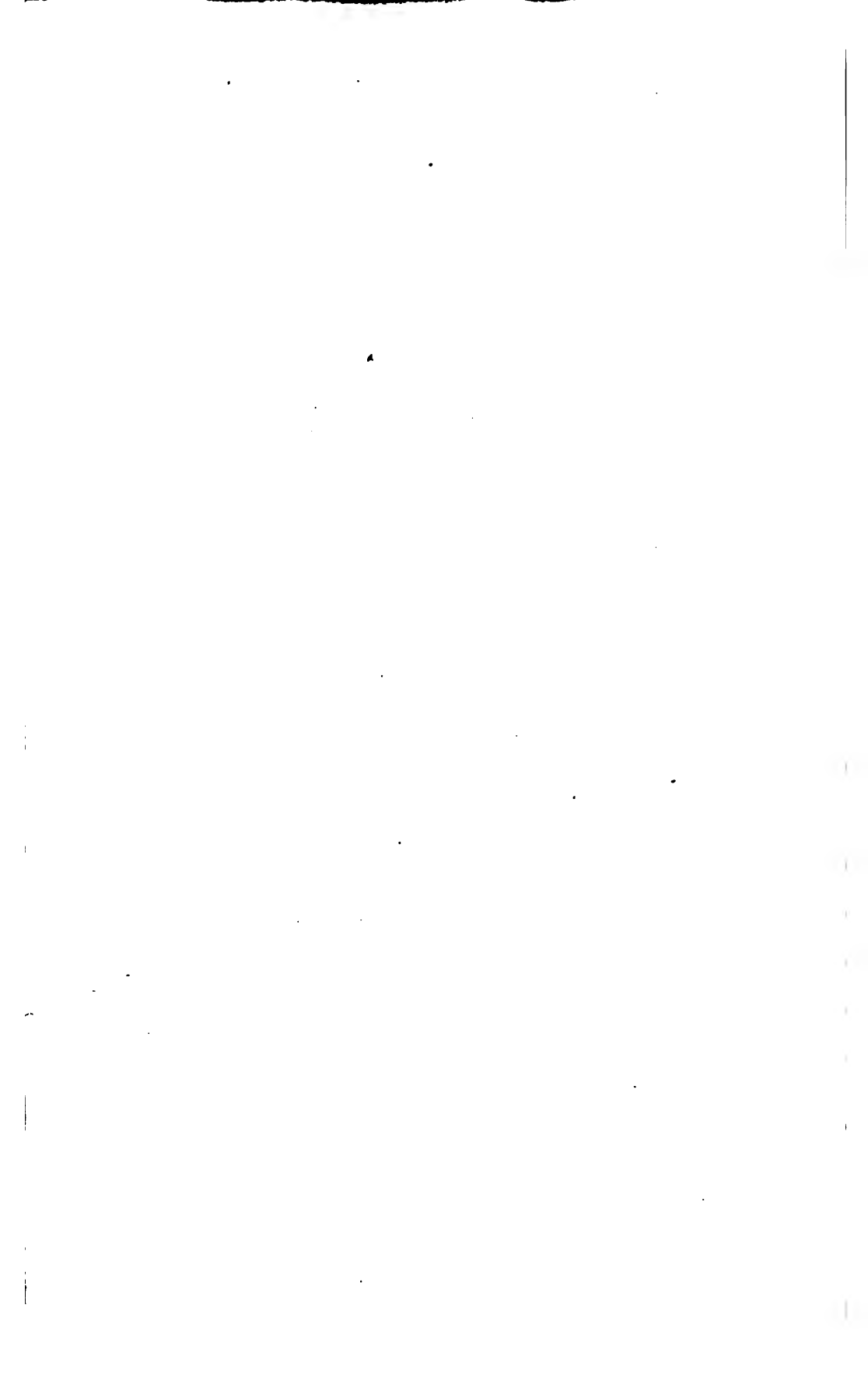
Refusal to enforce formal rules for questioning as ground for new trial, see New Trial, 1.

That one makes the adverse party his witness, does not prevent his proving admissions which had been made by him in conflict with his testimony. Koester v. Rochester Candy Works, 19: 783, 87 N. E. 77, — N. Y. —.

WRIT AND PROCESS.

Sufficiency of service to support judgment, see Judgments, 1.

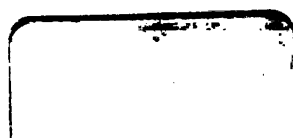
Jurisdiction of a married woman may be secured in an action to quiet title to real estate by publication of a summons against her in her maiden name, in which she took and held the title to the property. Emery v. Kipp, 19: 983, 97 Pac. 17, — Cal. —. (Annotated)

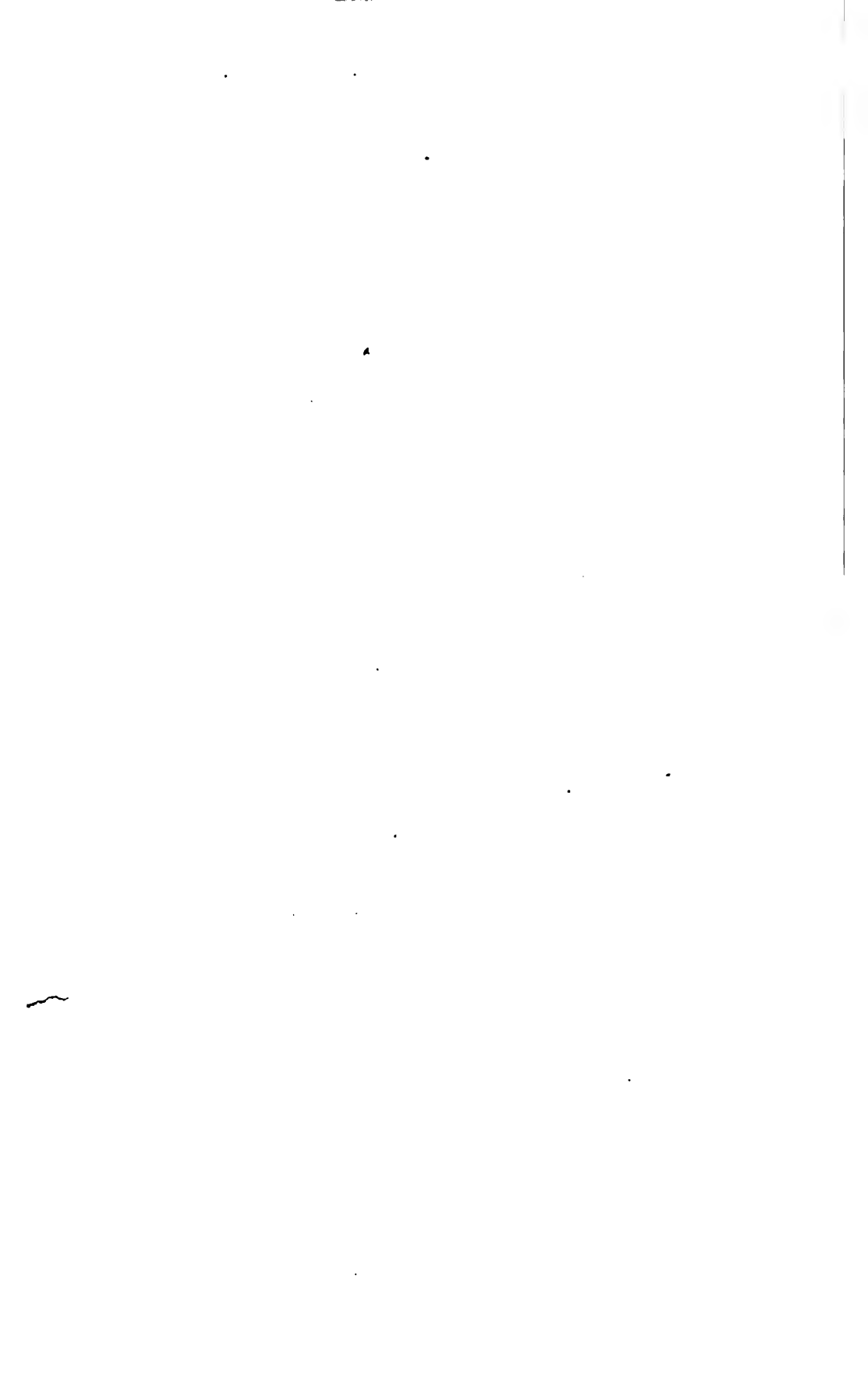


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